

EMERGING TORNADO CLAIMS AND BAD FAITH UPDATE

On April 27, 2011, a good portion of Alabama and many Alabama citizens sustained tornado damage. One early issue that arose was how tornado victims should deal with their insurance company. There were several articles in local newspapers and television coverage attempting to inform and instruct people on how best to deal with their insurance company. A more salient question for lawyers is whether or not the tort of bad faith even exists in Alabama under our current Court. This paper will try to address both of those issues. Following this paper is a series of frequently asked questions and advice that you may provide to your clients for dealing with insurance adjustors and walking through the claims process. The remainder of this document will address the current state of bad faith in Alabama.

Under current Alabama law there are two avenues to prosecute a bad faith claim. These are known as the “normal bad faith” claim and the “abnormal bad faith” claim. The Alabama Supreme Court has defined “normal” and “abnormal” bad faith in the following manner:

“In the ‘normal’ bad-faith case, the plaintiff must show the absence of any reasonably legitimate or arguable reason for denial of a claim. [*State Farm Fire & Cas. Co. v.] Slade*, 747 So.2d [293] at 306 [(Ala.1999)]. **(In the ‘abnormal’ case, bad faith can consist of: 1) intentional or reckless failure to investigate a claim, 2) intentional or reckless failure to properly subject a claim to a cognitive evaluation or review, 3) the manufacture of a debatable reason to deny a claim, or 4) reliance on an ambiguous portion of a policy as a lawful basis for denying a claim. 747 So.2d at 306-07. ...)**

Normal Bad Faith

In order to recover for a “normal” bad faith claim the plaintiff must prove

1. The existence of an insurance contract;
2. An intentional refusal to pay the claim; and
3. The absence of any lawful basis for refusal and the insurer’s knowledge of that fact or the insurer’s intentional failure to determine whether there is any lawful basis for its refusal. *Watson v. Life Insurance Company of Alabama*, 2011WL2508238(Ala.Civ.App)

Obviously, under the current Court it would be very difficult to prove the elements of a “normal” bad faith claim. In recent rulings, the Court looks more favorably upon abnormal bad faith as discussed below.

In a “normal” case, in order to submit a bad faith case to the jury, a plaintiff must show that he is entitled to a directed verdict on the contract claim. On this point, the Supreme Court has held as follows:

“In **the normal case** in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show **that the plaintiff is entitled to a directed verdict on the contract claim** and, thus, entitled to recover on the contract claim as a matter of law. Ordinarily, **if the evidence produced by either side creates a fact issue with regard to the validity of the claim** and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury.”

National Savings Life Ins. Co. v. Dutton, 419 So. 2d 1357, 1362 (Ala. 1982);
National Insurance Association, 829 So. 2d 111 (Ala. 2002).

Abnormal Bad Faith

The “abnormal” or “extraordinary” bad faith case is focused on the methods employed by the insurance company during the course of their investigation into the claim. Also, this type of bad faith claim does not come with the requirement of establishing a directed verdict on the merits of the underlying breach of contract claim.

The elements of an “abnormal” bad faith case are:

1. Intentional or reckless failure to investigate a claim;
 2. Intentional or reckless failure to properly subject a claim to a cognitive evaluation or review;
 3. The manufacture of a debatable reason to deny a claim; or
 4. Reliance on an ambiguous portion of a policy as lawful basis for denying a claim.
- Watson v. Life Insurance Company of Alabama*, 2011WL2508238(Ala.Civ.App)

Recently, in the case of Jones v. Alfa Mut. Ins. Co., 1 So. 3d 23, 37 (Ala., 2008), the Alabama Supreme Court reversed a trial court’s decision granting summary judgment in favor of the insurer on an “abnormal” bad faith claim where the facts presented created a “question of fact as to whether Alfa [the insurer] met its duty to marshal all facts necessary to make a determination as to coverage before it denied the Joneses' claim.” Id. at 37; See also National Ins. Ass'n v. Sockwell, 829 So.2d 111 (Ala. 2002) (“Evidence created jury question on insured's abnormal bad-faith claim that underinsured motorist (UIM) carrier denied payment without proper investigation; the carrier never even inquired as to whether the insured had settled her claims with the liability insurers, and even if the carrier was not required to pay elements of the loss covered by workers' compensation, an experienced adjuster never even attempted to discern the workers' compensation coverage).

Moreover, an abnormal bad faith claim may be established by a reckless disregard for the facts:

“The relevant question before the trier of fact would be whether a claim was properly investigated and whether the results of the investigation were subject to a cognitive evaluation and review. Implicit in that test is the conclusion that the knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company when there is a **reckless indifference to facts or to proof submitted by the insured**. . . .”
Aetna Life, supra.. at 1052.

Conclusion

Obviously, under the two types of bad faith avenues the “abnormal” is the easier to overcome with the current Court. For this reason, when pleading bad faith, both types of bad faith should be pled and discovery pursued specifically at the method of how the decision making process took place with the insurance company. This would include obtaining any claims manuals or guides for adjusters on how to conduct a claim investigation, investigating lay witnesses in the community and/or seeking objective facts such as weather data to support your client’s claim.

