Bad-Faith Claims in Illinois

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I. [12.1] INTRODUCTION

Until approximately 70 years ago, insurance companies operated in an environment in which they had all the advantages. As one commentator has noted:

A hundred years ago . . . [a]n insurer, faced with the choice whether to settle a claim against its insured or to pay a claim of its insured, knew that if it refused to settle or pay, it would never have to spend more than the limits of its liability as set forth in the insurance policy, even if the insured filed suit against the insurer for breach of contract. If a liability insurer rejected a third-party claimant’s offer to settle for an amount less than or equal to the policy limits and the claimant later recovered a judgment exceeding that limit, the burden of paying the excess portion of the judgment fell upon the insured, not the insurer. If a property insurer wrongfully refused to pay its insured’s own claim, thereby depriving the insured of funds when he most needed them and causing him great hardship, the insured could sue the insurer for breach of the policy and recover his policy benefits, but he would receive no compensation for the consequences of the insurer’s breach of the policy. Stephen S. Ashley, BAD FAITH ACTIONS: LIABILITY AND DAMAGES §1:01, pp. 1-1 through 1-2 (2d ed. 1997) (Ashley).

All of that began to change in the 1930s and 1940s, when courts around the country gradually began to recognize the validity of tort claims brought against insurance companies for abusive claims settlement practices. These tort actions came to be known as “bad-faith claims.” Ashley §1:02.

Since then, there has been an absolute explosion in bad-faith litigation, and it remains, to this day, a dramatic threat to insurers and a rich source of recovery for insureds. Anyone who doubts this fact need only review some of the more recent bad-faith verdicts that have been handed down across the nation. In April 2002, an Iowa jury returned a $20 million verdict against an insurance company that had allegedly acted in bad faith in handling a workers’ compensation claim. Douglas R. Richmond, Bad Insurance Bad Faith Law, 39 Tort Trial & Ins. L.J. 1, 2 (2003). On July 30, 2002, an Illinois jury awarded the plaintiff $35,000 in compensatory damages and $3 million in punitive damages when his insurer wrongfully denied a $9,500 claim for the theft of his car. In April 2003, an Arizona jury awarded $84.5 million, including $79 million in punitive damages, to an insured whose disability insurer strung her along for years before denying her claim. Id. In 2009, a punitive damage award of $1.15 million for an insured was affirmed based on evidence that the insurance company accused the insured of arson during the claim without an adequate investigation and with knowledge of the insured’s financial vulnerability. Moore v. American Family Mutual Insurance Co., 576 F.3d 781 (8th Cir. 2009).

The Illinois Supreme Court has outlined three types of claims for obtaining extra-contractual relief from an insurer for its post-claim conduct:

a. a claim under §155 of the Illinois Insurance Code, 215 ILCS 5/1, et seq., in which an insured can recover statutory damages and attorneys’ fees for vexatious and unreasonable conduct by an insurer;
b. a bad-faith claim for an insurer's failure to settle within policy limits based on the insurer's breach of an implied duty of good faith and fair dealing; and


These three types of claims are addressed in §§12.2 – 12.15, 12.16, and 12.17 – 12.20 below, respectively.

II. [12.2] BAD-FAITH CLAIMS BASED ON ILLINOIS INSURANCE CODE §155

Section 155 of the Illinois Insurance Code awards statutory penalties, attorneys' fees, and costs for an insurer's unreasonable and vexatious failure to fulfill its post-claim obligations. "The statute provides an extra-contractual remedy to policyholders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable." Cramer v. Insurance Exchange Agency, 174 Ill.2d 513, 675 N.E.2d 897, 900, 221 Ill.Dec. 473 (1996). The statute provides:

(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:

(a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;

(b) $60,000;

(c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.

(2) Where there are several policies insuring the same insured against the same loss whether issued by the same or by different companies, the court may fix the amount of the allowance so that the total attorney fees on account of one loss shall not be increased by reason of the fact that the insured brings separate suits on such policies. 215 ILCS 5/155.

Since its enactment, §155 has been amended several times, and with each amendment, the amount of attorneys' fees, costs, and penalties that can be recovered has expanded. Ill.Rev.Stat. (1967), c. 73, ¶767; Ill.Rev.Stat. (1977), c. 73, ¶767; 215 ILCS 5/155.
Although many believe that §155 is limited to first-party bad-faith claims (such as those arising out of automobile or homeowner’s insurance policies), it is clear that §155 also applies to claims involving third-party liability insurance (such as commercial or professional liability insurance) that provides policyholders with defense or indemnity benefits. Prisco Serena Sturm Architects, Ltd. v. Liberty Mutual Insurance Co., 126 F.3d 886 (7th Cir. 1997) (§155 is generally applicable to third-party as well as first-party insurance); Richardson v. Illinois Power Co., 217 Ill.App.3d 708, 577 N.E.2d 823, 160 Ill.Dec. 498 (5th Dist. 1991). Section 155 has also been specifically extended to apply to health maintenance organizations. 215 ILCS 125/5-1; 215 ILCS 130/4001. It is also important to note that the damages available under §155 are not limited solely to policyholders. It is well established that the rights and remedies available under §155 can be extended to assignees of policyholders. See, e.g., American States Insurance Co. v. CFM Construction Co., 398 Ill.App.3d 994, 923 N.E.2d 299, 377 Ill.Dec. 740 (2d Dist. 2010); Statewide Insurance Co. v. Houston General Insurance Co., 397 Ill.App.3d 410, 920 N.E.2d 611, 366 Ill.Dec. 402 (1st Dist. 2009).


Factors to be considered in deciding liability under §155 include the attitude of the insurer, whether the insured was forced to sue to recover, and whether the insured was deprived of the use of its property for any length of time. Stevens v. Country Mutual Insurance Co., 387 Ill.App.3d 796, 903 N.E.2d 733, 328 Ill.Dec. 73 (4th Dist. 2008); Gaston v. Founders Insurance Co., 365 Ill.App.3d 303, 847 N.E.2d 523, 301 Ill.Dec. 513 (1st Dist. 2006) (finding no §155 violation because dispute existed as to amount to be paid based on estimate, insured did not have to institute suit to get any proceeds, and insurer communicated with insured promptly and numerous times). “Neither the length of time, the amount of money involved, nor any other single factor is dispositive; rather, it is ‘the attitude of the defendant which must be examined.’” Green v. International Insurance Co., 238 Ill.App.3d 929, 605 N.E.2d 1125, 1129, 179 Ill.Dec. 111 (2d Dist. 1992), quoting Norman v. American National Fire Insurance Co., 198 Ill.App.3d 269, 555 N.E.2d 1087, 1110, 144 Ill.Dec. 568 (5th Dist. 1990). The acts of an insurer’s agent such as an appraiser or third-party administrator also may constitute unreasonable and vexatious conduct that can be attributed to an insurance company. McGee, supra, 734 N.E.2d at 155; Green, supra.

