



What are the Available Remedies Against an Insurance Company That Has Acted in Bad Faith?

This article will be the second in a series of articles by McKennon | Schindler LLP addressing and answering basic questions concerning insurance law. This one addresses: What are the available remedies against an insurance company that has acted unreasonably in handling an insurance claim?

The most common causes of action against insurers in the non-ERISA context are breach of contract and bad faith.

The breach of contract claim allows an insured to recover policy benefits owed under the insurance policy plus applicable interest from the date the benefits were due (or at the rate of 10% on delayed *disability* payments in California). The benefits due will depend on the type of policy at issue. They may be a specific amount (e.g., death benefits) or may depend upon a proof of loss (e.g., value of property damaged or destroyed).

The bad faith (aka breach of the implied covenant of good faith and fair dealing) claim potentially allows an insured/policyholder to recover future damages owed under the policy (in disability cases), attorneys' fees, consequential damages (economic damages caused by the bad faith conduct, such as medical bills as a result of emotional distress, interest paid on borrowed funds, loss on investment where there was a forced sale caused by insurer's denial, lost investment opportunities because personal funds had to be used to pay expenses), emotional distress and punitive damages.

There are three primary categories of damages recoverable in these types of actions:

1. **Contract Damages** – In first-party cases, the measure of contract damages is the benefits due under the policy. In third-party cases, the measure is the amount expended or liability incurred by the insured up to the policy limits. Consequential damages are also recoverable where appropriate, and are defined as those damages the parties should have foreseen as likely to result from a breach when they entered into the contract. Thus, an insured may recover damages that were within the parties' reasonable expectation at the time of contracting.
2. **Tortious (Extracontractual) Compensatory Damages** – In bad faith actions, an insured may recover extracontractual compensatory damages based on an insurer's tortious conduct. This includes all damages caused by the insurer's tortious conduct, including both economic loss and non-economic harm (e.g., emotional distress). This will often include attorney's fees reasonably incurred to compel payment of benefits due under an insurance policy (called *Brandt* fees).
3. **Punitive Damages** – In an action against an insurer where, in addition to bad faith or other tortious conduct, there is clear and convincing evidence of oppression, fraud or

malice on the part of the insurer, the insured may recover punitive damages. Punitive damages will be awarded to punish an insurer for tortious conduct giving rise to an action not based on the terms of the insurance contract (e.g., fraud).

In addition to breach of contract and bad faith, other claims available to insureds are fraudulent and negligent misrepresentation, intentional and negligent infliction of emotional distress, invasion of privacy, and intentional interference with economic advantage. Each of these causes of action may allow for recovery of alternative and additional damages, including punitive damages.

For additional information on this and other insurance matters you can visit the FAQ section of our website: www.mslawllp.com.

If you need to consult with an attorney about a possible insurance bad faith or ERISA matter, please contact our office.



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