The Bad Faith and Personal Counsel "Clubs" in Third-Party Cases

Many people believe that bad faith can only be used in a first-party case such as a UM/UIM or med pay claim. However, bad faith is a highly overlooked "club" that plaintiffs' lawyers can use to get larger settlements in third-party tort claims. It is also surprising to many lawyers that tortfeasor's insurers may be forced to hire two separate defense counsel.

The scenario that plaintiffs' lawyers often find difficult is the potential excess claim. However, plaintiffs' counsel can use leverage to get an insurer to pay the limits when (1) the maximum exposure of the tortfeasor's insurer is policy limits; and (2) the tortfeasor's insurer is using in-house or comparatively inexpensive outside counsel. The tortfeasor's insurer has every incentive to "dig in" on these claims.

Many cases have the potential to exceed the policy limits. Plaintiffs' counsel can reasonably justify potential excess exposure claims through jury verdicts and settlements, risk analysis, and through economic cost projections.

Economic leverage comes in two (2) forms in a potential excess claim:

1. Bad Faith — Plaintiffs can receive an assignment of the tortfeasor/insured's claim against the tortfeasor's insurer; and

2. Conflict of Interest and Multiple Counsel — Plaintiffs' counsel can argue that the tortfeasor's insurer must hire personal counsel for the defendant in addition to defense counsel.

Both approaches can significantly increase the exposure to the tortfeasor's insurer.

I. Bad Faith In Third-Party Claims.

A. Procedure.

Although there is no direct bad faith cause of action against a tortfeasor's insurer in Ohio,[1] plaintiffs may request the assignment of the tortfeasor/insured's bad faith claim in the event of an excess verdict.[2]

The procedure to expose the tortfeasor's insurer to a bad faith claim requires:

1. A demand in excess of policy limits (potential exposure to an excess claim);

2. A reduced demand within policy limits;[3] and

3. Plaintiff's counsel should give a reasonable time for the tortfeasor's insurer to evaluate the claim before withdrawing the limits demand.[4]

B. Grounds For Bad Faith.

Although there are many potential grounds for bad faith, the criteria most useful in potential excess claims include:

1. Torfeasor's insurer must provide equal consideration to the interest of its insured;[5]

2. The strength of the case on liability and damages;[6]

3. Did the insurer conduct an IME?[7]

4. Did the insurer notify the insured of her right to independent counsel to protect his personal exposure?[8]

5. Did the insurer advise its insured of its conflict of interest when there is excess exposure?[9]

6. Did the insurer request contribution to the settlement by its insured?[10]

7. Did the insurer ignore counsel's advice?[11] and

8. Independent of an excess verdict, insurer has a separate duty to conduct an adequate investigation and evaluation of the claim.[12]

II. Insurer's Duty To Pay For Personal Counsel.

The second "club" that plaintiffs' counsel can use is argue that a potential excess verdict creates a conflict of interest requiring the tortfeasor's insurer to pay for a second attorney, at the insured's selection, as personal counsel for the tortfeasor.[13] It is quite surprising how many cases in Ohio support the ability for the tortfeasor/insured to receive individual personal counsel paid by the torfeasor's insurer. Insurers hate to see their case costs and attorneys' fees exceed normal ranges and expectations.

Moreover, personal counsel may place their own leverage upon the insurer to settle the claim within policy limits to avoid excess exposure to the insured. The personal counsel also cannot be selected by the insurer since this may be additional evidence of bad faith.

CONCLUSION

Many cases can be argued as creating exposure in excess of the tortfeasor's policy limits. Combining potential bad faith and personal counsel paid by the insurer can significantly increase potential exposure to the tortfeasor's insurer well above policy limits and normal defense costs. The leverage available to obtain larger settlements is now much greater.

Bad faith claims provide a strong incentive for insureds to act fairly:

> The potential for a bad faith claim acts as an incentive for insurers to act in a reasonable manner in defending and settling claims.[14]

Plaintiffs' lawyers should take advantage of both "clubs" – bad faith and payment of personal counsel for the tortfeasor/insured.