A. Conduct That Constitutes a Violation of Insurance Code §155


One of the surest ways to violate the duty of good faith and fair dealing is to knowingly misrepresent relevant facts or policy provisions. A good example of this bad-faith conduct can be found in Emerson v. American Bankers Insurance Company of Florida, 223 Ill.App.3d 929, 585 N.E.2d 1315, 166 Ill.Dec. 293 (5th Dist. 1992). The plaintiffs in Emerson were in the business of breeding horses. They testified that a premier stallion was vital to the operation’s success. According to the record, Tough Cookie was purchased in 1983 to fulfill this role. The plaintiffs obtained insurance on Tough Cookie through American Bankers.

Each year, livestock policies were written on Tough Cookie’s life, and in 1985, the plaintiffs received an application to renew their insurance. The application requested the number of mares serviced by Tough Cookie in 1985. According to the application, Tough Cookie serviced 27 mares in 1984 and was to service 30 mares in 1985. Based in part on these representations, a $50,000 policy was issued in March 1985. Tough Cookie died in 1986. Included with the plaintiffs’ proof of loss were breeding reports for 1984 and 1985, which indicated that Tough Cookie had serviced 20 mares in 1984 and 19 mares in 1985, 12 of which were owned by the plaintiffs.

Because of the discrepancy between the application and the breeding reports, American Bankers had Tough Cookie appraised by two appraisers. They valued the horse at $10,000 and $15,000 respectively but considered only the market in the United States and Canada. The plaintiffs also obtained two appraisals of Tough Cookie, one for $50,000 and one for $55,000. These appraisals considered the European market.

American Bankers ultimately rejected the plaintiffs’ proof of loss. According to the rejection letter, the bases for American Bankers’ decision were the plaintiffs’ reliance on overseas values and misrepresentation in the application regarding the number of mares serviced by Tough Cookie. American offered the plaintiffs $25,000. That offer was rejected, and suit was filed. The case went to trial, and the jury found in favor of the plaintiffs and awarded them $55,000, the appraised value of the stallion on the European market. As part of the judgment, the court awarded the plaintiffs $33,072.23 on their claim under 215 ILCS 5/155.

On appeal, American argued that its refusal to consider the overseas market in determining the actual cash value of Tough Cookie was properly based on its interpretation of the policy’s geographic limitation provision. That provision provided that American Bankers would “not be liable for any claim on any animal that is removed from: 1) the U.S.; and/or 2) Canada.” 585 N.E.2d at 1322. In rejecting American’s interpretation of the geographic limitation provision of the policy, the appellate court stated:

Given the expertise of plaintiffs’ appraisers, their intimate familiarity with the business, their testimony regarding the importance of the European market in determining a horse’s value, and the fact that there is no mention of the geographic-limitation provision in either the rejection letter or the adjustment file, the jury
could have concluded that American well knew that the European market would have valued Tough Cookie considerably higher than the domestic market and employed a strained interpretation of a contract provision in order to exclude the European market from consideration, thereby deflating Tough Cookie's actual cash value, and that this defense was developed after the fact, in order to justify American's position. Id.

A similar result was reached in McGee v. State Farm Fire & Casualty Co., 315 Ill.App.3d 673, 734 N.E.2d 144, 151, 248 Ill.Dec. 436 (2d Dist. 2000), in which bad faith was found when the plaintiff alleged that the defendant refused to provide him with a copy of his insurance policy and misled him about the contents of the policy, and in Boyd v. United Farm Mutual Reinsurance Co., 231 Ill.App.3d 992, 596 N.E.2d 1344, 173 Ill.Dec. 465 (5th Dist. 1992), in which bad faith was found when the insurer employed an inappropriate method of calculating the amount of the plaintiff's loss.

2. [12.4] Failing To Communicate Promptly or Regularly with an Insured

Courts have found liability under §155 of the Illinois Insurance Code, 215 ILCS 5/155, was alleged or existed when

a. the insurer refused to acknowledge the defendant's prompt and repeated communications regarding a defense (Employers Insurance of Wausau v. Ehlo Liquidating Trust, 186 Ill.2d 127, 708 N.E.2d 1122, 237 Ill.Dec. 82 (1999));

b. the insurer refused to acknowledge the insured's communications requesting payment of the claim or arbitration (Millers Mutual Insurance Association of Illinois v. House, 286 Ill.App.3d 378, 675 N.E.2d 1037, 221 Ill.Dec. 613 (5th Dist. 1997));

c. the insurer failed to respond to the plaintiff's request for payment and information concerning the status of the claim for 111 days (Norman v. American National Fire Insurance Co., 198 Ill.App.3d 269, 555 N.E.2d 1087, 144 Ill.Dec. 568 (5th Dist. 1990)); and

d. the insurer ignored repeated attempts by the insured to set up a meeting to discuss the dispute (Mohr v. Dix Mutual County Fire Insurance Co., 143 Ill.App.3d 989, 493 N.E.2d 638, 97 Ill.Dec. 831 (4th Dist. 1986)).

3. [12.5] Failing To Pay Either All or the Portion of Claim the Insurer Acknowledges Is Due

"It is certainly a reasonable expectation of the insured that if the insurer has no honest doubts concerning its liability, it will promptly pay over the amount owing." Craft v. Economy Fire & Casualty Co., 572 F.2d 565, 571 (7th Cir. 1978). In Millers Mutual Insurance Association of Illinois v. House, 286 Ill.App.3d 378, 675 N.E.2d 1037, 221 Ill.Dec. 613 (5th Dist. 1997), an insurer's conduct was found to be vexatious and unreasonable when it delayed paying the $40,000 that it acknowledged it owed pending a determination of whether it owed an additional

4. [12.6] Settling a Claim for Less than It Is Worth

Attempting to settle a claim for less than the claim is reasonably worth also can subject an insurer to liability for bad faith. Valdovinos v. Gallant Insurance Co., 314 Ill.App.3d 1018, 733 N.E.2d 886, 248 Ill.Dec. 211 (2d Dist. 2000) (holding that actions of insurer, which waited nearly two months after claim was filed before submitting unexplained counteroffer $4,000 less than estimate, was vexatious and unreasonable); Ford Motor Credit Co. v. Manzo, 196 Ill.App.3d 874, 554 N.E.2d 480, 143 Ill.Dec. 545 (1st Dist. 1990) (finding bad faith based in part on insurer’s decision to settle claim by offering amount significantly less than what damaged vehicle was actually worth at time that it was stolen). Moreover, a court may award damages for unreasonable delay in handling a claim even though the insurer pays the full amount due before suit is filed. McGee v. State Farm Fire & Casualty Co., 315 Ill.App.3d 673, 734 N.E.2d 144, 248 Ill.Dec. 436 (2d Dist. 2000). See also Green v. International Insurance Co., 238 Ill.App.3d 929, 605 N.E.2d 1125, 179 Ill.Dec. 111 (2d Dist. 1992); Calcagno v. Personalcare Health Management, Inc., 207 Ill.App.3d 493, 565 N.E.2d 1330, 152 Ill.Dec. 412 (4th Dist. 1991).

