

Chapter 710.00
Liability Insurance – Bad Faith

Synopsis

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A contract of liability insurance contains an implied covenant of good faith and fair dealing. *Scroggins v. Allstate Ins. Co.*, 74 Ill.App.3d 1027, 1029, 393 N.E.2d 718, 720 (1st Dist.1979); *National Sur. Corp. v. Fast Motor Serv.*, 213 Ill.App.3d 500, 572 N.E.2d 1083 (1st Dist.1991) (workers' compensation insurance). The breach of this duty may give rise to a cause of action in tort.

In Illinois, causes of action against an insurer for breach of its duties under “first party” insurance policies--life and casualty insurance (fire, theft, etc.), health insurance, and other similar policies that indemnify the insured's own losses--are preempted by a statutory cause of action, 215 ILCS 5/155. *See, e.g., McGee v. State Farm*, 315 Ill. App. 3d 673, 680-81 (2000); *Valdovinos v. Gallant Ins. Co.*, 314 Ill. App. 3d. 1016 (2d Dist. 2000).

Section 155 provides an extra contractual remedy to policy holders. *Employers Ins. of Wausau v. Elhco Liquidating Trust*, 186 Ill. 2d 127, 159 (1999). The statute provides an insured may collect a statutory penalty, attorney's fees, interest, and costs where an insurer creates a “vexatious and unreasonable” delay in settling a claim. 215 ILCS 5/155 (1). For example, evidence of improper claims practices, *see* 50 Ill. Adm. Code 919.50(a)(1), are relevant and tend to support a section 155 claim. *See also Zagorski v. Allstate Ins. Co.*, 2016 IL App (5th) 140056, ¶27.

Claims against liability insurers for bad faith refusal to settle are not preempted by the Illinois Insurance Code. See *Haddick ex. rel. Griffith v. Valor Ins.*, 198 Ill. 2d. 409, 417 (2001).

“The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed.” *Id.* The duty of an insurer to settle arises “when a claim has been made against the insured and there is a reasonable probability of recovering in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations ... this duty also does not arise until a third party demands settlement within policy limits.” *Haddick ex rel. Griffith v. Valor Ins.*, 198 Ill. 2d 409, 416-417 (2001); see *Powell v. Am. Serv. Ins. Co.*, 2014 Ill. App. (1st) 123643, ¶18; *Charter Props. Inc. v. Rockford Mut. Ins. Co.*, 2018 IL App. (2d) 170637.

Fraud, negligence, and bad faith appear to be alternative bases of liability. An insurer may be held liable for negligence. *Browning v. Heritage Ins. Co.*, 33 Ill.App.3d 943, 338 N.E.2d 912, 915-16 (2d Dist.1975); *Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill.App. 649, 60 N.E.2d 896, 906 (1st Dist.1945); *General Casualty Co. v. Whipple*, 328 F.2d 353, 356 (7th Cir.1964). A showing of fraud is not necessary to prove bad faith. *Cernocky v. Indem. Ins. Co.*, 69 Ill.App.2d 196, 216 N.E.2d 198, 203 (2d Dist.1966).

The duty of good faith and fair dealing requires the insurer defending the insured to give the insured's interests consideration at least equal to its own interests when deciding whether to try or settle a claim. *Cernocky v. Indem. Ins. Co.*, 69 Ill.App.2d 196, 207, 216 N.E.2d 198, 204 (2d Dist.1966); *Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill.App. 649, 60 N.E.2d 896 (1st Dist.1945). The failure to so consider the insured's interests constitutes a breach of the duty of good faith. *Mid-America Bank v. Commercial Union Ins. Co.*, 224 Ill.App.3d 1083, 1087, 587 N.E.2d 81, 84, 167 Ill.Dec. 199, 202 (5th Dist.1992); *Sanders v. Standard Mut. Ins. Co.*, 142 Ill.App.3d 1082, 1084, 492 N.E.2d 917, 918, 97 Ill.Dec. 258, 259 (4th Dist.1986); *Edwins v. Gen. Cas. Co.*, 78 Ill.App.3d 965, 968, 397 N.E.2d 1231, 1232 (4th Dist.1979); *Smiley v. Manchester Ins. & Indem. Co.*, 13 Ill.App.3d 809, 812, 301 N.E.2d 19, 21 (2d Dist.1973). The argument that the insurer should be required to give paramount consideration to the interests of the insured has been rejected. *Adduci v. Vigilant Ins. Co.*, 98 Ill.App.3d 472, 424 N.E.2d 645, 650 (1st Dist.1981).

