Wisconsin

By Pamela J. Tillman, Dale O. Thornsjo, and Lance D. Meyer

Causes of Action

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

No. However, there is one exception, for bad faith in the handling and adjustment of workers' compensation claims. Wis. Stat. §102.18(1)(bp); *see Bosco v. Labor & Indus. Rev. Comm'n*, 2004 WI 77, 272 Wis. 2d, 681 N.W.2d 157. Wis. Stat. §102 does not apply to a third-party fund administrator (who served as the administrator and agent of the Department of Workforce Development for the uninsured employers fund program), and thus does not bar a plaintiff from pursuing a separate bad faith tort claim against the third-party administrator for how it handled and processed the claim. *See Aslakson v. Gallagher Bassett Svcs., Inc.*, 2007 WI 39, ¶79, 300 Wis. 2d 92, 729 N.W.2d 712; Wis. Admin. Code §DWD 80.70.

The unfair claims settlement practices are promulgated at Wis. Admin. Code §INS 6.11. The Commissioner of Insurance has authority to penalize insurers for violations, but insureds have no private right of action against insurers. *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 307 N.W.2d 256 (1981). However, violation of those rules may be evidence of bad faith. *Heyden v. Safeco Title Ins. Co.*, 175 Wis. 2d 508, 498 N.W.2d 905 (Wis. Ct. App. 1993), *overruled on other grounds*, *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 541 N.W.2d 753 (1995).

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

In most instances, no. *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 307 N.W.2d 256 (1981). However, a beneficiary may sue an insurer for benefits due under a life insurance policy when the insured owner of the policy has passed away. *See Plautz v. Time Ins. Co.*, 189 Wis. 2d 136, 525 N.W.2d 342 (Wis. Ct. App. 1994).

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

Yes, first recognized in *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978) and developed in progeny. A discussion of the elements of the tort in different contexts is included below.

Notably, Wisconsin courts have repeatedly explained that "[t]he insurer's duty of good faith and fair dealing arises from the insurance contract and *runs to the insured*." *Neri v. Barber*, 846 N.W.2d 34 (Wis. Ct. App. 2014) (emphasis added) (affirming dismissal of bad faith claim because third-party claimant cannot bring claim for bad faith against insurer).

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

In *Loy v. Bunderson*, 107 Wis. 2d 400, 320 N.W.2d 175 (1982), the Wisconsin Supreme Court held that the tort of bad faith cannot arise between a primary insurer and an excess insurer absent a contract between them describing their respective duties and obligations relating to their mutual insured. *See also Teigen v. Jelco of Wis., Inc.*, 124 Wis. 2d 1, 367 N.W.2d 806 (1985). Absent such a contractual arrangement, disputes between insurers typically have involved claims for declaratory relief seeking a judicial determination of which policies are primary and which are excess, along with accompanying claims for money damages representing funds improperly paid by one insurer. *See, e.g., Riccobono v. Seven Star, Inc.*, 2000 WI App 74, 234 Wis. 2d 374, 610 N.W.2d 501.

What causes of action for extracontractual liability have been recognized outside the claim handling context?

Generally, Wisconsin first-party bad faith claims involve claims handling practices or conduct with regard to the investigation, adjustment, and payment of claims. Similarly, Wisconsin third-party bad faith claims generally involve the insurer's conduct in defending claims filed against the insured. *Aul v. Golden Rule Ins. Co.*, 2007 WI App 165, 304 Wis. 2d 227, 737 N.W.2d 24, refused to extend the tort of bad faith or the duty of good faith and fair dealing to the insurer's conduct during the underwriting process. In an unpublished decision, *General Casualty Co. of Wisconsin v. Choles*, 2010 WI App 62, 324 Wis. 2d 583, 785 N.W.2d 687, the court held that an insurer can engage in bad faith by filing a dispositive coverage motion against its insured when the insurer's position is not fairly debatable.

Damages

Are punitive damages available?

Yes. *Anderson v. Cont'l Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978).

Are attorneys' fees recoverable?

Yes. *DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 547 N.W.2d 592 (1996) (first-party context); *Allied Processors, Inc. v. W. Nat'l Mut. Ins. Co.*, 2001 WI App 129, 246 Wis. 2d 579, 629 N.W.2d 329 (third-party context).