5. [12.7] Forcing an Insured To Litigate To Obtain His or Her Benefits

An “insurance company does not violate [215 ILCS 5/155] merely by unsuccessfully litigating a dispute.” Uhlich Children’s Advantage Network v. National Union Fire Company of Pittsburgh, 398 Ill.App.3d 710, 929 N.E.2d 531, 543, 340 Ill.Dec. 880 (1st Dist. 2010). However, an insurer that forces an insured to litigate or to seek arbitration of a claim knowing that it has no substantial grounds to reject the claim is guilty of bad faith. Siwek v. White, 388 Ill.App.3d 152, 905 N.E.2d 278, 328 Ill.Dec. 744 (1st Dist. 2009) (affirming award under §155 of Insurance Code when insurance company forced insured to sue to establish recovery when company unsuccessfully filed five sets of affirmative defenses); Buais v. Safeway Insurance Co., 275 Ill.App.3d 587, 656 N.E.2d 61, 63, 211 Ill.Dec. 869 (1st Dist. 1995) (finding claim under §155 of Insurance Code was alleged when insurer insisted on going to arbitration “all the time knowing it would have to pay out the full amount of the policy”). An insurance company is also guilty of bad faith when the company insists on prosecuting a meritless appeal to delay paying a claim. Myrda v. Coronet Insurance Co., 221 Ill.App.3d 482, 582 N.E.2d 274, 164 Ill.Dec. 66 (2d Dist. 1991).

In Norman v. American National Fire Insurance Co., 198 Ill.App.3d 269, 555 N.E.2d 1087, 144 Ill.Dec. 568 (5th Dist. 1990), the plaintiffs’ home was totally destroyed as the result of a fire. After the plaintiffs filed a proof of loss, the defendant investigated the cause and origin of the fire. According to the court, the defendant believed from the beginning that the plaintiffs had burned their own house to the ground, and “[o]nce arson was established as a possibility, defendant seemed to look only for clues to support this theory.” 555 N.E.2d at 1101. There was no real
proof that the plaintiffs had started the fire. In addition, there was proof from independent experts that the fire was caused by a faulty refrigerator motor. Despite these facts, the defendant denied the plaintiffs’ claim and forced the plaintiffs to file suit to recover the amount due under their homeowner’s policy.

In holding that the defendant was guilty of bad faith and subject to the penalties set forth in §155, the appellate court stated:

Defendant’s handling of plaintiffs’ claim ... suffers major infirmities. There was no adequate explanation of motive on the part of defendant’s experts to support a theory of incendiary origin.... Defendant’s delay in denying plaintiffs’ claim for 111 days is unreasonable, especially in light of letters written to defendant by both plaintiffs and plaintiffs’ mortgagee inquiring as to the status of the claim. Defendant had absolutely no evidence at any time to connect [one of the plaintiffs] with the fire, yet the entire claim was denied. 555 N.E.2d at 1111.

However, if reasonable grounds exist to dispute a claim, an insurer can dispute it without incurring the risk of liability for bad faith. See, e.g., Morris v. Auto-Owners Insurance Co., 239 Ill.App.3d 500, 600 N.E.2d 1299, 180 Ill.Dec. 222 (4th Dist. 1993) (finding of bad faith reversed when appellate court noted that defendant had reasonable grounds to dispute claim, including evidence establishing deliberate burning of property, financial motive, and access to premises); Fittje v. Calhoun County Mutual County Fire Insurance Co., 195 Ill.App.3d 340, 552 N.E.2d 353, 142 Ill.Dec. 3 (4th Dist. 1990) (trial court did not abuse its discretion in denying insured statutory penalties and attorneys’ fees when substantial evidence of arson established that insured’s claim was questionable).

6. [12.8] Failing To Properly Investigate a Claim and/or Basing a Denial on Improper Investigative Grounds

In Smith v. Equitable Life Assurance Society of United States, 67 F.3d 611 (7th Cir. 1995), the court affirmed the trial court’s decision that the insurer’s refusal to pay the plaintiff’s claim was unreasonable and vexatious in large part because the insurer failed to conduct an investigation into the plaintiff’s claims of disability. In Buais v. Safeway Insurance Co., 275 Ill.App.3d 587, 656 N.E.2d 61, 64, 211 Ill.Dec. 869 (1st Dist. 1995), the court found a claim under §155 of the Illinois Insurance Code, 215 ILCS 5/155, was stated in part because the complaint alleged that the insurer “refused to evaluate, investigate, or even talk about a claim” with the insured. In Meier v. Aetna Life & Casualty Standard Fire Insurance Co., 149 Ill.App.3d 932, 500 N.E.2d 1096, 103 Ill.Dec. 25 (2d Dist. 1986), the court found an insurer was vexatious and unreasonable because an adjuster arrived at his settlement figure based solely on his observation of the postaccident wreckage in violation of company rules on how to value a car.

When an investigation is properly conducted, however, an insurer should not have to worry about a bad-faith claim. Consider Zakarian v. Prudential Insurance Company of America, 652 F.Supp. 1126 (N.D.Ill. 1987), which involved beneficiaries who were seeking the proceeds of life insurance policies issued on the life of Zare Zakarian. The insurers refused to pay death benefits under the policies of insurance based on their having found that the insured had committed
suicide. After the insurers refused to pay the plaintiffs’ claims, the plaintiffs filed suit alleging that the defendants were guilty of bad faith based on their unreasonable and vexatious refusal to settle their claims. In rejecting the plaintiffs’ claims for extraordinary costs under §155, the court pointed to the following investigation undertaken by the insurers: (a) the beneficiaries were interviewed several times for more than two hours; (b) the insurers obtained Chicago Police Department records closing the department’s investigation based on a finding that the insured had committed suicide; (c) the insurers obtained hospital records showing that the insured had been treated for an aspirin overdose one month before his death and that he had been depressed for over two years; and (d) the insurers obtained a copy of the medical examiner’s report showing the cause of death as slash wounds to the wrists and the back of the knees. According to the court, this investigation conclusively showed that the insurers properly investigated the plaintiffs’ claims and justified their decision to deny the payment of death benefits under the applicable policies of insurance.

In Traum v. Equitable Life Assurance Society of United States, 240 F.Supp.2d 776 (N.D.Ill. 2002), an insured securities trader who had been diagnosed with major depression sued his disability income insurer for breach of contract after the insurer discontinued his benefits. In holding that the defendant was not guilty of vexatious and unreasonable conduct when it came to investigating the plaintiff’s claim, the court stated:

Equitable awarded disability benefits in 1993 and continued to pay the benefits until 1998. . . . It must have been unreasonable and vexatious to discontinue benefits in June 1998 or to continue to deny benefits thereafter. . . . [T]he record shows that Equitable continued to pay the benefits for a number of years even though its Claims Department had serious questions as to whether plaintiff was actually disabled. Equitable did not discontinue benefits until it obtained two IMEs’s strongly supporting discontinuation and, even after that, it obtained another consultant’s opinion when plaintiff sought reconsideration. 240 F.Supp.2d at 790.

Based on this investigation, the court dismissed the plaintiff’s claim for relief under §155.

