710.00

LIABILITY INSURANCE

INTRODUCTION

A contract of liability insurance contains an implied covenant of good faith and fair dealing. *Scroggins v. Allstate Ins. Co.*, 74 Ill.App.3d 1027, 1029; 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979); *National Sur. Corp. v. Fast Motor Service*, 213 Ill.App.3d 500, 572 N.E.2d 1083, 157 Ill.Dec. 619 (1st Dist.1991) (workers' compensation insurance). The breach of this duty may give rise to a cause of action in tort.

In Illinois, under the majority view, causes of action against an insurer for breach of its duties under so-called "first party" insurance policies--life and casualty insurance (fire, theft, etc.), health insurance, and other similar policies that indemnify the insured's own losses--are preempted by a statutory cause of action, 215 ILCS 5/155 (1994). *E.g., Mazur v. Hunt*, 227 Ill.App.3d 785, 592 N.E.2d 335, 169 Ill.Dec. 848 (1st Dist.1992); *contra, e.g., Emerson v. American Bankers Ins. Co.*, 223 Ill.App.3d 929, 585 N.E.2d 1315, 166 Ill.Dec. 293 (5th Dist.1992).

Claims against *liability* insurers for bad faith refusal to settle are not preempted by the Illinois Insurance Code. *National Union Fire Ins. Co. v. Continental Ill. Corp.*, 673 F.Supp. 267, 270-72 (N.D.Ill.1987). Therefore, the instructions in this chapter are limited to bad faith claims against liability insurers for refusal to settle.

Duty of Insurer

The Illinois Supreme Court has yet to define the duty or the elements of this cause of action. A number of Appellate Court decisions have defined the cause of action essentially as follows: A liability insurer may be liable in tort for a judgment entered against its insured in excess of the limits of coverage if the insurer refused to settle a claim against its insured within the policy limits and the insurer's conduct amounted to fraud, negligence, or bad faith. *Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.*, 224 Ill.App.3d 1083, 587 N.E.2d 81, 167 Ill.Dec. 199 (5th Dist.1992); *Nicholson v. St. Anne Lanes, Inc.*, 158 Ill.App.3d 838, 512 N.E.2d 127, 128; 111 Ill.Dec. 223, 224 (3d Dist.1987); *Adduci v. Vigilant Ins. Co.*, 98 Ill.App.3d 472, 424 N.E.2d 645, 648; 53 Ill.Dec. 854, 857 (1st Dist.1981); *LaRotunda v. Royal Globe Ins. Co.*, 87 Ill.App.3d 446, 408 N.E.2d 928, 935-936; 42 Ill.Dec. 219, 226-227 (1st Dist.1980); *Edwins v. General Cas. Co.*, 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232; 34 Ill.Dec. 274, 275 (4th Dist.1979); *Scroggins v. Allstate Ins. Co.*, 74 Ill.App.3d 1027, 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979); *Haas v. Mid America Fire & Marine Ins. Co.*, 35 Ill.App.3d 993, 343 N.E.2d 36, 38 (3d Dist.1976); *Kavanaugh v. Interstate Fire & Cas. Co.*, 35 Ill.App.3d 350, 342 N.E.2d 116, 120 (1st Dist.1975); *Browning v. Heritage Ins. Co.*, 33 Ill.App.3d 943, 338 N.E.2d 912, 915-916 (2d Dist.1975); *Smiley v. Manchester Ins. & Indem. Co.*, 13 Ill.App.3d 809, 301 N.E.2d 19, 21 (2d Dist.1973); *Wolfberg v. Prudence Mut. Cas. Co.*, 98 Ill.App.2d 190, 240 N.E.2d 176, 179 (1st Dist.1968); *Powell v. Prudence Mut. Cas. Co.*, 88 Ill.App.2d 343, 232 N.E.2d 155 (1st Dist.1967); *Cernocky v. Indemnity Ins. Co.*, 69 Ill.App.2d 196, 216 N.E.2d 198, 203 (2d Dist.1966); *Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill.App. 649,

60 N.E.2d 896, 906 (1st Dist.1945).

Fraud, negligence, and bad faith appear to be alternative bases of liability. An insurer may be held liable for negligence. *Browning v. Heritage Ins. Co.*, 33 Ill.App.3d 943, 338 N.E.2d 912, 915-916 (2d Dist.1975); *Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill.App. 649, 60 N.E.2d 896, 906 (1st Dist.1945); *General Casualty Co. v. Whipple*, 328 F.2d 353, 356 (7th Cir.1964). A showing of fraud is not necessary to prove bad faith. *Cernocky v. Indemnity Ins. Co.*, 69 Ill.App.2d 196, 216 N.E.2d 198, 203 (2d Dist.1966).

