

# INSURANCE BAD FAITH

An overview of the issues that arise from bad faith law in the insurance context.

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# BAD FAITH AS A CAUSE OF ACTION

- Two bases on which to bring an action in bad faith: Statute v. Common Law

# BAD FAITH AS A CAUSE OF ACTION - STATUTORY BASIS

- The various provincial Insurance Acts
  - Ex. *Insurance Act*, 1990 R.S.O. c. I.8
  - Section 439: “No person shall engage in any unfair or deceptive act or practice.”
- *Competition Act*, R.S.C. 1985, c. C-34

# BAD FAITH AS A CAUSE OF ACTION - COMMON LAW BASIS

- Implied obligation on both parties to insurance contract to act in “utmost good faith”
- Insurance company must act “promptly and fairly at every step of the claims process.”

# BAD FAITH AS A CAUSE OF ACTION - POSSIBLE COMMON LAW BASIS

- First Party Insurance (Property, Disability, Accident Benefits, Life and UIM Coverage)
  - unwarranted allegations of misrepresentation or non-disclosure in policy application;
  - failure to reasonably investigate and evaluate the claim;
  - unduly delaying the investigation, evaluation or payment of the claim;
  - failure to reasonably assist in claim preparation or advise of policy rights;

# BAD FAITH AS A CAUSE OF ACTION - POSSIBLE COMMON LAW BASIS

- bias in selection and use of experts;
- harassing, intimidating, intrusive or deceptive investigative practices;
- placing unwarranted conditions on payment of benefits;
- unwarranted allegations of arson or fraud in relation to the loss;
- refusal to pay undisputed portions of the claim while negotiating the disputed portion;
- paying less than the amount provided in the policy;
- refusing to provide details for the basis of the denial of the claim.

See Insurance Bad Faith [3<sup>rd</sup> Edition] Gordon G. Hilliker, pg. 49-50

# BAD FAITH AS A CAUSE OF ACTION - POSSIBLE COMMON LAW BASIS

- Third Party Insurance (CGL, D&O and E&O)
  - failure to defend;
  - inadequate defence;
  - failure to inform the insured;
  - failure to settle.

# DAMAGES FOR BAD FAITH - PUNITIVE DAMAGES

- Availability:
  - Bad faith conduct constituted a separate actionable wrong
  - Policyholder must show that insurer's conduct has been malicious, arbitrary, high-handed or highly reprehensible
- Quantum:
  - Historically, a conservative judicial approach



# *Zurich Life Insurance v. Branco*

## Background re Insurer 1

- Complex, involving injured Kyrgystan mine worker
- Sought coverage from insurer for Workers Comp benefits
- Injury not disputed, but could he be trained for another job function?
- Numerous delays and subsequent improper suspension of benefits:
  - Suspended benefits because of failure to enroll in rehab program
  - Extremely low offer to settle
  - Delay of payments forced acceptance of settlement
  - Same examiner had reported case law in area of bad faith

# *Zurich Life Insurance v. Branco*

## Trial Court Decision re Insurer 1

- No real coverage analysis, but finding of bad faith
- \$1.5M awarded in punitive damages and \$150,000 in exemplary damages or mental distress

# *Zurich Life Insurance v. Branco*

## Appeal Court Decision re Insurer 1

- Award reduced from \$1.5 to \$175,000 and reduced \$150,000 exemplary damages to \$15,000
- Court held analysis of trial court fundamentally flawed
- Trial court did not consider specific terms of policy
- Insured did not cooperate as required by policy: Insurer had made 22 cooperation requests and 12 warnings demanding enrollment in a rehabilitation program.
- Case involving other adjuster only relevant for general principles regarding punitive damages, case was not basis for deterrence related quantum.

# *Zurich Life Insurance v. Branco*

## Insurer 2 Analysis

- Somewhat similar factually to Insurer 1 however...
  - Did not communicate claim was covered under group policy until after discoveries (5 years later)
  - Did not pay insured until 7 years post claim approval
  - A low ball offer was made to the insured at early stages
  - In house legal department withheld medical reports from claims department
  - Insurer 2 brought three pretrial motions
  - Pleading (likely boilerplate) denied the insured ever had a claim

# *Zurich Life Insurance v. Branco*

## Decision re Insurer 2

- Trial Judge awards \$3 million dollars noting the \$1M *Whiten* decision was evidentially not enough of a deterrent, and \$300,000 in exemplary damages
- Court of Appeal reduces award to \$500,000 punitive and \$30,000 exemplary
- Insurer 2 failure to pay for a longer period of time than insurer 1 and concealed the fact that the plaintiff's claim was covered at the outset
- Court emphasized proportionality noting unlike *Whiten* the insurer had acknowledged wrongdoing before trial

# BAD FAITH - ELEMENTS OF PROOF

- Standard of proof: on a balance of probabilities
- Fact-specific, not amenable to a precise definition
- “Conscious doing of a wrong or dishonest act and a state of mind affirmatively operating with ill will or an improper or illegal design.”
  - Judicial interpretation of “bad faith” in section 267.8(22) of Ontario *Insurance Act*

# BAD FAITH - DEFENCES AND COUNTERCLAIMS

- Unreasonable conduct of the insured / third party claimant
- Detrimental reliance on legal advice
- Fairness in the claims handling process
- “Reverse” bad faith

# Questions?