7. [12.9] Failing To Affirm or Deny Coverage Within a Reasonable Time After Proof-of-Loss Statements Have Been Completed

In Dickman v. Country Mutual Insurance Co., 120 Ill.App.3d 470, 458 N.E.2d 199, 76 Ill.Dec. 60 (3d Dist. 1983), the plaintiff claimed that his barn had been damaged in a windstorm. The plaintiff completed and submitted proof-of-loss forms to his insurer, Country Mutual Insurance Company, shortly after the damage to the barn occurred. Following the submission of the forms, the defendant asked the plaintiff to contact a local contractor of the defendant’s choosing in order to obtain an estimate of the damages. The plaintiff did so, and the contractor determined that the barn was damaged beyond repair. Almost a year after the storm, the defendant engaged an engineer to examine the barn. He found the barn to be in very good condition. The plaintiff claimed that he heard nothing further from his insurer until he contacted the Illinois Department of Insurance regarding his claim and received a report from the department that contained a written denial of the claim by the defendant.
Country Mutual moved to dismiss the plaintiff’s subsequent suit to obtain the proceeds of his insurance policy, arguing that the plaintiff failed to file his suit within the one-year limitations period contained in the policy. The plaintiff argued that the defendant should not be allowed to invoke the one-year limitations period contained in the policy since he learned about the defendant’s denial of his claim — for the first time — more than a year after the claim was made and he had completed and submitted the required claim forms. The plaintiff also argued that the defendant had engaged in bad faith since it failed to affirm or deny coverage within a reasonable time after proof-of-loss statements had been submitted.

The appellate court reversed the order of dismissal entered by the trial court. In reaching its decision, the court had the following to say about the timely denial of a claim after proof-of-loss forms have been completed:

With reference to all insurance companies, the Illinois legislature has declared certain acts to be improper claims practices if committed without just cause and either knowingly or with such frequency as to indicate a persistent tendency to engage in that type of conduct. . . . One of those acts is the failure to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed. . . .

We believe that this provision evidences a strong legislative intent to impose a duty upon insurance companies to either affirm or deny coverage within a reasonable period of time after notification of a claim. This reasonable period of time would certainly fall well before the contractual limitations period had run. Therefore, we find that the defendant was under an obligation to deny plaintiff coverage prior to the running of the limitations period. [Citations omitted.] 458 N.E.2d at 201.

8. [12.10] Failing To Defend an Insured in an Underlying Action That Potentially Falls Within the Policy’s Coverage

It is well established that an insurer can be liable for extra-contractual damages under § 155 of the Illinois Insurance Code, 215 ILCS 5/155, if it vexatiously and unreasonably refuses to defend its insured in an underlying action that potentially falls within the policy’s coverage. See, e.g., Bedoya v. Illinois Founders Insurance Co., 293 Ill.App.3d 668, 688 N.E.2d 757, 228 Ill.Dec. 59 (1st Dist. 1997) (upholding award of attorneys’ fees and statutory penalty against insurer who refused to defend its insured against all counts of underlying complaint); Richardson v. Illinois Power Co., 217 Ill.App.3d 708, 577 N.E.2d 823, 160 Ill.Dec. 498 (5th Dist. 1991) (same). An insurer may be found to be liable for § 155 damages if the undisputed facts demonstrate that the insurer both (a) had a duty to defend and (b) failed to defend its insured under a reservation of rights or to timely file a declaratory judgment action prior to resolution of the conclusion of the underlying action. American Safety Casualty Insurance Co. v. City of Waukegan, 776 F.Supp.2d 670 (N.D.Ill. 2011); Statewide Insurance Co. v. Houston General Insurance Co., 397 Ill.App.3d 410, 920 N.E.2d 611, 366 Ill.Dec. 402 (1st Dist. 2009).
B. Damages Available for Insurance Code §155 Violations

1. [12.11] Penalties

The statutory penalty for violations of §155 of the Illinois Insurance Code is currently capped at $60,000. 215 ILCS 5/155. Illinois courts have interpreted the language “an amount not to exceed any one of the following amounts” as limiting the statutory penalty award to the maximum allowed in subparagraph (1)(b) of §155. See Nelles v. State Farm Fire & Casualty Co., 318 Ill.App.3d 399, 742 N.E.2d 420, 252 Ill.Dec. 170 (1st Dist. 2000). Subparagraphs (1)(a) and (1)(c) of §155 provide a formula for calculating the penalty award when, for example, the court has determined that a penalty of $60,000 is excessive.

2. [12.12] Attorneys’ Fees


3. [12.13] Costs

“Other costs” in §155 of the Illinois Insurance Code, 215 ILCS 5/155, is not defined by the statute. Courts give the term a broad interpretation with the goal of placing “the insured in as good a position as he would have been had the insurer paid the value of the claim when requested.” Watson v. State Farm Fire & Casualty Co., 122 Ill.App.3d 559, 461 N.E.2d 57, 61, 77 Ill.Dec. 670 (3d Dist. 1984). “Other costs” include any costs incurred that are found to be reasonably necessary in preparation of the case for trial. Id.

4. [12.14] Prejudgment Interest

Prejudgment interest can be recovered with respect to claims under 215 ILCS 5/155. Millers Mutual Insurance Association of Illinois v. House, 286 Ill.App.3d 378, 675 N.E.2d 1037, 221 Ill.Dec. 613 (5th Dist. 1997). Prejudgment interest, however, is recoverable only if the amount is liquidated or capable of easy calculation. Id.

When there is a bona fide dispute as to whether a policy provides coverage for a claim, an insurer’s delay in handling or denying a claim will not be considered a violation of 215 ILCS 5/155. State Farm Mutual Automobile Insurance Co. v. Smith, 197 Ill.2d 369, 757 N.E.2d 881, 259 Ill.Dec. 18 (2001); Statewide Insurance Co. v. Houston General Insurance Co., 397 Ill.App.3d 410, 920 N.E.2d 611, 366 Ill.Dec. 402 (1st Dist. 2009). A bona fide dispute regarding coverage means a dispute that is “[r]eal, actual, genuine, and not feigned.” American States Insurance Co. v. CFM Construction Co., 398 Ill.App.3d 994, 923 N.E.2d 299, 308, 377 Ill.Dec. 740 (2d Dist. 2010), quoting BLACK’S LAW DICTIONARY, p. 177 (6th ed. 1990). A bona fide dispute exists when (1) there is a genuine dispute over the scope and application of insurance coverage, (2) the insurer asserts a legitimate policy defense, (3) the claim presents a genuine factual issue regarding coverage, or (4) the insurer takes a reasonable legal position based on an unsettled issue of law. Scottsdale Indemnity Co. v. Village of Crestwood, 784 F.Supp.2d 988 (N.D.Ill. 2011); General Star Indemnity Co. v. Lake Bluff School District No. 65, 354 Ill.App.3d 118, 819 N.E.2d 784, 289 Ill.Dec. 288 (2d Dist. 2004). See, for example, the following cases:

1. Baxter International, Inc. v. American Guarantee & Liability Insurance Co., 369 Ill.App.3d 700, 861 N.E.2d 263, 308 Ill.Dec. 198 (1st Dist. 2006), in which the court found a bona fide dispute existed because the language of an insurance policy was ambiguous, leaving no clear answer to the issue disputed by the parties;

