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# The Bad Faith Sentinel

*Standing guard on developments in the law of insurance bad faith around the country*

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## Eighth Circuit: No Bad Faith Where Insured Failed to Make a Sufficient Demand and Insurer Refused to Entertain Settlement Offer Prior to Completing Investigation

*Purscell v. Tico Ins. Co.*, No. 13-2362, 2015 WL 3855253 (8th Cir. June 22, 2015).

*Court holds it was not bad faith for insurer to pursue investigation into underlying lawsuit before considering settlement demand.*

One fatality and severe injuries resulted when, on the evening of May 19, 2006, Ben Purscell accelerated to 75 m.p.h. and ran a stop sign, crashing into the vehicle of Tim and Amy Carr. Purscell's passenger, Amy Priesendorf, was ejected from the car and pronounced dead at the scene. Although all surviving passengers suffered injuries, Tim Carr's injuries were the most severe.

The events leading up to the accident were unusual. Priesendorf, a new co-worker of Purscell, had arrived at Purscell's home and requested that Purscell give her a ride. Purscell drove Priesendorf to a cemetery where she visited the gravesite of a friend who had been killed as a result of Priesendorf's drunk driving. On the return trip to Purscell's home, Priesendorf twice reached her leg over from the passenger seat and pushed down on the accelerator, which ultimately caused the accident with the Carrs. Purscell later learned that Priesendorf had been suicidal after her friend's death and that Priesendorf's friends never agreed to drive her places because of her erratic tendencies to reach for the steering wheel and push on the accelerator.

Just three weeks after the accident, the Carrs' attorney presented a settlement offer to Purscell's motor vehicle insurer, Infinity Assurance Insurance ("Infinity"), requesting the full limit under Purscell's policy. Purscell's policy limited liability to \$25,000 per person and \$50,000 per accident for bodily injury. Infinity refused to settle with the Carrs prior to completing its investigation into Priesendorf's intentional conduct, especially due to Purscell's potential exposure to a wrongful death claim. Just two weeks after proposing the settlement, the Carrs unexpectedly withdrew their offer.

As Infinity anticipated, Priesendorf's parents filed a wrongful death claim against Purscell. A few weeks later, the Carrs also filed suit against Purscell seeking the full policy limit. The competing claimants then entered negotiations to determine how to distribute the \$50,000 policy. Without acknowledging the wrongful death claim, Purscell's attorney wrote a letter to Infinity directing Infinity to settle the Carrs' claims using the full policy limit. Infinity responded by informing Purscell of the wrongful death claim and that the claimants were in negotiations in order to settle within the policy limits. Neither Purscell nor his attorney responded to Infinity's letter.

In an effort to avoid having to file an interpleader action, Infinity sent a second letter to Purscell's attorney seeking the attorney's input on how to allocate the policy limit. After again receiving no response, Infinity proceeded to file a petition with the Missouri state court for an interpleader action, submitting the full \$50,000 policy limit to the court.

The following year, a jury in Missouri state court determined Purscell and Priesendorf were equally at fault for the Carrs' injuries and awarded damages of \$830,000 and \$75,000 to Tim and Amy Carr, respectively. One month later, the Missouri state court approved a settlement of Priesendorf's parents' wrongful death claim in the amount of \$7,764. After subtracting this settlement amount from the \$50,000 policy limit, the court apportioned \$17,235 to Amy Carr and \$25,000 to Tim Carr.

Left with the substantial judgment from the Carrs' lawsuit in excess of his policy limits, Purscell sued Infinity in Missouri state court for bad faith failure to settle and breach of fiduciary duty. Purscell claimed that Infinity should have focused on settling Tim Carr's claim because his medical expenses clearly exposed Purscell to liability in excess of the policy limits. Purscell asserted that Infinity's decision to instead pursue a settlement of all three claims was a self-serving attempt to avoid any future bad faith claim. After removing the matter to federal district court, Infinity moved for summary judgment. The court granted the motion, and Purscell filed a timely appeal.

The Eighth Circuit affirmed the district court's ruling. Under Missouri law, Purscell had the burden of proving that Infinity: 1) reserved the exclusive right to contest or settle any claims; 2) prohibited Purscell from assuming liability or settling any claims without consent; and 3) was guilty of fraud or bad faith in refusing to settle a claim within the policy limits. Specifically, Purscell had to show that Infinity had a reasonable opportunity to settle within the policy limits and was trying to escape its full responsibility under the policy.

The Court determined that the Carrs' unexpected and quick withdrawal of their early settlement offer did not present a reasonable opportunity for Infinity to settle. Additionally, there was no evidence that Infinity was trying to avoid its responsibility to pay the full policy limit, as evidenced by its submission of the full \$50,000 to the Court with its interpleader filing. Rather, the Court concluded that Infinity properly pursued a global settlement due to its knowledge that Purscell was living paycheck to paycheck and wanted protection against any personal exposure.