The Illinois Supreme Court has recognized that an insurance provider has a duty to act in good faith in responding to settlement offers. *Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 526 (1996); *Krutsinger v. Ill. Cas. Co.*, 10 Ill. 2d 518, 527 (1957). If the insurer breaches this duty, it may be liable for the entire judgment against its insured, including any amount in excess of policy limits. *Cramer*, 174 Ill. 2d at 526.

An insurer derives the authority to engage in settlement negotiations from the language of the insurance contract. Generally, such language gives the insurer the right to “make such investigation, negotiation, and settlement of any claim or suit as it deems expedient.” 14 Couch § 203:7. The basis for the duty to settle is the insurer’s exclusive control over settlement negotiations

and defense of litigations. *Haddick*, 198 Ill. 2d at 417; *Cramer*, 174 Ill. 2d at 526 (policyholder relinquishes defense of suit); 14 Couch § 203:13 (insurer controls settlement negotiations). This exclusive control, however, necessarily results in a conflict of interest between the insurance provider and its insured. The Illinois Supreme Court stated in *Cramer*:

In the typical 'duty to settle' case, the third party has sued the policyholder for an amount in excess of the policy limits but has offered to settle the claim against the policyholder for an amount equal to or less than those policy limits.

In this circumstance, the insurer may have an incentive to decline the settlement offer and proceed to trial. The insurer may believe it can win a verdict in its favor. In contrast, the policyholder may prefer to settle within the policy limits and avoid the risk of trial. The insurer may ignore the policyholder's interest and decline to settle.

174 Ill. 2d at 525-26.

In such cases, the insurance contract itself does not provide a remedy to the insured faced with a judgment in excess of policy limits; therefore, the law imposes upon the insurer the duty to settle in good faith.

Id. at 526.

Breach of Duty--Standards and Proof

There is no *per se* liability for failure to settle within policy limits. *Browning v. Heritage Ins. Co.*, 33 Ill.App.3d 943, 946, 338 N.E.2d 912, 915 (2d Dist.1975). The insurer's duty to its insured is not unlimited; the insurer is not required to disregard its own interests. *Adduci v. Vigilant Ins. Co.*, 98 Ill.App.3d 472, 424 N.E.2d 645, 650 (1st Dist.1981).

A claim against an insurer for breach of its duty to its insured presupposes that the insurer had a reasonable opportunity to settle within the policy limits. *Brocato v. Prairie State Farmers Ins. Assoc.*, 166 Ill.App.3d 986, 520 N.E.2d 1200 (4th Dist.1988); *Van Vleck v. Ohio Cas. Ins. Co.*, 128 Ill.App.3d 959 471 N.E.2d 925 (3d Dist.1984) (where only settlement demand was over 160% of the policy limits, insurer violated no duty by refusing to settle).

In *Kavanaugh v. Interstate Fire & Cas. Co.*, 35 Ill.App.3d 350, 356, 342 N.E.2d 116, 121 (1st Dist.1975), the Appellate Court made reference to two rules. First, it stated, "we cannot hold that the law imposes a duty on an insurance company to initiate negotiations to settle a case." *Id.* Next, it stated, "Illinois law does not demand that an insurer settle within the policy limits without exception or else invariably suffer the consequences of an excess liability judgment for breach of its fiduciary duty." *Id.* The opinion then goes on to state: "There is a well recognized exception to the general principle when the probability of an adverse finding is great and the amount of probable damages would greatly exceed the policy limits." *Id.* Thus, it is unclear whether the "exception" in that sentence was intended to state elements of the bad faith cause of action, applicable generally, or only to describe an exception to the rule that an insurer has no duty to initiate

settlement negotiations.