2. O’Rourke v. Access Health, Inc., 282 Ill.App.3d 394, 668 N.E.2d 214, 222, 218 Ill.Dec. 51 (1st Dist. 1996), in which the court found that an insurer’s “assertion of a legitimate policy defense, supported by appropriate authority, [could] not be considered vexatious and unreasonable”;

3. Gaston v. Founders Insurance Co., 365 Ill.App.3d 303, 847 N.E.2d 523, 301 Ill.Dec. 513 (1st Dist. 2006), in which the court found that the existence of a factual dispute over the amount to be paid based on an estimate precluded §155 damages; and

4. American Alliance Insurance Co. v. 1212 Restaurant Group, L.L.C., 342 Ill.App.3d 500, 794 N.E.2d 89, 276 Ill.Dec. 642 (1st Dist. 2003), in which the court found that an insurer’s denial was not vexatious and unreasonable, even though the insurer had a duty to defend the underlying complaint, as the issue of whether the complaint fell within an employment-related practices exclusion had not been addressed by state courts.

Illinois courts have found that a bona fide dispute also exists when an insurer relies on Illinois caselaw to support its coverage position. Ragan v. Columbia Mutual Insurance Co., 291 Ill.App.3d 1088, 684 N.E.2d 1108, 226 Ill.Dec. 112 (5th Dist. 1997) (finding that insurer did not act unreasonably and vexatiously when Illinois caselaw supported insurer’s coverage position, even though Illinois authority was split); State Farm Mutual Automobile Insurance Co. v. Fisher, 315 Ill.App.3d 1159, 735 N.E.2d 747, 249 Ill.Dec. 143 (1st Dist. 2000) (finding that bona fide coverage dispute existed when there was no Illinois caselaw on point but insurer argued for extension of existing caselaw). However, in a situation in which the insured has asked for a
defense, even if a bona fide dispute exists, delaying the decision to either defend the insured under a reservation of rights or seek a declaratory judgment on the issue can leave an insurer liable for §155 damages even when a policy defense to coverage exists. Korte Construction Co. v. American States Insurance, 322 Ill.App.3d 451, 750 N.E.2d 764, 255 Ill.Dec. 847 (5th Dist. 2001).

A bona fide dispute is a valid defense to a §155 claim even when coverage was denied on grounds that the court ultimately holds to be erroneous or unacceptable. Smith, supra; Clayton v. Millers First Insurance Cos., 384 Ill.App.3d 429, 892 N.E.2d 613, 322 Ill.Dec. 976 (5th Dist. 2008). However, there must be some factual or legal support for the defense. Employers Insurance of Wausau v. Ehco Liquidating Trust, 186 Ill.2d 127, 708 N.E.2d 1122, 237 Ill.Dec. 82 (1999) (rejecting insurer’s argument that there was bona fide dispute as to coverage when insurer failed to offer any argument as to why its asserted coverage defense was bona fide); Morris v. Auto-Owners Insurance Co., 239 Ill.App.3d 500, 600 N.E.2d 1299, 180 Ill.Dec. 222 (4th Dist. 1993) (finding no bad faith because defendant had reasonable grounds to dispute claim, including evidence establishing incendiaries, financial motive, and access to premises); Bedoya v. Illinois Founders Insurance Co., 293 Ill.App.3d 668, 688 N.E.2d 757, 228 Ill.Dec. 59 (1st Dist. 1997) (finding no bona fide dispute as to coverage when insurer attempted to argue that it had duty to defend its insureds only against covered causes of action, even though it is established Illinois law that insurers must defend entire lawsuit even if only one count of complaint falls under policy).

III. [12.16] BAD-FAITH CLAIMS BASED ON A FAILURE TO SETTLE

There are basically two causes of action for an insurer’s refusal to settle a third-party action: a breach of contract action and a third-party bad-faith action. Because the tort cause of action for bad faith supports the recovery of a wider array of damages (including in egregious cases punitive damages), most plaintiffs choose to sue in tort rather than contract. The only exception to this rule is when the statute of limitations bars a tort cause of action but permits a breach of contract action.

While there is no common-law bad-faith tort action under Illinois law, an insured may assert a common-law action against a liability insurer that has failed to act in good faith in responding to a settlement offer. Cramer v. Insurance Exchange Agency, 174 Ill.2d 513, 675 N.E.2d 897, 221 Ill.Dec. 473 (1996). One of an insurer’s obligations under a contract of liability insurance, arising out of its implied duty of good faith and fair dealing, is to settle a claim that has been brought against the insured when it is appropriate to do so. The bad-faith “failure-to-settle” claim is a narrow exception to the rule that there is no independent tort for the breach of the duty of good faith and fair dealing. Voyles v. Sandia Mortgage Corp., 196 Ill.2d 288, 751 N.E.2d 1126, 256 Ill.Dec. 289 (2001). Section 155 of the Illinois Insurance Code, 215 ILCS 5/155, does not preempt a common-law claim for failure to settle within policy limits. California Union Insurance Co. v. Liberty Mutual Insurance Co., 930 F.Supp. 317 (N.D.Ill. 1996).

The typical “duty-to-settle” claim arises from cases involving a policyholder, a liability insurer, and a third party. Chandler v. American Fire & Casualty Co., 377 Ill.App.3d 253, 879
N.E.2d 396, 316 Ill.Dec. 329 (4th Dist. 2007). In the usual circumstances, a third party has sued the insured for an amount in excess of the policy limits but has offered to settle the claim for an amount equal to or less than those policy limits. Id. Illinois courts have recognized that the insurer has a duty to act in good faith in responding to such settlement offers. Illinois Pattern Jury Instructions — Civil §710.01 (2011) (I.P.I. — Civil); Haddick v. Valor Insurance, 198 Ill.2d 409, 763 N.E.2d 299, 261 Ill.Dec. 329 (2001).

The “duty to settle” arises because the policyholder has relinquished defense of the suit to the insurer. The policyholder depends upon the insurer to conduct the defense properly. In these cases, the policyholder has no contractual remedy because the policy does not specifically define the liability insurer’s duty when responding to settlement offers. The duty was imposed to deal with the specific problem of claim settlement abuses by liability insurers where the policyholder has no contractual remedy. Cramer, supra, 675 N.E.2d at 903.

When an insurer breaches this duty, the insurer may be liable for the full amount of the judgment against the policyholder, regardless of policy limits. Krutsinger v. Illinois Casualty Co., 10 Ill.2d 518, 141 N.E.2d 16 (1957); Swedish-American Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange, 395 Ill.App.3d 80, 916 N.E.2d 80, 334 Ill.Dec. 7 (2d Dist. 2009). The statute of limitations for a duty-to-settle claim is also five years. 735 ILCS 5/13-205; Chandler, supra.

An insurer’s “duty to settle arises once a third-party claimant has made a demand for settlement of a claim within policy limits and, at the time of the demand, there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against its insured.” [Emphasis added.] Haddick, supra, 763 N.E.2d at 306. See also Swedish-American Hospital Association of Rockford, supra, 916 N.E.2d at 99. Thus, the duty to settle does not arise until (a) there is a reasonable probability of recovery in excess of policy limits, (b) there is a reasonable probability of a liability finding against the insured, and (c) a third party demands settlement within policy limits. Haddick, supra; Chandler, supra.