Are consequential damages recoverable?

Yes. *See DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 547 N.W.2d 592 (1996); *Jones v. Secura Ins. Co.*, 2002 WI 11, 249 Wis. 2d 623, 638 N.W.2d 575; *Allied Processors, Inc. v. W. Nat'l Mut. Ins. Co.*, 2001 WI App 129, 246 Wis. 2d 579, 629 N.W.2d 329 (reasonable expenses incurred in successfully litigating bad faith claim are compensatory damages); *Stewart v. Farmers Ins. Grp.*, 2009 WI App 130, ¶13, 321 Wis. 2d 391, 773 N.W.2d 517 (Wisconsin courts have held "as damages resulting from the tort of bad faith, attorney fees do not remain attorney fees, but instead are transformed into damages").

Can a plaintiff recover damages for emotional distress?

Yes. Damages for emotional distress are available in certain circumstances if the insured can establish "substantial" damages aside from his or her emotional distress. *Anderson v. Cont'l Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (Wis. 1978).

Elements of Proof

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

To establish bad faith in the first-party context, an insured must show an absence of a reasonable basis for denying policy benefits. The absence of a reasonable basis for denying a claim exists when the claim is not "fairly debatable." An insured must show the absence of a reasonable basis for denying policy benefits *and* the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. This requires both an objective analysis of policy language as well as a subjective analysis of the insurer's knowledge whether there was a reasonable basis for denying the claim.

An insurer may challenge claims that are fairly debatable and will not be found liable for bad faith unless it is found to have acted intentionally to avoid paying the claim without a reasonable basis for doing so. *Anderson v. Cont'l Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978); *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 541 N.W.2d 753 (1995); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, 261 Wis.2d 333, 661 N.W.2d 789, *reconsideration denied*, 2003 WI 126, 265 Wis.2d 421, 668 N.W.2d 561, *cert. denied*, 540 U.S. 1074 (2003). Absent an objectively unreasonable response to an insured's offer of settlement, there is merely a disagreement between the insured and insurer, which is not enough to state a cause of action or seek discovery on the objective aspect of a bad faith claim. *See Farmers Auto. Ins. v. Union Pacific Ry. Co.*, 2008 WI App 116, ¶28, 313 Wis. 2d 93, 756 N.W.2d 461. Wisconsin also has pattern jury instructions for first-party bad faith claims. *See* Wis. J.I.—Civil 2761.

Cases interpreting the "fairly debatable" standard require the insurer to investigate a claim properly,

evaluate and review the results of the investigation fairly, and not recklessly ignore or disregard facts necessary to evaluate the claim. *Anderson*, 85 Wis. 2d 675, 271 N.W.2d 368; *Trinity Evangelical*, 2003 WI 46, 261 Wis.2d 333, 661 N.W.2d 789; *Pum v. Wis. Physicians Serv. Ins. Corp.*, 2007 WI App 10, 298 Wis. 2d 497, 727 N.W.2d 346 (Wis. 2007). Wisconsin courts have found bad faith when the insurer failed to conduct a neutral evaluation of a claim, when it attempted to negotiate the value of a loss in the face of evidence that the loss exceeded policy limits, when the insurer destroyed evidence pertaining to the loss, and when the insurer disregarded the results of its claims investigators. *See*, *e.g.*, *Davis v. Allstate Ins. Co.*, 101 Wis. 2d 1, 303 N.W.2d 596 (1981); *Benke v. Mukwonago-Vernon Mut. Ins. Co.*, 110 Wis. 2d 356, 329 N.W.2d 243 (Wis. Ct. App. 1982); *Upthegrove Hardware, Inc. v. Pa. Lumberman's Mut. Ins. Co.*, 146 Wis. 2d 470, 431 N.W.2d 689 (Wis. Ct. App. 1988). Whether an insurer's conduct is reasonable is based on the information known to the insurer at the time based on its competent investigation. *Rhiel v. Wis. Cnty. Mut. Ins. Corp.*, 212 Wis. 2d 46, 568 N.W.2d 4 (is. Ct. App. 1997); *see Winter v. Seneca*, 2012 WI App 1, ¶19, 338 Wis. 2d 212 (holding that in determining whether insured has presented "fairly debatable" claim, insurer may be guided by third-party advice, including advice of attorneys and experts).