Two subsequent cases adopted the factors stated by *Kavanaugh* as elements of the cause of action. *Phelan v. State Farm Mut. Auto. Ins. Co.*, 114 Ill.App.3d 96, 448 N.E.2d 579, 585 (1st Dist.1983); *Van Vleck v. Ohio Cas. Ins. Co.*, 128 Ill.App.3d 959, 471 N.E.2d 925, 927 (3d Dist.1984). This would mean that the insured would have to prove that when the insurer faced the decision of whether to settle, the probability of an adverse finding was great and the amount of probable damages would greatly exceed the policy limits. The "reasonable probability" standard set forth in *Haddick* requires pleading facts that demonstrate liability is "probable," as opposed to merely "possible." *Haddick*, 198 Ill. 2d at 417. In other words, *Haddick* requires the pleading of facts which show that liability is at least more likely than not, but not necessarily a certainty. *Powell v. Am. Serv. Ins. Co.*, 2014 Ill. App. (1st) 123643, ¶ 26-32.

However, two other decisions have cited the *Kavanaugh* exception in reference to the general rule that the insurer does not have to initiate settlement negotiations. *Adduci v. Vigilant Ins. Co.*, 98 Ill.App.3d 472, 424 N.E.2d 645, 649 (1st Dist.1981); *Ranger Ins. Co. v. Home Indem. Co.*, 741 F.Supp. 716, 722 (N.D.Ill.1990). The general rule is that the insurer has no obligation to initiate settlement negotiations, as such a duty would put the insurer at a negotiating disadvantage. *Adduci v. Vigilant Ins. Co.*, 98 Ill.App.3d 472, 424 N.E.2d 645 (1st Dist.1981); *Haas v. Mid America Fire & Marine Ins. Co.*, 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976); *Kavanaugh v. Interstate Fire & Cas. Co.*, 35 Ill.App.3d 350, 356, 342 N.E.2d 116, 121 (1st Dist.1975). An insurer need not submit to demands for the policy limits simply because there is a risk of an excess verdict. And an insurer need not make settlement proposals when it reasonably believes it has a good defense to the claim. *Haas v. Mid America Fire & Marine Ins. Co.*, 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976).

The fact that the plaintiff did not make a firm settlement demand may not be conclusive of the insurer's good faith. *Cernocky v. Indem. Ins. Co.*, 69 Ill.App.2d 196, 216 N.E.2d 198, 205 (2d Dist.1966). When the probability of an adverse finding on liability is considerable and the amount of probable damages would greatly exceed the insured's coverage, the insurer, to avoid a breach of the duty of good faith, may be required to initiate settlement negotiations. *Adduci v. Vigilant Ins. Co.*, 98 Ill.App.3d 472, 424 N.E.2d 645, 649 (1st Dist.1981); *Ranger Ins. Co. v. Home Indem. Co.*, 741 F.Supp. 716, 722 (N.D.Ill.1990). An insurer is only required to settle within the policy limits if that is the honest and prudent course of action. *LaRotunda v. Royal Globe Ins. Co.*, 87 Ill.App.3d 446, 454, 408 N.E.2d 928, 936 (1st Dist.1980). Similarly, the majority of jurisdictions require the insurer to consider the conflicting interests of itself and the insured with impartiality and good faith. That duty has been breached where the risk of an unfavorable result is out of proportion to the chances of a favorable outcome. *See, e.g., Eastham v. Or. Auto. Ins. Co.*, 273 Or. 600, 540 P.2d 364, 367 (1975).