In determining whether an insurer has breached the duty to settle, Illinois courts consider whether (a) the insurer ignored the advice of its own claims adjusters, (b) the insurer refused to engage in settlement negotiations, (c) the insurer ignored the settlement recommendations of the insured’s defense counsel, (d) the insurer kept the insured aware of the third party’s willingness to settle, (e) the insurer conducted an adequate investigation and defense, (f) a substantial prospect of an adverse verdict exists, and (g) there is a potential for damages to exceed the policy limits. I.P.I. — Civil No. 710.05; Bailey v. Prudential Mutual Casualty Co., 429 F.2d 1388 (7th Cir. 1970); Swedish-American Hospital Association of Rockford, supra, 916 N.E.2d at 99; O’Neill v. Gallant Insurance Co., 329 Ill.App.3d 1166, 769 N.E.2d 100, 263 Ill.Dec. 898 (5th Dist. 2002); Phelan v. State Farm Mutual Automobile Insurance Co., 114 Ill.App.3d 96, 448 N.E.2d 579, 69 Ill.Dec. 861 (1st Dist. 1983).

In Illinois, although liability for failure to settle is described as being based on “bad faith,” that term does not require any subjective culpability. Instead, “bad faith” simply means “being . . . unfaithful to the duty or obligation that is owed” to the insured. Cernocky v. Indemnity
Insurance Company of North America, 69 Ill.App.2d 196, 216 N.E.2d 198, 206 (2d Dist. 1966). Accord California Union Insurance Co. v. Liberty Mutual Insurance Co., 920 F.Supp. 908, 919 n.5 (N.D.Ill. 1996). Although the duty owed by the insurance company is sometimes described as a duty to give equal consideration to the interests of the insured and the company, a more precise formulation is that an insurance company’s duty in settlement is to act as if there are no policy limits. Transport Insurance Co. v. Post Express Co., 138 F.3d 1189 (7th Cir. 1998).

The courts in this country have basically allowed plaintiffs to recover under two different theories in third-party failure-to-settle cases: negligence and bad faith. Most courts have held that an insurance company acts in bad faith whenever it fails to exercise “due care” in responding to policy limits settlement offers and breaches its duty to settle by failing to adequately consider the interests of the insured. As a practical matter, this amounts to a negligence standard. Other courts have held that bad faith requires a showing of intentional or reckless failure to carry out the contract. Bad faith is therefore absent if the insurer failed to settle either because it had reasonably concluded that there was no coverage or because it entertained a bona fide belief that the claim may be defeated or the verdict could be kept within the policy limits. Illinois courts appear to apply both theories of liability in bad-faith cases. See, e.g., Cramer, supra; Twin City Fire Insurance Co. v. Country Mutual Insurance Co., 23 F.3d 1175 (7th Cir. 1994); Scroggins v. Allstate Insurance Co., 74 Ill.App.3d 1027, 393 N.E.2d 718, 30 Ill.Dec. 682 (1st Dist. 1979); Edwins v. General Casualty Company of Wisconsin, 78 Ill.App.3d 965, 397 N.E.2d 1231, 34 Ill.Dec. 274 (4th Dist. 1979).

An insurer does not breach a duty to settle when it rejects a settlement offer made after entry of an excess judgment. Chandler, supra. An insurer also does not breach a duty to settle if it offers to settle and the offer is refused for no reason. Meixell v. Superior Insurance Co., 230 F.3d 335 (7th Cir. 2000) (finding no bad faith when insured demanded policy limits in settlement but refused insurer’s offer, three months later, to pay its limits). Finally, an insurer has no duty to make a settlement offer in excess of its policy limits. Central Illinois Public Service Co. v. Agricultural Insurance Co., 378 Ill.App.3d 728, 880 N.E.2d 1172, 1181, 317 Ill.Dec. 180 (5th Dist. 2008) (“The duty to settle does not obligate the insurer to perform the impossible by offering more than called for by the policy.”).

In Illinois, insurance companies are not required to initiate negotiations to settle a case. Adduci v. Vigilant Insurance Co., 98 Ill.App.3d 472, 424 N.E.2d 645, 53 Ill.Dec. 854 (1st Dist. 1981). The well-recognized exception to this rule is when the probability of an adverse finding on liability is great and the amount of probable damages would greatly exceed the policy limits. SwedishAmerican Hospital Association of Rockford, supra, 916 N.E.2d at 100. This exception is to be “sparingly used, and then only in the most glaring cases of an insured’s liability, since trial attorneys are not endowed with the gift of prophecy so as to be able to predict the precise outcome of personal injury litigation.” Ranger Insurance Co. v. Home Indemnity Insurance Co., 741 F.Supp. 716, 722 (N.D.Ill. 1990), quoting Adduci, supra, 424 N.E.2d at 649 – 650. Finally, just as a bona fide dispute about coverage can defeat a §155 bad-faith claim, a bona fide dispute about coverage can also defeat a failure-to-settle bad-faith claim. Stevenson v. State Farm Fire & Casualty Co., 257 Ill.App.3d 179, 628 N.E.2d 810, 195 Ill.Dec. 346 (1st Dist. 1993) (finding that when claim is not covered by policy, insurer does not owe duty to reasonably settle within policy limits).
Failure-to-settle claims are not limited to insured-versus-insurer situations. Primary insurers owe a duty to excess insurers to act reasonably and in good faith in attempting to settle the underlying claim within their policy limits, also based on the primary insurer’s right to control the litigation. *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill.App.3d 562, 732 N.E.2d 1082, 247 Ill.Dec. 750 (1st Dist. 1999). At least one Illinois court has also found that an excess insurer can owe another excess insurer a duty to settle a claim. *Central Illinois Public Service*, supra. To prevail on an action for bad-faith failure to settle, an excess insurer must show not only that the primary insurer had a duty to settle and breached that duty but also that the failure to settle within policy limits proximately caused the excess insurer to be harmed by having to contribute money to the excess settlement or verdict. *California Union Insurance*, supra.

If successful in proving a failure-to-settle bad-faith claim, a plaintiff can recover the full amount of the excess judgment, attorneys’ fees, and possibly punitive damages. I.P.I. - Civil No. 710.07; *Adduci*, supra (excess judgment); *O’Neill*, supra (excess judgment, attorneys’ fees, and punitive damages). In order to recover for an insurer’s failure to settle, an insured must demonstrate that it sustained damage as a result of the insurer’s failure to act. Entry of a judgment in excess of the policy limits constitutes damage and harm sufficient to permit recovery. *Swedishamerican Hospital Association of Rockford*, supra, 916 N.E.2d at 100. It is not necessary that the insured allege payment of the excess judgment. *Wolfgang v. Prudence Mutual Casualty Company of Chicago, Illinois*, 98 Ill.App.2d 190, 240 N.E.2d 176, 180 (1st Dist. 1968). The insurer may also be liable for punitive damages if the insurer’s failure to settle is a result of conduct that exceeds mere negligence. *O’Neill*, supra, 769 N.E.2d at 109 (holding that punitive damages could be imposed on insurer who acted with “utter indifference and reckless disregard for its policyholder’s financial welfare” in its failure to settle within policy limits).