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

An insurer's decision whether to settle suits filed against its insureds should be the result of the honest weighing of the probabilities of defeating the claim. The decision to contest, rather than settle, a claim against the insured must be honest and intelligent and must be based upon knowledge of the facts and circumstances upon which liability and potential damages are predicated. *Hilker v. W. Auto. Ins. Co.*, 204 Wis. 1, 231 N.W. 257 (1930), *on rehrg.*, 235 N.W. 431 (Wis. 1931). The insurer has the right to exercise its own judgment in determining whether to contest or settle a claim, but that determination must be based on a thorough evaluation of the underlying circumstances of the claim and on informed interaction with the insured. *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (Wis. 1986). Wisconsin also has pattern jury instructions for third-party bad faith claims. *See* Wis. J.I.—Civil 2760.

The insurer must conduct a diligent investigation into the facts of a claim. The insurer must also inform the insured if it appears that an excess judgment is possible. *Hilker v. W. Auto. Ins. Co.*, 204 Wis. 1, 231 N.W. 257 (1930), *on rehrg.*, 235 N.W. 431 (Wis. 1931). An insurer must also timely inform the insured of any settlement discussions and must even clarify the terms of an ambiguous settlement offer. *Prosser v. Leuck*, 225 Wis. 2d 126, 592 N.W.2d 178 (Wis. 1999).

Under certain circumstances, an insurer may even be under a duty to seek out a settlement within policy limits. *Alt v. Am. Fam. Mut. Ins. Co.*, 71 Wis. 2d 340, 237 N.W.2d 706 (1976). However, an insurer is not liable for bad faith for an alleged failure to seek out a settlement within policy limits when the plaintiff's conduct made clear that such an effort would be futile. *Rhiel v. Wis. Cnty Mut. Ins. Corp.*, 568 N.W.2d 4 (Wis. Ct. App. 1997). An insurer is under a duty to minimize an insured's exposure under its deductible when the payment of the deductible is within the control of the insurer. *Roehl Transport, Inc. v. Liberty Mut. Ins. Co.*, 2010 WI 49, 784 N.W.2d 542.

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

Yes. An insured must establish that the insurer acted maliciously toward its insured or that it acted with an intentional disregard of the insured's rights to recover punitive damages. Wis. Stat. §895.043 (previously numbered Wis. Stat.§895.85) (subsection (6) limits punitive damages to "twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater"); *see Strenke v. Hogner*, 2005 WI 25, 279 Wis. 2d 52, 694 N.W.2d 296 (discussing standards for imposing punitive damages); *Wischer v. Mitsubishi Heavy Indus. Am., Inc.*, 2005 WI 26, 279 Wis. 2d 4, 694 N.W.2d 320 (same).

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

No. Bad faith may be established in individual cases whenever the elements of the tort are satisfied.

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

In *Weiss v. United Fire & Casualty Co.*, 197 Wis. 2d 365, 541 N.W.2d 753 (1995), the Wisconsin Supreme Court held that expert testimony is required only for cases presenting particularly complex facts and circumstances outside the common knowledge and experience of an average juror. Conversely, if the claim does not involve such circumstances, no expert testimony is required. *See also DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 547 N.W.2d 592 (1996); *Miller v. Safeco Ins. Co. of Am.*, 761 F. Supp. 2d 813, 822 (E.D. Wis. 2010) (characterizing issue of whether insurer denied claim in bad faith as "purely fact-driven and one that the court is fully capable of deciding on its own without any 'expert' assistance").

On what issues is expert evidence precluded?

No published Wisconsin decision precludes the introduction of expert testimony on any issue in a bad faith case.

