Avoiding Bad Faith - D.C.

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Is there a statutory basis for an insured to bring a bad faith claim?

There is no statutory basis for a bad faith claim under District of Columbia law. *Washington v. Gov't Emps. Ins. Co.*, 769 F. Supp. 383, 386 (D.D.C. 1991); *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1087, 1090-91 (D.C. 2008). Although not bad faith, a statute authorizes the recovery of attorneys' fees for advising and representing a claimant for payment of overdue personal injury protection benefits under the no-fault statute. *See* D.C. Code § 31-2410 (2001). The statute also authorizes interest from the date the payment first became due.

Can a third party bring a statutory action for bad faith?

There is no bad faith statute under District of Columbia law. In addition, the United States Court of Appeals for the District of Columbia Circuit has held that, "[w]hen there is no contractual relationship between the claimant and the insurer, … the implied covenant does not exist, and hence there is no doctrinal basis for holding the insurer liable in tort." *Messina v. Nationwide Mut. Ins. Co.*, 998 F.2d 2, 5 (D.C. Cir. 1993).

Is there a common law cause of action for bad faith?

The tort of bad faith refusal to provide insurance coverage has not been recognized in the District of Columbia in either the first or third-party context. However, every contract contains an implied covenant to act in good faith and damages may be recovered for its breach as part of a contract action. *Nugent v. Unum Life Ins. Co. of Am.*, 752 F. Supp. 2d 46, 56-57 (D.D.C. 2010); *Nkpado v. Standard Fire Ins. Co.*, 697 F. Supp. 2d 94, 98 (D.D.C. 2010); *Thorpe v. Banner Life Ins. Co.,* 632 F. Supp. 2d 8, 19 (D.D.C. 2009); *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1087-88 (D.C. 2008). *Choharis* resolved a split among federal courts concerning whether the District of Columbia would recognize a bad faith tort for the refusal to provide insurance coverage. *Compare Fireman's Fund Ins. Co. v. CTIA-The Wireless Ass'n*, 480 F. Supp. 2d 7, 9 (D.D.C. 2007); *Brand v. Gov't Emps. Ins. Co.*, No. Civ.A. 04-01133, 2005 WL 3201322, * 5 (D.D.C. Nov. 29, 2005); *Am. Registry of Pathology v. Ohio Cas. Ins. Co.*, 401 F. Supp. 2d 75, 79 (D.D.C. 2005); *Am. Nat'l Red Cross v. Travelers Indem. Co. of R.I.*, 896 F. Supp. 8, 12 n.4 (D.D.C. 1995); *Washington v. Gov't Emps. Ins. Co.*, 769 F. Supp. 383, 386 (D.D.C. 1991); *with Washington v. Group Hospitalization, Inc.*, 585 F. Supp. 517, 520 (D.D.C. 1984).

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The District of Columbia Court of Appeals has not addressed bad faith in the "wrongful failure to settle within policy limits" context. However, in *Choharis*, the court suggested that fiduciary principles may come into play in the settlement of a third-party claim and the course of defending the insured. 961 A.2d at 1090 n.15. *See also Wender v. United Servs. Auto. Ass'n*, 434 A.2d 1372, 1374-75 (D.C. 1981) (addressing attorney-client privilege issue in a bad faith refusal to settle case). In so noting, the *Choharis* court cited Maryland law, which has special significance as the common law of the District of Columbia is derived from Maryland common law in 1801. 961 A.2d at 1090 n.10. *See also Fireman's Fund Ins. Co. v. CTIA-The Wireless Ass'n*, 480 F. Supp. 2d 7, 11 (D.D.C. 2007). Hence, it seems likely that the District of Columbia will follow Maryland's lead and recognize a bad faith cause of action sounding in tort for an insurer's wrongful refusal to settle within policy limits. *See*, *e.g.*, *Kremen v. Md. Auto. Ins. Fund*, 363 Md. 663, 674-75, 770 A.2d 170, 177 (2001); *Mesmer v. Md. Auto. Ins. Fund*, 353 Md. 241, 259, 725 A.2d 1053, 1061-62 (1999).