**IV. [12.17] BAD-FAITH CLAIMS BASED ON THE INSURER COMMITTING AN INDEPENDENT TORT**

Section 155 of the Illinois Insurance Code, 215 ILCS 5/155, does not insulate an insurer from suits that allege separate and independent torts. Torts, like common-law fraud, require proof of elements that are different from bad faith and provide for damages that are different from those provided for in §155. As a result, the Illinois Supreme Court has held that when a plaintiff can properly allege and prove the elements of a separate tort for insurer misconduct (something other than an unreasonable and vexatious delay in resolving a claim), the plaintiff will be allowed to pursue that cause of action against the insurer. *Cramer v. Insurance Exchange Agency*, 174 Ill.2d 513, 675 N.E.2d 897, 221 Ill.Dec. 473 (1996). Such additional tort theories include claims for
fraud, intentional infliction of emotional distress, and consumer fraud pursuant to the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, et seq. Mere allegations of bad faith or vexatious and unreasonable conduct are insufficient to state a claim for an independent tort. *Cramer, supra; Young v. Allstate Insurance Co.*, 351 Ill.App.3d 151, 812 N.E.2d 741, 285 Ill.Dec. 921 (1st Dist. 2004) (finding separate tort claim inappropriate when claim was essentially based solely on defendant insurer’s failure to pay amounts due under insurance contract).

A. [12.18] Fraud

An insurer may be found to have committed common-law fraud and may thereby be exposed to extra-contractual damages if it makes misrepresentations to injured third parties in connection with handling claims or settlement negotiations. *McCarter v. State Farm Mutual Automobile Insurance Co.*, 130 Ill.App.3d 97, 473 N.E.2d 1015, 85 Ill.Dec. 416 (3d Dist. 1985). Fraud requires proof of (1) a false statement of material fact, (2) knowledge that the statement is false, (3) intent on the part of the party making the statement to induce the other party to act, (4) action taken in reliance on the truth of the statement, and (5) damage to that party. *Cramer v. Insurance Exchange Agency*, 174 Ill.2d 513, 675 N.E.2d 897, 221 Ill.Dec. 473 (1996). Generally, the measure of damages for fraud is such an amount as will compensate the plaintiff for the loss occasioned by the fraud or, in simpler terms, the amount that plaintiff is actually out of pocket by reason of the transaction. *Martin v. Allstate Insurance Co.*, 92 Ill.App.3d 829, 416 N.E.2d 347, 48 Ill.Dec. 316 (1st Dist. 1981). Fraud actions are subject to a five-year statute of limitations. *McCarter, supra.*

B. [12.19] Intentional Infliction of Emotional Distress

To establish a cause of action for intentional infliction of emotional distress, the plaintiff must prove that the defendant engaged in outrageous conduct that caused severe emotional distress to the plaintiff and that the defendant intended to upset the plaintiff or acted in reckless disregard of the probability of doing so. *Emerson v. American Bankers Insurance Company of Florida*, 223 Ill.App.3d 929, 585 N.E.2d 1315, 166 Ill.Dec. 293 (5th Dist. 1992). This is an extremely difficult cause of action to prove since, except in extreme cases, plaintiffs in bad-faith cases often have trouble proving that the insurer’s conduct was outrageous, that the plaintiff’s distress was severe, or that the insurance company intended to cause the distress. *Tobolt v. Allstate Insurance Co.*, 75 Ill.App.3d 57, 393 N.E.2d 1171, 30 Ill.Dec. 824 (1st Dist. 1979).

C. [12.20] Consumer Fraud

The Illinois Consumer Fraud and Deceptive Business Practices Act is designed to protect consumers by outlawing certain deceptive or misleading trade practices. According to §2 of the Act:

*Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described*
in Section 2 of the “Uniform Deceptive Trade Practices Act”, approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. 815 ILCS 505/2.

In order to allege a violation of the Act, a plaintiff must allege (1) a deceptive act or practice by the defendant, (2) the defendant’s intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, (4) actual damage to the plaintiff, and (5) that the damage was proximately caused by the deception. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill.2d 100, 835 N.E.2d 801, 296 Ill.Dec. 448 (2005). See also *Barille v. Sears Roebuck & Co.*, 289 Ill.App.3d 171, 682 N.E.2d 118, 224 Ill.Dec. 557 (1st Dist. 1997); *Bernhauser v. Glen Ellyn Dodge, Inc.*, 288 Ill.App.3d 984, 683 N.E.2d 1194, 225 Ill.Dec. 531 (2d Dist. 1997). To prevail, a plaintiff must prove each of these elements by a preponderance of the evidence. *Avery, supra.* Under §10b(6) of the Act, any claim regarding the communication of false, misleading, or deceptive information by an insurer must plead that the insurer had actual knowledge of the false, misleading, or deceptive character of the transmitted information. 815 ILCS 505/10b(6). Plaintiffs can recover “actual economic damages or any other relief which the court deems proper,” “reasonable attorney’s fees and costs,” and punitive damages. 815 ILCS 505/10a(a), 505/10a(c). See also *Smith v. Prime Cable of Chicago*, 276 Ill.App.3d 843, 658 N.E.2d 1325, 213 Ill.Dec. 304 (1st Dist. 1995) (holding that punitive damages, while disfavored, are recoverable in consumer fraud action).


V. TIPS FOR PROSECUTING BAD-FAITH CLAIMS IN ILLINOIS


The fact that an insurer engages in one of the improper claims practices outlined in the Illinois Insurance Code can serve as evidence that the insurer’s conduct constituted consumer fraud or was unreasonable and vexatious, which in turn can serve as the basis for a claim under 215 ILCS 5/155. *Ford Motor Credit Co. v. Manzo*, 196 Ill.App.3d 874, 554 N.E.2d 480, 143 Ill.Dec. 545 (1st Dist. 1990). Those portions of the Insurance Code that should be reviewed by counsel seeking to plead a bad-faith cause of action include the following:
Unfair methods of competition and unfair or deceptive acts or practices defined. The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

* * *

(4) Engaging in any of the acts or practices defined in or prohibited by Sections 154.5 through 154.8 of this Code.

Improper Claims Practices. It is an improper claims practice for any domestic, foreign or alien company transacting business in this State to commit any of the acts contained in Section 154.6 if:

(a) It is committed knowingly in violation of this Act or any rules promulgated hereunder; or

(b) It has been committed with such frequency to indicate a persistent tendency to engage in that type of conduct.