Factors that have been considered by the courts in determining whether the insurer breached its duty to the insured include: the insurer's willingness to negotiate, *Cernocky v. Indem. Ins. Co.*, 69 Ill.App.2d 196, 216 N.E.2d 198, 203 (2d Dist.1966); the insurer's proper investigation of the claim, *Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill.App. 649, 60 N.E.2d

896, 906 (1st Dist.1945); *Ballard v. Citizens Cas. Co.*, 196 F.2d 96, 103 (7th Cir.1952); the insurer's consideration of the advice of its defense counsel, *Olympia Fields Country Club, supra*; *Bailey v. Prudence Mut. Cas. Co.*, 429 F.2d 1388, 1390 (7th Cir.1970); whether the insurer informed the insured of the injured plaintiff's offer to settle within the limits of coverage; the risks of litigation, and the insured's right to retain (at insured's personal expense) additional counsel of his or her choice, *Olympia Fields Country Club, supra*; *Bailey, supra*.

On the other hand, the insured likewise owes the insurer a duty of good faith and fair dealing, and the insured may be deemed to have breached that duty when the insured misleads the insurer as to the underlying facts or fails in some respect to cooperate in the presentation of the defense. *Sanders v. Standard Mut. Ins. Co.*, 142 Ill.App.3d 1082, 1084, 492 N.E.2d 917, 918 (4th Dist.1986); *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill.2d 178, 579 N.E.2d 322 (1991).

The conduct of the insurer is tested against an objective--not a subjective--standard. It is not sufficient that the insurer sincerely believes that its insured will not be held liable. Its refusal to settle will be judged upon review of those factors with which the insurer was faced at the time it decided to forgo settlement. *Shearer v. Reed*, 286 Pa. Super. Ct. 188, 428 A.2d 635, 638 (1981). The fact that the injured person has refused to consider settlement, or that the insurer reasonably believes it has a good defense to the claim, are also important factors. *Haas v. Mid Am. Fire & Marine Ins. Co.*, 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976); *Kavanaugh v. Interstate Fire & Cas. Co.*, 35 Ill.App.3d 350, 342 N.E.2d 116, 121 (1st Dist.1975).

Where no reasonable person, upon consideration of the interests of the insurer and the insured and those factors which led to the insurer's decision, would decide that the insurer had an affirmative duty to settle within the policy limits, there is no liability as a matter of law. *General Cas. Co. v. Whipple*, 328 F.2d 353, 357 (7th Cir.1964).

Where there are multiple claimants against the same policy, so long as the insurer acts reasonably and in good faith, the insurer may settle fewer than all the claims and thereby exhaust the policy limits without incurring liability to the nonsettling claimants. *Haas v. Mid Am. Fire & Marine Ins. Co.*, 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976).

The insurer's liability may arise from the negligence of its agent-attorney in the settlement negotiations. *Mid-Am. Bank & Trust Co. v. Commercial Union Ins. Co.*, 224 Ill.App.3d 1083, 587 N.E.2d 81 (5th Dist.1992); *Smiley v. Manchester Ins. & Indem. Co.*, 71 Ill.2d 306, 375 N.E.2d 118. *Compare Steele v. Hartford Fire Ins. Co.*, 788 F.2d 441 (7th Cir.1986) (attorney's conduct as a matter of law was neither negligent nor bad faith).

In most cases, the insured will have suffered an excess judgment. However, in certain situations the insured may settle in excess of the policy limits, rather than suffer an excess judgment, and then recover the full amount of the settlement from the insurer. *Nat'l Union Fire Ins. v. Cont'l Ill. Corp.*, 673 F.Supp. 267, 272-74 (N.D.Ill.1987). Where the plaintiff's claim is based on a settlement in excess of the policy limits, the word "settlement" should be substituted

for “judgment” where it appears in instructions 710.02 or 710.03.

Status of the Plaintiff

The insured is the party wronged by the insurer's breach; it is the insured that has sustained a judgment in excess of the policy limits, and the insured's assets and income are exposed to the excess liability.