Further, under Missouri law, Purscell had not made a "sufficiently definite demand" on Infinity to settle with the Carrs, as Purscell never responded to Infinity's letter to communicate his desire to settle with the Carrs in light of the competing wrongful death claim. While a demand to settle is not a requisite element under Missouri law, it is a factor considered by courts and one that was heavily weighed here by the lower court.

According to the Court, Infinity's focus on a global settlement was not evidence of bad faith; rather, Infinity acted in Purscell's best interest by attempting to settle all three claims within the policy limits. Once Infinity realized this would not be possible, the Court concluded Infinity responded appropriately by filing an interpleader action. Thus, without a reasonable opportunity to settle and without a subsequent sufficient demand from Purscell to settle with the Carrs, the Court found no support for Purscell's bad faith failure to settle claim.

## Third Circuit Court of Appeals Predicts That Pennsylvania Supreme Court Would Prevent an Insured from Recovering Punitive Damages Awarded Against Him in a Subsequent Bad Faith Refusal to Settle Claim

*Wolfe v. Allstate Prop. & Cas. Ins. Co.*, No. 12-4450, 2015 WL 3634779 (3d Cir. June 12, 2015).

*The Third Circuit Court of Appeals holds that evidence of punitive damages award against insured in underlying suit was not relevant to resolution of bad faith claim.*

Several hours after consuming 15 or 16 beers, Karl Zierle was driving and rear-ended Jared Wolfe. Zierle had a blood alcohol content of 0.25% at the time of the accident and had been convicted of three prior DUIs. Wolfe suffered injuries in the accident that required emergency room treatment.

After the accident, Wolfe made an initial settlement demand of \$25,000 to Allstate, Zierle's insurer. Allstate, however, only valued Wolfe's claim at between \$1,200 and \$1,400 and, therefore, made a counteroffer of \$1,200. After the parties reached an impasse in their negotiations, Wolfe filed suit against Zierle seeking compensatory and punitive damages. In pretrial settlement conferences, two judges each placed a settlement value of \$7,500 on the case. Wolfe later stated that if Allstate offered \$7,500, he would have accepted the offer, but at the time neither party moved from their initial demand and offer of \$25,000 and \$1,200 respectively.

The case proceeded to trial and the jury awarded Wolfe \$15,000 in compensatory damages and \$50,000 in punitive damages. Allstate paid the compensatory damages but not the punitive damages. Wolfe agreed not to enforce the punitive damages judgment against Zierle, and in exchange, Zierle assigned his rights against Allstate to Wolfe. Wolfe then sued Allstate in Pennsylvania state court to recover the \$50,000 in punitive damages awarded against Zierle, alleging breach of contract, statutory bad faith, and a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law. Allstate subsequently removed the case to federal court.

Allstate filed, and the district court denied, a motion for summary judgment and a motion in limine to exclude evidence related to the punitive damages award from the underlying claim. In denying summary judgment, the court reasoned that

Allstate had a duty to negotiate a settlement in good faith and that a reasonable jury could find that Allstate acted in bad faith. The court denied the motion in limine, holding that the \$50,000 punitive damage award against Zierle was relevant, as it potentially resulted from Allstate's failure to negotiate with Wolfe in good faith. According to the court, if Allstate had settled Wolfe's claim against Zierle, the court would not have been in a position to award Wolfe punitive damages.

At trial, the jury found that Allstate breached its contract with Zierle and violated Pennsylvania's bad faith statute. While it did not award Wolfe damages on the breach of contract claim, it did award him \$50,000 in punitive damages under the bad faith statute. Allstate appealed, asking the Third Circuit to determine: (1) whether the district court erred by allowing Wolfe to introduce evidence of the punitive damages award from the underlying suit against Zierle; and (2) whether the district court erred by denying the motion for summary judgment.

The underlying question that the court had to answer in resolving the first issue was whether an insured can seek to recover from his insurer punitive damages awarded against him in an underlying suit. In the absence of controlling precedent, the Third Circuit predicted that the Pennsylvania Supreme Court would find that, in an action by an insured against his insurer for bad faith refusal to settle, the insured may not collect as damages the punitive damages awarded against the insured in an underlying lawsuit. Therefore, the punitive damages award in the underlying suit against Zierle was not relevant to Wolfe's bad faith claim and should not have been admitted as evidence. In so holding, the court relied on a Pennsylvania statute which prohibits insurers from providing coverage for punitive damages. The law is based on the public policy that punitive damages are meant to punish and deter the wrongdo-

er himself. The court reasoned that if it allowed Wolfe to hold Allstate responsible for the punitive damages in the underlying lawsuit, it would punish the insurer and not Zierle, in contradiction of the law and the public policy.

Additionally, the court held that the insurer need not even consider the potential for punitive damages when negotiating a settlement. Imposing such a duty when negotiating a settlement would similarly go against public policy by shifting the responsibility for punitive damages to the insurer. The court consequently held that Allstate was entitled to a new trial where evidence relating to the \$50,000 settlement is inadmissible.