What cause of action exists for an excess carrier to bring a claim against a primary carrier?

This issue has not been addressed by the District of Columbia courts.

What causes of action for extra-contractual liability have been recognized outside the claim handling context?

An insured may sue an insurer for a tort that exists independently of the breach of contract, including fraud, slander, assault, invasion of privacy, intentional or negligent infliction of emotional distress, negligence or conspiracy. *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1088-89 (D.C. 2008).

DAMAGES

Are punitive damages available?

Punitive damages are not available for a breach of contract, even if "the breach is willful, wanton or malicious." *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1090 n.15 (D.C. 2008) (citing *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 37 (D.D.C. 1982)). However, where "[t]he defendant's tortious conduct [has] been outrageous, characterized by malice, wantonness, gross fraud, recklessness, or willful disregard of the plaintiff's rights . . . [and] the

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alleged breach of contract 'merges with, and assumes the character of, a willful tort' . . . punitive damages [will] be available." *Choharis*, 961 A.2d at 1090. *See also Nkpado v. Standard Fire Ins. Co.*, 697 F. Supp. 2d 94, 100 (D.D.C. 2010); *Fireman's Fund Ins. Co. v. CTIA-The Wireless Ass'n*, 480 F. Supp. 2d 7, 12-15 (D.D.C. 2007). In *Choharis*, the court did not rule out the possibility that punitive damages may be available in a wrongful failure to settle action. 961 A.2d at 1090 n.15.

Are attorneys' fees recoverable?

Attorneys' fees may be recovered if permitted by contract, statute or a showing that the defendant's conduct was willfully and oppressively fraudulent. *Cont'l Ins. Co. v. Lynham*, 193 A.2d 481, 483 (D.C. 1972). As noted, the D.C. Code provides for the recovery of attorneys' fees in connection with a claim for overdue benefits under a no-fault motor vehicle insurance policy. D.C. Code §§ 31-2410(c), (e). Bad faith is irrelevant to a claim under section 31-2410. *See Messina v. Nationwide Mut. Ins. Co.*, 998 F.2d 2, 5 (D.C. Cir. 1993).

Attorneys' fees are also recoverable in a coverage action where the "opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Eureka Investment Corp., N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932, 945-46 (D.C. Cir. 1984). *See also Nugent v. Unum Life Ins. Co. of Am.*, 752 F. Supp. 2d 46, 57-58 (D.D.C. 2010).

Are consequential damages recoverable?

A policyholder may recover consequential damages flowing from a breach of contract to the extent that they were foreseeable. *Washington v. Group Hospitalization, Inc.*, 585 F. Supp. 517, 520 (D.D.C. 1984); *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1087 (D.C. 2008); *Bay Gen. Indus., Inc. v. Johnson*, 418 A.2d 1050, 1056 (D.C. 1980).

Can a plaintiff recover damages for emotional distress?

To recover emotional distress damages, the insured must establish a tort independent of the insurance contract. *Nugent v. Unum Life Ins. Co. of Am.*, 752 F. Supp. 2d 46, 53 (D.D.C. 2010); *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1088-89 (D.C. 2008); *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 37-38 (D.C. 1982). At least one court has permitted a putative insured to amend the complaint to assert a claim for intentional infliction of emotional distress arising from the insurer's failure to pay. *Washington v. Gov't Emps. Ins.*

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Co., 769 F. Supp. 383, 388-89 (D.D.C. 1993) (casting doubt on the merits of such a claim).

ELEMENTS OF PROOF

What is the legal standard required to prove bad faith in a first-party case?

The District of Columbia has not recognized the tort of bad faith in the first-party context. *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1087-88 (D.C. 2008) (deferring to the legislature on a failure to pay claim).

What is the legal standard required to prove bad faith for a third-party failure to settle a claim?