The plaintiff in the underlying action may collect the excess part of the judgment from the insured, leaving the insured to maintain the bad-faith action against the insurer. More often, however, the insured will assign the bad-faith action to the original injured plaintiff in exchange for a covenant not to enforce, and the plaintiff will then maintain the bad-faith action as the insured's assignee. Such assignments are valid, *see Edwins v. Gen. Cas. Co.*, 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232(4th Dist.1979); *Scroggins v. Allstate Ins. Co.*, 74 Ill.App.3d 1027, 393 N.E.2d 718, 720 (1st Dist.1979); *Browning v. Heritage Ins. Co.*, 33 Ill.App.3d 943, 338 N.E.2d 912, 915-16 (2d Dist.1975); *Brown v. State Farm Mut. Auto. Ins. Ass'n*, 1 Ill.App.3d 47, 272 N.E.2d 261 (4th Dist.1971); *Bailey v. Prudence Mut. Cas. Co.*, 429 F.2d 1388 (7th Cir.1970), and in fact may be ordered by the court. See *Nicholson v. St. Anne Lanes, Inc.*, 158 Ill.App.3d 838, 512 N.E.2d 127, 128 (3d Dist.1987); *Phelan v. State Farm Mut. Auto. Ins. Co.*, 114 Ill.App.3d 96, 448 N.E.2d 579 (1st Dist.1983), rejecting the contrary holding in *Roundtree v. Barringer*, 92 Ill.App.3d 903, 416 N.E.2d 675 (5th Dist.1981). As assignee of the insured, the plaintiff stands in the insured's shoes, and plaintiff's bad faith action is subject to any defenses that would have been available against the insured. *Sanders v. Standard Mut. Ins. Co.*, 142 Ill.App.3d 1082, 492 N.E.2d 917, 97 Ill.Dec. 258 (4th Dist.1986); *Edwins v. Gen. Cas. Co.*, 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232 (4th Dist.1979).

The injured plaintiff is not a beneficiary of the insurance contract and does not have standing to maintain an action against defendant's insurer based upon the insurer's breach of a duty owed only to the insured. *Kennedy v. Kiss*, 89 Ill.App.3d 890, 412 N.E.2d 624, 629 (1st Dist.1980); *Murphy v. Clancy*, 83 Ill.App.3d 779, 404 N.E.2d 287, 301 (1st Dist.1980), *aff'd in part & rev'd in part on other grounds*, 88 Ill.2d 444, 430 N.E.2d 1079 (1981); *Scroggins v. Allstate Ins. Co.*, 74 Ill.App.3d 1027, 393 N.E.2d 718, 721 (1st Dist.1979); *Yelm v. Country Mut. Ins. Co.*, 123 Ill.App.2d 401, 259 N.E.2d 83 (3d Dist.1970).

Damages

The measure of damages includes at least the full amount of the judgment rendered against the insured, less any amount the plaintiff has been paid by the insurer, other tortfeasors, and any other allowable offsets. Also, since the insured's liability includes statutory post-judgment interest (735 ILCS 5/2-1303), this is also recoverable. *Mid-Am. Bank & Trust Co. v. Commercial Union Ins. Co.*, 224 Ill.App.3d 1083, 587 N.E.2d 81, 85-86 (5th Dist.1992).

There are no Illinois cases directly on point on the issue of whether attorneys' fees, or any other damages, are recoverable in a bad faith action.

The very fact of the entry of the excess judgment against the insured itself constitutes the damages; the plaintiff need not allege payment of the excess judgment. *Scroggins v. Allstate Ins. Co.*, 74 Ill.App.3d 1027, 393 N.E.2d 718, 720 (1st Dist.1979); *Browning v. Heritage Ins. Co.*, 33 Ill.App.3d 943, 338 N.E.2d 912, 916 (2d Dist.1975). It does not matter that the judgment may be uncollectible at that time, or ever. *Edwins v. Gen. Cas. Co.*, 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232 (4th Dist.1979) (insolvent estate); *Smiley v. Manchester Ins. & Indem. Co.*, 13 Ill.App.3d 809, 301 N.E.2d 19, 22 (2d Dist.1973) (same); *Wolfberg v. Prudence Mut. Cas. Co.*, 98 Ill.App.2d 190, 240 N.E.2d 176 (1st Dist.1968) (same). However, if the insured's entire personal liability has been contracted away, the excess judgment has caused the insured no damage that will support a bad faith claim. *Childress v. State Farm Mut. Auto. Ins. Co.*, 97 Ill.App.2d 112, 239 N.E.2d 492 (4th Dist.1968). *Accord Nat'l Union Fire Ins. Co. v. Cont'l Ill. Corp.*, 673 F. Supp. 267, 274-75 (N.D.Ill.1987) (insureds not personally liable, so FDIC as insureds' assignee cannot maintain bad faith claim).