Acts constituting improper claims practice. Any of the following acts by a company, if committed without just cause and in violation of Section 154.5, constitutes an improper claims practice:

(a) Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue;

(b) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;

(c) Failing to adopt and implement reasonable standards for the prompt investigations and settlement of claims arising under its policies;

(d) Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;

(e) Compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;

(f) Engaging in activity which results in a disproportionate number of meritorious complaints against the insurer received by the Insurance Department;
(g) Engaging in activity which results in a disproportionate number of lawsuits to be filed against the insurer or its insureds by claimants;

(h) Refusing to pay claims without conducting a reasonable investigation based on all available information;

(i) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(j) Attempting to settle a claim for less than the amount to which a reasonable person would believe the claimant was entitled . . .

(k) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;

* * *

(m) Delaying the investigation or payment of claims by requiring an insured, a claimant, or the physicians of either to submit a preliminary claim report and then requiring subsequent submission of formal proof of loss forms, resulting in the duplication of verification;

(n) Failing in the case of the denial of a claim or the offer of a compromise settlement to promptly provide a reasonable and accurate explanation of the basis in the insurance policy or applicable law for such denial or compromise settlement;

(o) Failing to provide forms necessary to present claims within 15 working days of a request with such explanations as are necessary to use them effectively;

* * *

(r) Engaging in any other acts which are in substance equivalent to any of the foregoing.


Violations of the Illinois Administrative Code can also serve as evidence of bad faith:

[50 Ill.Admin.Code §919.50]

a) The company shall affirm or deny liability on claims within a reasonable time and shall offer payment within 30 days of affirmation of liability, if the amount of the claim is determined and not in dispute. For those portions of the claim which are not in dispute and for which the payee is known, the company shall tender payment within said 30 days.
1) On first party claims if a settlement of a claim is less than the amount claimed, or if the claim is denied, the company shall provide to the insured a reasonable written explanation of the basis of the lower offer or denial within 30 days after the investigation and determination of liability is completed....

2) Within 30 days after the initial determination of liability is made, if the claim is denied, the company shall provide the third party a reasonable written explanation of the basis of the denial.

b) No company shall deny a claim upon information obtained in a telephone conversation or personal interview with any source unless such telephone conversation or personal interview is documented in the claim file.

c) The company's standards for claims processing shall be such that notice of claim and proofs of loss submitted against one policy issued by that company shall fulfill the insured's obligation under any and all similar policies issued by that company and specifically identified by the insured to said company to the same degree that the same form would be required under any similar policy.

Unreasonable Delays can also serve as evidence of bad faith:

[50 Ill.Admin.Code §919.80]

b) Unreasonable Delays

***

2) An unreasonable delay to pay automobile collision claims exist when the median payment period exceeds 40 calendar days....

3) An unreasonable delay to pay automobile property damage liability claims exist when the median payment period exceeds 60 calendar days....

***

c) Total Loss Vehicle Claims

***

7) Required Practice — Fire and Extended Coverage Claims

A) An unreasonable delay to pay claims on policies of fire and extended coverage insurance . . . exists when the median payment period exceeds 40 calendar days.
B. [12.22] Itemized Bills Are the Best Way To Obtain Attorneys’ Fees

The best way to justify an award of the full attorneys’ fees spent in a bad-faith action is through itemized billing, detailing the precise numbers of hours spent, the billing rate for each attorney performing the work, and a particularized description of the work. Richardson v. Illinois Power Co., 217 Ill.App.3d 708, 577 N.E.2d 823, 160 Ill.Dec. 498 (5th Dist. 1991); Ford Motor Credit Co. v. Manzo, 196 Ill.App.3d 874, 554 N.E.2d 480, 143 Ill.Dec. 545 (1st Dist. 1990).

VI. TIPS ON DEFENDING BAD-FAITH CLAIMS IN ILLINOIS


If no coverage is owed under a policy, an insurer cannot be held liable for damages under 215 ILCS 5/155. Rhone v. First American Title Insurance Co., 401 Ill.App.3d 802, 928 N.E.2d 1185, 340 Ill.Dec. 588 (1st Dist. 2010); American Family Mutual Insurance Co. v. Fisher Development, Inc., 391 Ill.App.3d 521, 909 N.E.2d 274, 330 Ill.Dec. 561 (1st Dist. 2009). Many §155 claims arise in the context of a complaint filed by an insured alleging two counts — breach of contract and bad faith. If sufficient facts are alleged in the complaint to argue there is no breach because coverage does not exist, then an insurer should consider filing a motion to dismiss or a motion for judgment on the pleadings that argues there can be no breach because there is no coverage for the claim. If there is no coverage, no §155 claim can exist. DeVore v. American Family Mutual Insurance Co., 383 Ill.App.3d 266, 891 N.E.2d 505, 322 Ill.Dec. 490 (2d Dist. 2008) (holding that because court already determined that insurer properly denied coverage, it need not address §155 claim). Such a motion focuses the court on the legal question of coverage, not the factual and prejudicial question of bad faith.

B. [12.24] Argue Any Tort Based on an Insurer’s Post-Claim Conduct Has Been Preempted by Insurance Code §155

When an insured alleges a tort claim based on an insurer’s handling or resolution of a claim, the insurer should consider whether to argue the claim is preempted. While §155 of the Illinois Insurance Code, 215 ILCS 5/155, does not preempt any common-law action for recovery of compensatory damages based on the handling of a claim, it has been found to preempt common-law claims seeking to recover extra-contractual or punitive damages based on an unreasonable delay in resolving insurance claims. Calcagno v. Personalcare Health Management, Inc., 207 Ill.App.3d 493, 565 N.E.2d 1330, 152 Ill.Dec. 412 (4th Dist. 1991); Perfection Carpet, Inc. v. State Farm Fire & Casualty Co., 259 Ill.App.3d 21, 630 N.E.2d 1152, 197 Ill.Dec. 28 (1st Dist. 1994); Mohr v. Dix Mutual County Fire Insurance Co., 143 Ill.App.3d 989, 493 N.E.2d 638, 97 Ill.Dec. 831 (4th Dist. 1986). Limiting a claim to §155 damages, which caps the penalty for bad faith, could be very beneficial to an insurer.

A party may not obtain damages under §155 of the Insurance Code, 215 ILCS 5/155, in an arbitration proceeding. Relying on the statutory text, Illinois courts have held that §155 damages may be awarded only by a court. Smith v. State Farm Insurance Cos., 369 Ill.App.3d 478, 861 N.E.2d 183, 308 Ill.Dec. 118 (1st Dist. 2006). The limitation of jurisdiction to award §155 damages to a court of law “applies regardless of the method by which the parties entered arbitration.” Amerisure Mutual Insurance Co. v. Global Reinsurance Corporation of America, 399 Ill.App.3d 610, 927 N.E.2d 740, 753, 340 Ill.Dec. 1 (1st Dist. 2010). Thus, object if §155 damages are sought in an arbitration or move to vacate any arbitration award of §155 damages. Id. However, this particular defense may not be around for very long. In 2011, a bill was introduced before the 97th Generally Assembly to expand the reach of §155 to arbitrations. If passed, House Bill 3463 would amend §155 to apply to proceedings in court or arbitrations instead of just “actions” and would permit arbitrators as well as courts to make findings and enter awards. At the time of this publication, the last act taken on House Bill 3463 was to re-refer it to the Rules Committee on March 17, 2011.
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