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

No Wisconsin published opinion has expressly addressed the issue. It would seem difficult to establish evidence to support the objective element of bad faith—the absence of a reasonable basis for denial of the claim—if a court ultimately upholds the denial of the claim. Moreover, the Wisconsin Supreme Court has ruled an insurer does not commit bad faith in its failure to settle an underlying lawsuit when the coverage issue was "reasonably debatable," even when the coverage issue is ultimately determined against it. *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (1986). As well, the Wisconsin Court of Appeals has held that an insurer should not be held to have acted in bad faith, even if the court ultimately finds the insurer's coverage determination was incorrect, if the insurer denied a claim as a result of the applicable law being unsettled. *Samuels Recycling Co. v. CNA Ins. Cos.*, 223 Wis. 2d 233, 588 N.W.2d 385 (Wis. Ct. App. 1998). Therefore, it would seem incongruous to hold that bad faith is established when the claim is ultimately resolved in favor of the insurer.

The Wisconsin Supreme Court has held that some breach of contract by an insurer is a "fundamental prerequisite" for a first-party bad faith claim by the insured against its insurer. *See Brethorst v. Allstate Prop. and Cas. Co.*, 2011 WI 41, ¶65, 334 Wis. 2d 23, 798 N.W. 2d 467.

Is a 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?

No reported cases.

Practice and Procedure

Statute of limitations

Two years for bad faith. Wis. Stat. §893.57; *Warmka v. Hartland Cicero Mut. Ins. Co.*, 136 Wis. 2d 31, 400 N.W.2d 923 (1987). An insured's bad faith claim does not necessarily accrue upon denial of the claim, but instead accrues when the insured discovered, or in the exercise of due diligence, should have discovered his or her injury. *Davis v. Am. Family Mut. Ins. Co.*, 212 Wis. 2d 382, 569 N.W.2d 64 (Wis. Ct. App. 1997).

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

Wis. Stat. §805.05(2) permits a trial court, in its discretion, to bifurcate a proceeding in the interest of convenience, to avoid prejudice, or as a matter of judicial economy. In *Dahmen v. American Family Mutual Insurance Co.*, 2001 WI App 198, 247 Wis. 2d 541, 635 N.W.2d 1, the court held that a trial court abused its discretion when it refused to bifurcate the trial of a bad faith claim from the resolution of the underlying claim for insurance benefits, staying

discovery on the bad faith claim. The court noted that the failure to bifurcate would result in prejudice to the insurer because the claimant would be entitled to review the claim file in the underlying action, which may include privileged material, to support its bad faith claim. The court also noted that the claims involve fundamentally different evidentiary issues, increasing the complexity of the matter as well as the potential for juror confusion. The court also stated that bifurcation promotes settlement and judicial economy. *See also Brethorst v. Allstate Prop. & Cas. Co.*, 2011 WI 41, ¶76, 334 Wis. 2d 23, 798 N.W.2d 467 (holding that insured may not proceed with discovery on first-party bad faith claim until it has pleaded breach of contract by insurer *as part of a separate bad faith claim* and satisfied court that insured has established such breach or will be able to prove such breach in future).

Stated differently, an insured must plead, in part, that he or she was entitled to payment under the insurance contract and allege facts to show that her claim under the contract was not fairly debatable. To go forward in discovery, these allegations must withstand the insurer's rebuttal. A failure to make this preliminary showing would be grounds for the court to grant summary judgment. *Id.*, 2011 WI 41, ¶79. Therefore, even when a breach of contract claim is concomitantly pled, the insured needs to make a preliminary showing on bad faith, and the court must be satisfied that the claimed breach of contract is well founded and can be proved in the future. *Ullerich v. Sentry Ins.*, 2012 WI App 127, ¶21, 344 Wis. 2d 708, 824 N.W.2d 876.

Under what circumstances will bad faith claims be severed for trial from the underlying claim?

See Dahmen v. Am. Fam. Mut. Ins. Co., 635 N.W.2d 1 (Wis. App. Ct. 2001), discussed above.

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

While no Wisconsin case expressly addresses this issue in the context of a claim for bad faith, claims for punitive damages may be bifurcated from claims for compensatory damages as a rational exercise of a trial court's discretion under Wis. Stat. §805.05(2). In *Majorowicz v. Allied Mutual Insurance Co.*, 212 Wis. 2d 513, 569 N.W.2d 472 (Wis. Ct. App. 1997), the court impliedly approved of such a bifurcation as a method of avoiding prejudice to the insurer from the arguable late notice of the punitive damage claim. The Wisconsin Supreme Court also approved, without significant discussion, the bifurcation of a punitive damages claim from the bad faith claim in *Trinity Evangelical Lutheran Church v. Tower Insurance Co.*, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789.