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710.01 Insurance Bad Faith--Duty of Liability Insurer--Definition of Good Faith/Bad Faith-- - Definition of Reasonable Probability

In handling the claim of [name of person/claimant] against [name of insured] under the insurance policy issued by [name of insurance company], it was the duty of [name of insurance company] to exercise [good faith] toward the interests of [name of insured].

An insurance company has a duty to settle a claim brought by a third party against its insured within its policy limits when there is both a reasonable probability of a finding of liability and a reasonable probability of a recovery against the insured in excess of the limits of the policy's coverage. This duty does not arise until the third party demands settlement within the policy limits.

[“Good faith” means that [name of insurance company] was required to give as much consideration to [name of insured]'s interests as it gave to its own interests. A failure to exercise good faith is known as “bad faith.”]

The term “reasonable probability” means that the entry of both a finding of liability and the recovery of damages in excess of policy limits in favor of [name of injured person] and against [name of the insured] were at least more likely than not at the time that [name of insurance company] received [name of injured person]'s demand for settlement within policy limits.

Notes on Use

Bad faith and negligence are alternative bases of recovery; a plaintiff may seek recovery under either or both theories. This instruction and the other instructions in this series should be utilized only in regard to a claim of bad faith refusal to settle within applicable policy limit(s), and not to a claim based on common-law negligence.

Comment

See Introduction.

Instruction and Notes on Use revised March 2021.

710.02 Insurance Bad Faith--Issues Made by the Pleadings

The plaintiff claims that as of [date on which the settlement demand within policy limits was made or, if applicable, the date on which the plaintiff's demand for settlement within policy limits expired] [name of insurance company] had a reasonable opportunity to settle [name of injured person]'s claim against [name of the insured party] within the limits of its policy.

The plaintiff further claims that as of [date on which the settlement demand within policy limits was made or, if applicable, the date on which the plaintiff's demand for settlement within policy limits expired, there was both a reasonable probability of a finding of liability against [name of the insured] and a reasonable probability of a recovery in favor of [name of injured person] and against [name of the insured] in excess of the limits of its policy's coverage.

[Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the bad faith of the insurance company which have not been withdrawn or ruled out by the court and are supported by the evidence.]

The plaintiff further claims that one or more of the foregoing proximately caused the judgment in excess of the policy limits to be entered against [name of insured].

[Name of insurance company] [denies that it did any of the things claimed by the plaintiff,] denies that it acted in bad faith in doing any of the things claimed by the plaintiff, and denies that any claimed act or omission on the part of [name of insurance company] proximately caused the judgment in excess of the policy limits to be entered against [name of insured].

[[Name of insurance company] also sets up the following affirmative defense(s):]

[Here set forth in simple form without undue emphasis or repetition those affirmative defenses (except contributory negligence) in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[The plaintiff denies that (summarize affirmative defense(s)).]

Notes on Use

The first paragraph of this instruction is bracketed because in many cases, there will be no fact issue for the jury as to whether the insurer had an opportunity to settle at or below the policy limits. If the trial court rules that this is a submissible issue, the first paragraph should be used.

Ordinarily, there will be no issue as to the dollar amount of the plaintiff's damages. If there is, the instruction should be modified to add an appropriate claim and denial.

If the plaintiff makes separate claims as to bad faith and negligent conduct, they may be stated in separate paragraphs, in which case this instruction will need to be modified consistent with the instructions governing a claim of professional negligence to address the claim of negligence and any affirmative defenses alleged by the defendant in response to the claim of negligence.