The duty of good faith and fair dealing requires the insurer defending the insured to give the insured's interests consideration at least equal to its own interests when deciding whether to try or settle a claim. *Cernocky v. Indemnity Ins. Co.*, 69 Ill.App.2d 196, 207; 216 N.E.2d 198, 204 (2d Dist.1966); *Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill.App. 649, 60 N.E.2d 896 (1st Dist.1945). The failure to so consider the insured's interests constitutes a breach of the duty of good faith. *Mid-America Bank v. Commercial Union Ins. Co.*, 224 Ill.App.3d 1083, 1087; 587 N.E.2d 81, 84; 167 Ill.Dec. 199, 202 (5th Dist.1992); *Sanders v. Standard Mutual Ins. Co.*, 142 Ill.App.3d 1082, 1084; 492 N.E.2d 917, 918; 97 Ill.Dec. 258, 259 (4th Dist.1986); *Edwins v. General Casualty Co.*, 78 Ill.App.3d 965, 968; 397 N.E.2d 1231, 1232; 34 Ill.Dec. 274, 275 (4th Dist.1979); *Smiley v. Manchester Ins. & Indem. Co.*, 13 Ill.App.3d 809, 812; 301 N.E.2d 19, 21 (2d Dist.1973). The argument that the insurer should be required to give *paramount* consideration to the interests of the insured has been rejected. *Adduci v. Vigilant Ins. Co.*, 98 Ill.App.3d 472, 424 N.E.2d 645, 650; 53 Ill.Dec. 854, 859 (1st Dist.1981).

Breach of Duty--Standards and Proof

There is no *per se* liability for failure to settle within policy limits. *Browning v. Heritage Ins. Co.*, 33 Ill.App.3d 943, 946; 338 N.E.2d 912, 915 (2d Dist.1975). The insurer's duty to its insured is not unlimited; the insurer is not required to disregard its own interests. *Adduci v. Vigilant Ins. Co.*, 98 Ill.App.3d 472, 424 N.E.2d 645, 650; 53 Ill.Dec. 854, 859 (1st Dist.1981).

A claim against an insurer for breach of its duty to its insured presupposes that the insurer had a reasonable opportunity to settle within the policy limits. *Brocato v. Prairie State Farmers Ins. Assoc.*, 166 Ill.App.3d 986, 520 N.E.2d 1200, 117 Ill.Dec. 849 (4th Dist.1988); *Van Vleck v. Ohio Cas. Ins. Co.*, 128 Ill.App.3d 959, 471 N.E.2d 925, 84 Ill.Dec. 159 (3d Dist.1984) (where only settlement demand was over 160% of the policy limits, insurer violated no duty by refusing to settle).

In *Kavanaugh v. Interstate Fire & Casualty Co.*, 35 Ill.App.3d 350, 356; 342 N.E.2d 116, 121 (1st Dist.1975), the Appellate Court made reference to two rules. First, it stated, “we cannot hold that the law imposes a duty on an insurance company to initiate negotiations to settle a case.” *Id*. Next, it stated, “Illinois law does not demand that an insurer settle within the policy limits without exception or else invariably suffer the consequences of an excess liability judgment for breach of its fiduciary duty.” *Id*. The opinion then goes on to state:

> There is a well recognized exception to the general principle when the probability of an adverse finding is great and the amount of probable damages would greatly exceed the policy limits.

Id. Thus, it is unclear whether the "exception" in that sentence was intended to state elements of the bad faith cause of action, applicable generally, or only to describe an exception to the rule that an insurer has no duty to initiate settlement negotiations.

Two subsequent cases adopted the factors stated by *Kavanaugh* as elements of the cause of action. *Phelan v. State Farm Mut. Auto. Ins. Co.,* 114 Ill.App.3d 96, 448 N.E.2d 579, 585; 69 Ill.Dec. 861, 867 (1st Dist.1983); *Van Vleck v. Ohio Cas. Ins. Co.,* 128 Ill.App.3d 959, 471 N.E.2d 925, 927; 84 Ill.Dec. 159, 161 (3d Dist.1984). This would mean that the insured would have to prove that when the insurer faced the decision of whether to settle, the probability of an adverse finding was great and the amount of probable damages would greatly exceed the policy limits.

