

BEWARE OF BAD FAITH BY INSURANCE COMPANIES

Ohio law provides for a cause of action against an insurer for the tort of bad faith. This claim is independent of any liability arising from an insurance company's breach of the insurance contract.

Under general liability policies, the insurance company promises to defend the policyholder against actions within the policy coverage. In fulfilling that obligation, the insurance company selects and pays for defense counsel and also controls the course of the litigation. Included in the control of that litigation is control over settlement.

In making settlement decisions, insurance companies owe a duty of good faith and fair dealing to the policyholders. When an insurance company willfully, recklessly, or with gross negligence disregards the interests of the insured, it may be acting in bad faith.

Typically, disputes over bad faith related to settlement issues often arise when the policyholder wants the case settled, but the insurance company refuses to do so. This is most common when there is a potential for liability against the policyholder beyond policy limits, *i.e.*, where the potential judgment against the policyholders exceeds the maximum amount the insurance company is obligated to pay pursuant to policy limits. In those cases where there is potential liability beyond policy limits, the policyholder's interest is to settle the case for an amount within the policy limits. In many cases, the insurance company feels that it gains little by settling at or near policy limits, its maximum exposure under the insurance contract. Thus, the interests of the insurance company and the insured may be in conflict.

We have also seen cases where disputes can arise in the opposite situation. For example, an insurance company may want to settle a claim when a policyholder does not. This may occur when a policyholder has a self-insured retention or large deductible.

When an insurance company engages in bad faith, the policyholder should act quickly and decisively. As a first step, the policyholder should meet or confer with the insurance

company. The bad faith issues should be brought to the table and the insurance company should be informed that the policyholder is aware of its rights. Due to the complexity of these issues, it is generally advisable for a policyholder to hire its own counsel in dealing with bad faith issues.

In those cases where the policyholder is unsuccessful in convincing the insurance company to settle, a claim for bad faith should be considered. It appears that this course is particularly viable where the insurance company has failed or refused to provide a defense to the policyholder. In such a case, the policyholder would sue the insurance company for bad faith for both its refusal to defend and refusal to indemnify. If the court determines that the settlement was reasonable and the insurance company's refusal to defend was wrongful, the policyholder may be able to recover the full settlement amount from the insurer. In those cases where the insurance company is providing a defense, a different strategy may be necessary.

In any case, you should be aware of your rights when insurance companies are acting or dealing with you in bad faith. Carefully documenting your dealings with the insurance company and conferring with independent counsel will help you protect your rights.