The court then evaluated whether the district court should have granted Allstate's motion for summary judgment. Its

ruling with respect to a new trial notwithstanding, the Third Circuit held that the district court properly denied Allstate's motion for summary judgment on both the breach of contract and bad faith claims.

With respect to the breach of contract claim, the court found that, under Pennsylvania law, even if Wolfe could not establish compensatory damages flowing from the alleged breach, he could still recover nominal damages if he proved that Allstate breached its contractual duty of good faith and so the trial court properly ruled that his claim survived summary judgment. Similarly, the Third Circuit held that the statutory bad faith claim properly survived summary judgment because it was possible that Wolfe might prove that Allstate acted in bad faith independent of its refusal to pay the punitive damages award against Zierle.

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## Fifth Circuit Court of Appeals: Establishing an Arguable Basis for Delay or Denial of a Claim Precludes a Finding of Bad Faith

*Dey v. State Farm Mut. Auto. Ins. Co.*, No. 14-60300, 2015 WL 3772762 (5th Cir. June 17, 2015).

*Fifth Circuit holds that "pocketbook dispute" between insured and insurer over value of the insured's claim and insurer's delay in resolving claim while it conducted further investigation did not constitute bad faith.*

In October 2009, Daniel Dey's vehicle was struck by a police officer in Mississippi. Under Mississippi law, police officers are considered uninsured motorists, so Dey tendered his claim to State Farm under his automobile policy, which provided \$100,000 in uninsured motorists ("UM") benefits.

In January 2010, Dey notified State Farm of the potential UM claim and in May 2011, submitted a settlement brochure to State Farm, which included \$12,080 in medical bills, \$5,777 in lost wages and mileage, and \$13,871 in special damages, for a total of \$31,728. The brochure also included Dey's medical records, which indicated that Dey's injury would likely not require surgery. Dey demanded \$125,000, in excess of the policy limit, to settle the claim.

On June 14, 2011, a State Farm adjuster valued Dey's claim at between \$37,000 and \$47,000. State Farm initially offered Dey

\$37,000 to settle the claim and eventually increased the offer to \$45,000; Dey rejected both offers and demanded the policy limit of \$100,000.

On February 6, 2012, Dey sent State Farm another letter that demanded \$100,000 and included a medical report from November 2011 stating that Dey still had medical problems but should not require surgery. State Farm responded by reducing its offer to \$37,000. On August 17, 2012, Dey provided State Farm with additional medical records from June 2012, which now recommended surgery. Dey underwent surgery in December 2012, which resulted in \$44,841 in additional medical expenses.

On January 24, 2013, State Farm requested medical authorization from Dey to allow State Farm to review Dey's medical records, and in April 2013, Dey provided the medical authori-

zation. During the period between Allstate’s request and Dey’s authorization, Dey again demanded \$100,000, and State Farm refused, stating that it questioned whether the accident was the cause of the injury that required surgery. State Farm deposed

Dey in May 2013. In July 2013, a medical expert retained by State Farm to evaluate Dey’s medical records concluded that he was unable to determine, and no shoulder specialist would be able to determine with any degree of medical certainty, that the need for surgery was attributable to the initial accident. Dey sued State Farm in Mississippi state court for, among other things, bad faith denial of the UM claim; State Farm removed the case to federal court. Dey argued that State Farm acted in bad faith because it delayed requesting medical authorization and delayed informing him that it had questions concerning the cause of his injuries.

State Farm sought and was granted summary judgment on the bad faith claim. The district court analyzed Dey’s claim in two separate periods: before and after State Farm was informed that Dey needed surgery. The court found that, prior to receiving the medical records indicating that Dey needed surgery, State Farm denied Dey’s claim because Dey’s medical bills and expenses totaled \$31,728, an amount significantly less than the \$100,000 that Dey sought. According to the court, the parties had been engaged in a “pocketbook dispute,” which could not

support a claim of bad faith. The court then concluded that State Farm’s delay in investigating the cause of Dey’s injury until after it was notified that Dey needed surgery was appropriate because State Farm had no reason to question the cause of the injury prior to that point. The Court reached this conclusion despite the fact that State Farm: (1) did not seek clarification from Dey’s physician as to the additional medical records; (2) did not request Dey be seen by a State Farm doctor; (3) did not respond to Dey’s offer to depose his physicians for two months; and (4) did not retain an expert until six days before the litigation deadline. The court held that State Farm’s conduct was at worst negligent and thus did not rise to the level of bad faith. Dey appealed the district court ruling.

The issue on appeal was whether there were genuine disputes of material fact as to whether State Farm lacked an arguable basis on which to deny Dey’s claim. The Fifth Circuit held that Dey did not meet his heavy burden in demonstrating that there was no reasonable arguable basis for denying his claim. Rather, the undisputed evidence showed that State Farm had an arguable basis in its delay and denial of Dey’s claims. The Fifth Circuit affirmed the district court’s grant of summary judgment, finding that State Farm performed a prompt and adequate investigation and made reasonable and good faith decisions based on its investigation, while Dey failed to present sufficient evidence to find otherwise.

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