The plaintiff in an insurance bad faith case must prove that the insurer's bad faith conduct proximately resulted in the judgment in excess of the policy limits. It is not enough to show that the insurer's conduct was only one of the reasons for the excess judgment. The issues and burden of proof instructions have been drafted accordingly. IPI 710.04, a definition of proximate cause for bad faith cases, should also be given.

The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations [citations], this duty also does not arise until a third party demands settlement within policy limits.

Haddick ex rel. Griffith v. Valor Ins., 198 Ill. 2d 409, 417 (2001).

The “reasonable probability” requirement set out in *Haddick* essentially means that a plaintiff in a bad faith suit must establish that liability in excess of the policy limits in the underlying suit was “at least more likely than not, but not necessarily a certainty.” *Powell v. Am. Serv. Ins. Co.*, 2014 IL App (1st) 123643, ¶¶ 36, 42; *Hana v. Ill. State Med. Mut. Co.*, 2018 IL App (1st) 162166, ¶ 35.

Instruction and Notes on Use revised March 2021.

710.03 Insurance Bad Faith--Burden of Proof

The plaintiff has the burden of proving all of the following propositions:

First, that as of [date on which the settlement demand within policy limits was made or, if applicable, the date on which plaintiff's demand for settlement within policy limits expired], there was both a reasonable probability of a finding of liability against [name of the insured] and a reasonable probability of a recovery against [name of the insured] in excess of the limits of its policy's coverage.

Second, that as of [date on which the settlement demand within policy limits was made or, if applicable, the date on which the plaintiff's demand for settlement within policy limits expired], [name of insurance company] had a reasonable opportunity to settle [name of injured person]'s claim against [name of the insured] within the limits of its policy's coverage.

[First,] [Second,] that [name of insurance company] acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, [name of insurance company] acted in bad faith with respect to [name of insured]'s interests;

[Second,] [Third,] that [name of insurance company]'s bad faith proximately caused the judgment in excess of the policy limits to be entered against [name of insured].

Plaintiff must establish that liability in excess of the policy limits in the underlying suit was at least more likely than not, but not necessarily a certainty.

[[Name of insurance company] has asserted the affirmative defense that [summarize affirmative defense]. [name of insurance company] has the burden of proving this affirmative defense.]

If you find from your consideration of all the evidence that all of the propositions required of the plaintiff have been proved [and that the defendant's affirmative defense has not been proved], then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of the propositions required of the plaintiff has not been proved [or that [name of insurance company]'s affirmative defense has been proved], then your verdict should be for [name of insurance company].

Notes on Use

IPI 21.01 should also be given.
See Notes on Use to IPI 710.02.

Instruction revised March 2021.

710.04 Insurance Bad Faith--Proximate Cause--Definition

When I use the expression “proximate cause,” I mean that cause which, in natural or probable sequence, resulted in the judgment against [name of insured] in excess of the policy limits.

Notes on Use

In an insurance bad faith case, this proximate cause instruction should be used. Do not use IPI 15.01 unless there is also a claim of negligence, in which case IPI 15.01 should be used with respect to the negligence claim.

Notes on Use revised March 2021.

710.05 Insurance Bad Faith--Factors to be Considered in Determining Breach of Duty

In determining whether [name of insurance company] acted in bad faith in failing to settle [name of injured person]'s claim against name of insured within the policy limits, you may consider what the evidence shows concerning the following factors:

1. What [name of insurance company] [and its agent(s)] knew or should have known concerning the probability of a verdict in favor of [name of injured person] if [name of injured person]'s claim against [name of insured] was not settled, and what [name of insurance company] [and its agent(s)] knew or should have known concerning the amount by which such a verdict might or might not exceed the policy limits;

[2. The willingness of [name of insurance company]'s (and its agent's(s')) and [name of injured person] to negotiate;]

[3. The reasonableness of the negotiating parties' conduct during the negotiations;]

[4. The extent of [name of insurance company]'s (and its agent's(s')) investigation of [name of injured person]'s claim;]

[5. [Name of insurance company]'s proper consideration of, or its failure to properly consider, the advice of counsel;]

[6. *(Insert here any other factor or factors which the court rules are supported by the evidence and are legally relevant to a determination of the insurer's bad faith.)*]

Notes on Use

The first factor will be appropriate in any action in which the insurer is charged with a bad faith (or a negligent) failure to settle within the policy limits. Include any of the remaining factors that have support in the evidence. The wording of the factors may be modified as necessary to conform to the facts of each case.