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[1] Intercity Auto Sales, Inc. v. Evans, 2011 WL 1080271 (8th Dist. 3/24/11); Chitlik v. Allstate Ins. Co., 34 Ohio App.2d 193 (8th Dist. 1973).
[2] Carter v. Pioneer Mut. Ins., Co., 67 Ohio St.2d 146 (1981); Romstadt v. Allstate Ins. Co., 59 F.3d 608 (6th Cir. 1995).
[3] Miller v. Kronk, 35 Ohio App.3d 103 (10th Dist. 1987).
[4] Calich v. Allstate Ins. Co., 2004-Ohio-1619 (9th Dist. 3/31/04).

[5] Anderson v. Nationwide Mut. Ins. Co., Case No. L-92-273 (6th Dist. 9/30/93); Wasserman v. Buckeye Union Casualty Co., 29 Ohio App.2d 7 (8th Dist. 1971) (rev'd on other grounds 32 Ohio St.2d 69 (1972)); Netzley v. Nationwide Mut. Ins. Co., 34 Ohio App.2d 65 (2nd Dist. 1971).

[6] Wasserman, supra; Netzley, supra.

[7] Combs v. Reliance Standard Life Ins. Co., 2012 WL 1309252 (S.D. Ohio 2012) (credibility determination requires an exam); Anderson v. Nationwide Mut. Ins. Co., Case No. L-92-273 (6th Dist. 9/30/93).

[8] Dicus v. Laipply, Case No. 3-92-36 (3rd Dist. 12/15/92); Wasserman, supra; Netzley, supra.

[9] Wasserman, supra; Netzley, supra.

[10] Miller v. Kronk, 35 Ohio App.3d 103 (10th Dist. 1987); Wasserman, supra; Netzley, supra.

[11] Miller v. Kronk, 35 Ohio App.3d 103 (10th Dist. 1987); Netzley, supra.

[12] Zoppo v. Homestead Ins. Co., 71 Ohio St.3d 552 (1994) (failure to conduct factual investigation); Fifth Third Mortgage Co. v. Chicago Title Ins. Co., 758 F.2d 476, 489 (S.D. Ohio 2010); Barker v. Am. Standard Ins. Co., 2004 WL 1765341 (6th Dist. 8/6/04); La Plas Condo Assoc. 1 and 2 v. Utica National Group, 2004 WL 2260099 (3rd Dist. 10/4/04); Mid-American Fire & Cas Co. v. Broughton, 154 Ohio App.3d 728 (7th Dist. 2003); Ohio Bar Liab. Ins. Co. v. Hunt, 152 Ohio App.3d 224 (2nd Dist. 2003); Wasserman, supra; Netzley, supra.

[13] State Farm Fire & Cas. Co. v. Pildner, 40 Ohio St.2d 101, 105-106 (O'Neill C.J. concurring); Socony-Vacuum Oil Co. v. Continental Casualty Co., 144 Ohio St. 382 (1945), paragraph one of the syllabus (when there is a mutually exclusive conflict of interest, the insurer must pay for personal counsel); American States Ins. Co. v. Sovereign Chemical Co., 2002-Ohio-3180 (9th Dist. 6/26/02) (insurer offered to pay personal counsel); Red Head Brass Inc. v. Buckeye Union Ins. Co., 135 Ohio App.3d 616 (9th Dist. 1999) (duty to pay costs of insured's private counsel); Pasco v. State Auto Mut. Ins. Co., 99-LW-5679 (10th Dist. 12/21/99) (citing Pildner and Belcher); International EPDM Rubber Roofing System v. Midwestern Indemnity Co., 1993 WL 452084 (6th Dist. 11/5/93) (insurer is obligated to pay personal counsel's fees "necessitated by a conflict of interest"); Lusk v. Imperial Cas. & Indemnity Co., 78 Ohio App.3d 11 (10th Dist. 1992) (duty to pay for personal counsel if it is impossible for insurer to represent both its interests and those of its insured); Belcher v. Dooley, 1988 WL 15647 (2nd Dist. 2/16/88) (insurer has duty to pay for independent counsel).

[14] OBLIC v. Hunt, 152 Ohio App.3d (2nd Dist. 2003).