After the Storm: Frequently asked Legal Questions and Issues following the April 27th Alabama Tornado Outbreak

Storm Damage and Insurance Claims

1. The first stage of the claim process - getting started:

I have a storm claim - what do I do? The first step in the claims process is reporting your damage to your insurance company. Call your insurance company to report the claim. At this stage, your call will most likely be directed to someone gathering basic information such as contact information and broad general information regarding your loss. This person most likely will not be the adjuster assigned to assess and evaluate your claim and is not the person who will ultimately decide on insurance benefit payments to you. It is important to provide answers to any questions asked at this stage.

What if I cannot find my policy? Immediately ask your insurance company or agent for a complete copy of your insurance policies, including your declarations page. That policy is the contract between your insurance company and you. You need a copy to understand what coverage types are available to you in case you later need to tell your lawyer this information. Some of these coverages may be difficult to understand. Basic coverage types in these policies include dwelling, other structures, personal property and loss of use. Common additional coverages include debris removal, property collapse, and reasonable repairs. Also, the policy will also determine amounts of coverage as well as any exclusions, conditions, and deductibles regarding coverage. The debris removal coverage, if available, may be particularly helpful at this early stage to pay to clear your property. While this fact sheet addresses residential homeowner's insurance, commercial property insurance can cover both physical structures and property as well as loss of business and income as a result of a disaster.

I have been assigned an adjuster, so what happens now? An adjuster's job is to investigate the claim for the insurance company. Determining what caused the damage and placing a value on the damage are part of this stage. You should expect the adjuster to inspect the damage initially and provide guidance as to what you can do to move the claim forward. You should ask the adjuster what you should do to assist in the claims process. Take notes of any instruction given to you. If you do not understand anything, ask for clearer instruction or explanation.

The adjuster assigned to me does not work for my insurance company, should I be concerned? Oftentimes, following a natural disaster with widespread damage like we experienced on April 27th, insurance companies will employ what are called "independent" adjusters to help handle claims due to the high volume of claims coming in. This does not change any obligation of your insurance company. The policy between you and your company remains in effect and must be honored regardless of whether the adjuster is a direct employee of your insurance company or an "independent adjuster."

I do not like my adjuster, what can I do? You have an obligation under your insurance contract to cooperate with your insurance company. This might include answering questions you feel are unnecessary or impossible to answer at this time. Do not forget your obligation to

cooperate. If you refuse to cooperate, you may be giving your insurance company an opportunity to not pay your claim, in whole or in part. That does not mean you have to accept any payment offer from the company. Instead, this means you have to provide information asked by the company or adjuster. If you find you cannot work well with your adjuster, you may request another one. Some policies provide for this right, while other policies do not. Prior to making this request, review your policy. Under the strain from and the recent destruction, such a request may also slow down your claim.

I cannot live in my home, what can I expect from my insurance company? Determine what "Additional Living Expense" coverage you have from your adjuster and your policy. "Additional Living Expenses" generally includes hotel or restaurant bills; the limit in terms of specific dollar amounts or percentage of coverage are usually defined. Make sure you understand the limit - the maximum total amount of coverage - you have so you can budget your living arrangements. This coverage is designed to provide a comparable standard of living after a loss. Ask what documentation you need to provide to continue this coverage while you are displaced from your home.

2. Second Stage - claim valuation

What can I do protect myself at this stage? Document your loss and timely file a proof of loss with the insurance company or its independent adjuster, as the case may be. Make your video and photographs of your damage as detailed as possible, as they are important if there is a later dispute with your insurance company over what was lost in the storm. Generally, in taking photographs and video, the more images of the damage, the easier it will be to prove your damages to the insurance company.

The adjuster is demanding a list of everything I lost. Do I have to do this? Yes. You have an obligation to cooperate with your insurance company, which means providing requested information. Many people when faced with a complete loss assume the insurance company will pay the limit of coverage; unfortunately, this is not always the case. As difficult as it may be, start room by room and account for every item lost due to the storm.

I do not agree with the estimate to repair my home, what can I do? If you do not agree with the insurance company's estimate to repair your home, get your own estimate from a reputable contractor. Send that estimate to you insurance company, and ask that the adjuster meet with your contractor so the adjuster can understand the discrepancy. Put this request in writing.

What is the difference between "Actual Cash Value" and "Replacement Cost"? Actual cash value is what your home and/or contents were worth at the time of loss. Replacement cost is the amount of money to replace your home or lost items. Some policies provide replacement cost coverage only when the item is actually replaced. It is important to review your policy and go over this coverage with your adjuster. You may be entitled to additional funds when you start replacing items if you have replacement cost coverage. Be aware that some policies require you to rebuild within a limited number of days in order to claim replacement cost for your lost dwelling. Also, it may be helpful to inform your insurance company that you intend to rebuild to obtain maximum coverage of benefits.