How does a bankruptcy petition (by either the insured or the insurer) affect the prosecution and defense of bad faith and extracontractual claims?

No published cases. However, at least one unpublished decision, which cannot be cited as precedent in Wisconsin, suggests (without expressly considering the issue) that the bankruptcy trustee for an insured's estate may pursue a claim for third-party bad faith against the insured's liability carrier. *Kepler v. Wis. Mut. Ins. Co.*, 171 Wis. 2d 770, 495 N.W.2d 102 (Wis. Ct. App. 1992) (unpublished opinion). *Isermann v. MBL Life Assurance Corp.*, 231 Wis. 2d 136, 605 N.W.2d 210 (Wis. Ct. App. 1999) contains a discussion of the pursuit of bad faith claims against insurers in liquidation.

How does insolvency or the intervention of a state guaranty fund affect the prosecution and defense of bad faith and extracontractual claims?

In *Isermann v. MBL Life Assurance Corp.*, 231 Wis. 2d 136, 605 N.W.2d 210 (Wis. Ct. App. 1999), the Wisconsin Court of Appeals held that principles of comity barred Wisconsin courts from exercising jurisdiction over a bad faith claim against an insolvent disability insurer that was the subject of a New Jersey rehabilitation proceeding claiming exclusive jurisdiction over suits against the insurer.

The Wisconsin Insurance Security Fund will not pay claims for bad faith against an insolvent insurer. *See* Wis. Stat. §646.31.

Defenses and Counterclaims

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

While no Wisconsin case directly addresses the conduct of the insured or the third-party claimant under evidentiary admissibility standards, that conduct seems relevant to the reasonableness and adequacy of the investigation undertaken by the insurer. If the insurer's investigation is legitimately hampered by such conduct, it seems to follow that bad faith should not be found. In *Aul v. Golden Rule Insurance Co.*, 2007 WI App 165, 304 Wis. 2d 227, 737 N.W.2d 24, although not dispositive with respect to its finding of no bad faith, the court considered the fact that the insured did not submit favorable follow up test results in order for the carrier to reevaluate its denial of coverage. The court also stated that it was an "unreasonable" expectation for the insured to assume its insurer would follow up or pursue subsequent test results.

Is "advice of counsel" a recognized defense?

Yes. In *Berk v. Milwaukee Automobile Insurance Co.*, 245 Wis. 597, 15 N.W.2d 834 (1944), the Wisconsin Supreme Court reversed a trial court finding that an insurer acted in bad faith by failing to settle a claim against an insured. *Berk* specifically cited the insurer's reliance on its counsel's advice as evidence that no bad faith occurred, stating that "[i]t was reasonable and natural that [the insurer] should rely… on the judgment and advice of its attorney," who had recommended against settlement. *See also Winter v. Seneca*, 2012 WI App 1, ¶19, 338 Wis. 2d 212, 808 N.W.2d 175 (holding that in determining whether insured has presented "fairly debatable" claim, insurer may be guided by third-party advice, including advice of attorneys and experts).

What other defenses are available?

Wisconsin insurers should be prepared to prove that their conduct was based on an honest and intelligent consideration of all of the facts and circumstances learned upon a diligent and good faith investigation into all aspects of a claim. *See Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789.

Is there a cause of action for reverse bad faith?

Not expressly recognized. However, the Wisconsin Supreme Court recognized in *Anderson v. Continental Insurance Co.*, 271 N.W.2d 368 (Wis. 1978), that every contract in Wisconsin places an obligation of good faith upon "each party" as a matter of contract law. Wisconsin courts also recognize an insured's contractual duty to cooperate with the insurer in the resolution or defense of claims.