The District of Columbia has not expressly recognized a bad faith wrongful failure to settle claim. However, for the reasons discussed, it seems likely that the District of Columbia will recognize such a claim. Practitioners should consult Maryland law concerning the likely applicable standard. *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1089 n.10 (D.C. 2008) (noting that the District of Columbia common law is derived from Maryland law). Under Maryland law, the insurer's negligence is one of several factors relevant to a determination of whether the insurer acted in good faith in failing to settle a claim within policy limits. Other factors include:

> the severity of the plaintiff's injuries giving rise to the likelihood of a verdict greatly in excess of the policy limits; lack of proper and adequate investigation of the circumstances surrounding the accident; lack of skillful evaluation of plaintiff's disability; failure of the insurer to inform the insured of a compromise offer within or near the policy limits; pressure by the insurer on the insured to make a contribution towards a compromise settlement within the policy limits, as an inducement to settlement by the insurer; and actions which demonstrate a greater concern for the insurer's monetary interests than the financial risk attendant to the insured's predicament.

State Farm Mut. Auto. Ins. Co. v. White, 248 Md. 324, 332, 236 A.2d 269, 273 (1967).

Is there a separate legal standard that must be met to recover punitive damages?

"Punitive damages may be awarded only if it is shown by clear and convincing evidence that the tortious act committed by the defendant was aggravated by egregious conduct and a

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state of mind that justifies punitive damages." *Chatman v. Lawlor*, 831 A.2d 395, 400 (D.C. 2003) (citing *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (D.C. 1995), *cert. denied*, 519 U.S. 1148 (1997)). The behavior required has been described as "outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights." *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 593 (D.C. 1985).

Does a bad faith claim require evidence of a pattern or practice of unfair or deceptive conduct?

There is no recognized tort of bad faith under District of Columbia law. However, the Unfair Claim Settlement Practices statute permits the imposition of fines and the revocation of fire and casualty company licenses if unfair claim settlement practices occur "with such frequency as to indicate a general business practice." *See* D.C. Code §§ 31-2231.17(a), (c), -2502.03(a)(5).

On what issues is expert evidence required to establish bad faith?

This has not been addressed by the District of Columbia courts.

On what issues is expert evidence precluded?

This has not been addressed by the District of Columbia courts.

Is a bad faith claim viable if a coverage decision has been determined to be correct?

The District of Columbia has not recognized a bad faith cause of action. However, one court has noted that "[a]n insured's claim of bad faith breach of contract against its insurer fails if coverage for the underlying claim does not exist." *Am. Nat'l Red Cross v. Travelers Indem. Co. of R.I.*, 896 F. Supp. 8, 11-12 (D.D.C. 1995).

Is a third party bad faith claim asserted in connection with a policy that provides third party coverage viable if the third party claimant does not prevail in the underlying claim?

The District of Columbia has not recognized a bad faith cause of action.

PRACTICE AND PROCEDURE

Statute of Limitations

A three year statute of limitation applies to a tort action. *See* D.C. Code § 12-301(8). Thus, to the extent that the District of Columbia

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recognizes the tort of wrongful refusal to settle, a three year limitation likely applies. A three year limitation also applies to contract claims. *See* D.C. Code § 12-301(7).

Under what circumstances will bad faith claims be dismissed or stayed pending the resolution of the underlying claims?

This has not been addressed by the District of Columbia courts.

Under what circumstances will the compensatory and punitive damage claims be bifurcated?

This has not been addressed by the District of Columbia courts.

DEFENSES AND COUNTERCLAIMS

Is evidence regarding the reasonableness of the conduct of the insured or third-party claimant admissible?

This has not been addressed by the District of Columbia courts.

Is "advice of counsel" a recognized defense?

Yes. *See*, *e.g.*, *Wender v. United Servs. Auto. Ass'n*, 434 A.2d 1372, 1373-75 (D.C. 1981).

What other defenses are available?

The court may consider whether the coverage issue is rare or one of first impression. *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932, 945-46 (D.C. Cir. 1984).

Is there a cause of action for reverse bad faith?

This has not been addressed by the District of Columbia courts. However, at least one court has addressed whether the insured's alleged breach of the implied covenant of good faith barred coverage. *See*, *e.g.*, *Eureka Inv. Corp., N. V. v. Chicago Title Ins. Co.*, 530 F. Supp. 1110, 1121-22 (D.D.C. 1982), *aff'd in part, rev'd in part*, 743 F.2d 932 (D.C. Cir. 1984).

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