If plaintiff's claim is based in whole or in part on the conduct of an agent of the insurance company, such as defense counsel, include the bracketed references to agents as appropriate. In such cases, IPI 50.02 may also be given.

Because the insurance company is a corporation, IPI 50.11 may also be given.

Instruction and Notes on Use revised March 2021.

710.06 Insurance Bad Faith--Status of the Plaintiff

The plaintiff in this case is [name of plaintiff]. [Name of plaintiff] brings this action as the assignee of [name of insured], who was the [person] [corporation] [[describe entity, e.g., partnership]] to whom [name of insurance company] issued the insurance policy in question. Therefore, you should decide the issues in this case just as if [name of insured] was the actual plaintiff.

Notes on Use

This instruction should be given whenever the plaintiff sues as assignee of the insured.

Comment

See Sanders v. Standard Mut. Ins. Co., 142 Ill.App.3d 1082, 492 N.E.2d 917, 97 Ill.Dec. 258 (4th Dist.1986); *Scroggins v. Allstate Ins. Co.*, 74 Ill.App.3d 1027, 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979).

710.07 Insurance Bad Faith--Measure of Damages

If you decide for the plaintiff on the question of liability, you must then award the amount of money which will compensate the plaintiff for the damages proved by the evidence to have resulted from [name of insurance company]'s bad faith. The plaintiff's damages are \$ [insert sum] [which is the amount of the judgment entered in favor of the plaintiff and against [name of insured] (minus the amount received by the plaintiff from [name of insurance company] under the policy) (and) (minus the amount received by the plaintiff from another insurance company) (and) (minus [describe any other allowable offset(s)])].

Notes on Use

In most cases, there will be no dispute as to the dollar amount of the damages to which the plaintiff is entitled if the insurance company is found liable, and this instruction has been drafted accordingly. *Hana v. Ill. State Med. Inter-Ins. Exch.*, 2018 IL App (1st) ¶ 42. This instruction also assumes that any additional damages to which the plaintiff may be entitled (such as interest) can be added to the verdict by the court and included in the judgment.

If the dollar amount of the damages is not calculable by simple addition and subtraction as shown in this instruction, then modify this instruction accordingly and use a verdict form such as IPI B45.01.A.

Whether the jury should be instructed as to how the sum claimed by the plaintiff was calculated is a matter left to the discretion of the court, and therefore, the last part of this instruction is bracketed.

If the trial court elected to provide such a description as to how the amount of damages was calculated, the second sentence of the instruction in this case should be in the following general form: "The plaintiff's damages are (numerical value) which is the amount of the judgment entered in favor of the plaintiff and against the defendants minus the amount received by the plaintiffs from the insurer under the policy and minus the amount of any pretrial settlement in the underlying case." *Hana*, at ¶14-15.

Instruction and Notes on Use revised March 2021.

710.08 Insurance Bad Faith--Instruction on Use of Verdict Forms

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it to the court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

If you find for the plaintiff [name of plaintiff] and against the defendant [name of insurance company] then you should use Verdict Form A.

If you find for the defendant [name of insurance company] and against the plaintiff [name of plaintiff] then you should use Verdict Form B.

710.09 Insurance Bad Faith--Verdict Forms

Verdict Form A

We, the jury, find for the plaintiff [name of plaintiff] and against the defendant [name of insurance company]. We assess plaintiff's damages in the sum of \$_____.

[Signature lines]

Notes on Use

If the amount of the damages recoverable if the jury finds in favor of the plaintiff is a fixed sum, it may be inserted in place of the blank line "\$_____."

Verdict Form B

We, the jury, find for the defendant [name of insurance company] and against the plaintiff [name of plaintiff].

[Signature lines]