Other Significant Cases Involving Bad Faith and Extracontractual Claims

In *McEvoy v. Group Health Cooperative*, 213 Wis. 2d 507, 570 N.W.2d 397 (Wis. 1997), the Wisconsin Supreme Court held that the tort of bad faith applies to health maintenance organizations (HMOs) making out of network benefits decisions for their subscribers under certain circumstances. The case involved a plan and participant not governed by ERISA.

The Wisconsin Court of Appeals case *Majorowicz v. Allied Mutual Insurance Co.*, 212 Wis. 2d 513, 569 N.W.2d 472 (Wis. Ct. App. 1997) is noteworthy for several reasons. First, the court appears to have applied the bad faith standard applicable for first-party claims to a third-party claim in affirming a trial court finding that the insurer acted in bad faith when it failed to settle a claim against its insured. Second, the court found that the duty of good faith is a non-delegable duty under Wisconsin law, and an insurer cannot escape liability by delegating the investigation, evaluation, and defense of claims against the insured to defense counsel.

In *Jones v. Secura Insurance Co.*, 2002 WI 11, 249 Wis. 2d 623, 638 N.W.2d 575, the Wisconsin Supreme Court held that the breach of the insurance contract and the tort of bad faith are separate causes of action, and that an insured was not barred from pursuing a claim for bad faith despite the fact the

breach of contract claim was barred by the statute of limitations.

In *Lockwood International v. Volm Bag Co., Inc.*, 273 F.3d 741 (7th Cir. 2001), the Seventh Circuit Court of Appeals, purportedly applying Wisconsin law, held that an insurer acted in bad faith when it settled all covered claims against its insured while permitting the underlying plaintiff to file an amended complaint alleging only uncovered claims. The court stated that it had "difficulty imagining a more conspicuous betrayal of the insurer's fiduciary duty to its insured than for its lawyers to plot with the insured's adversary a repleading that will enable the adversary to maximize his recovery of uninsured damages from the insured while stripping the insured of its right to a defense by the insurance company." *Id.* at 744; *see also Soc'y Ins. v. Bodart*, 2012 WI App 75, ¶¶13, 22, 343 Wis. 2d 418, 425, 429, 819 N.W.2d 298, 301, 303 (adopting general rule that "[a]n insurer's duty to defend ends after all at least arguably covered claims are settled and dismissed" but recognizing an exception where "the insurer has purported to 'settle' claims out of a case but has done so in bad faith").

In *Liebovich v. Minnesota Insurance Co.*, 2007 WI App 28, ¶18, 299 Wis. 2d 331, 728 N.W.2d 357, *aff'd on other grounds*, 2008 WI 75, 310 Wis. 2d 751, 751 N.W.2d 764, the Wisconsin Court of Appeals refused to reinstate the insured's bad faith denial of coverage claim against the insurer, even though it held that the insurer wrongfully refused to defend him in a neighbor's suit alleging construction of his house in violation of setback requirements. Acknowledging that the "fairly debatable" analysis is the same with respect to the duty to defend analysis and the bad faith claim analysis, the court's finding that it was fairly debatable whether the policy covered the insured for the acts alleged in the complaint in effect defeated the bad faith claim that coverage was self-evident.

In *Roehl Transport, Inc. v. Liberty Mutual Insurance Co.*, 2010 WI 49, 784 N.W.2d 542, the Wisconsin Supreme Court ruled an insured (which had negotiated a high $500,000 deductible policy) could maintain a bad faith failure to settle claim against its insurer when the insurer exercises control over the settlement of a third-party claim, even though the judgment does not exceed the policy limits. In other words, because there was evidence that the insurer could have settled the case for well below the $500,000 deductible and did not, which led to a $800,000 verdict, the insurer was held to be in bad faith. This was in spite of the fact that the verdict did not exceed the $2 million general policy limits of the insured's policy.

AUTHORS

Pamela J. Tillman | Meissner Tierney Fisher & Nichols S.C. | 414.273.1300 | pjt@mtfn.com

Dale O. Thornsjo | O'Meara, Leer, Wagner & Kohl, P.A. | 952.806.0498 | DOThornsjo@OLWKLaw.com

Lance D. Meyer | O'Meara, Leer, Wagner & Kohl, P.A. | 952.806.0498 | LDMeyer@OLWKLaw.com