However, two other decisions have cited the *Kavanaugh* exception in reference to the general rule that the insurer does not have to initiate settlement negotiations. *Adduci v. Vigilant Ins. Co.,* 98 Ill.App.3d 472, 424 N.E.2d 645, 649; 53 Ill.Dec. 854, 858 (1st Dist.1981); *Ranger Ins. Co. v. Home Indem. Co.,* 741 F.Supp. 716, 722 (N.D.Ill.1990). The general rule is that the insurer has no obligation to initiate settlement negotiations, as such a duty would put the insurer at a negotiating disadvantage. *Adduci v. Vigilant Ins. Co.,* 98 Ill.App.3d 472, 424 N.E.2d 645, 53 Ill.Dec. 854 (1st Dist.1981); *Haas v. Mid America Fire & Marine Ins. Co.,* 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976); *Kavanaugh v. Interstate Fire & Casualty Co.,* 35 Ill.App.3d 350, 356; 342 N.E.2d 116, 121 (1st Dist.1975). An insurer need not submit to demands for the policy limits simply because there is a risk of an excess verdict. And an insurer need not make settlement proposals when it reasonably believes it has a good defense to the claim. *Haas v. Mid America Fire & Marine Ins. Co.,* 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976).

The fact that the plaintiff did not make a firm settlement demand may not be conclusive of the insurer's good faith. *Cernocky v. Indemnity Ins. Co.,* 69 Ill.App.2d 196, 216 N.E.2d 198, 205 (2d Dist.1966). When the probability of an adverse finding on liability is considerable and the amount of probable damages would greatly exceed the insured's coverage, the insurer, to avoid a breach of the duty of good faith, may be required to initiate settlement negotiations. *Adduci v. Vigilant Ins. Co.,* 98 Ill.App.3d 472, 424 N.E.2d 645, 649; 53 Ill.Dec. 854, 858 (1st Dist.1981); *Ranger Ins. Co. v. Home Indem. Co.,* 741 F.Supp. 716, 722 (N.D.Ill.1990). An insurer is only required to settle within the policy limits if that is the honest and prudent course of action. *LaRotunda v. Royal Globe Ins. Co.,* 87 Ill.App.3d 446, 454; 408 N.E.2d 928, 936; 42 Ill.Dec. 219, 227 (1st Dist.1980). Similarly, the majority of jurisdictions require the insurer to consider the conflicting interests of itself and the insured with impartiality and good faith. That duty has been breached where the risk of an unfavorable result is out of proportion to the chances of a favorable outcome. *See, e.g., Eastham v. Oregon Auto. Ins. Co.,* 273 Or. 600, 540 P.2d 364, 367 (1975).

Factors which have been considered by the courts in determining whether the insurer breached its duty to the insured include the insurer's willingness to negotiate (*Cernocky v. Indemnity Ins. Co.,* 69 Ill.App.2d 196, 216 N.E.2d 198, 203 (2d Dist.1966)); the insurer's proper investigation of the claim (*Olympia Fields Country Club v. Bankers Indem. Ins. Co.,* 325 Ill.App. 649, 60 N.E.2d 896, 906 (1st Dist.1945); *Ballard v. Citizens Casualty Co.,* 196 F.2d 96, 103 (7th Cir.1952)); the insurer's consideration of the advice of its defense counsel (*Olympia Fields Country Club, supra; Bailey v. Prudence Mutual Cas. Co.,* 429 F.2d 1388, 1390 (7th Cir.1970)); whether the insurer informed the insured of the injured plaintiff's offer to settle within the limits

of coverage, the risks of litigation, and the insured's right to retain (at insured's personal expense) additional counsel of his or her choice (*Olympia Fields Country Club, supra; Bailey, supra*).

On the other hand, the insured likewise owes the insurer a duty of good faith and fair dealing, and the insured may be deemed to have breached that duty where the insured misleads the insurer as to the underlying facts or fails in some respect to cooperate in the presentation of the defense. *Sanders v. Standard Mutual Ins. Co.*, 142 Ill.App.3d 1082, 1084; 492 N.E.2d 917, 918; 97 Ill.Dec. 258, 259 (4th Dist.1986); *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 144 Ill.2d 178, 579 N.E.2d 322, 161 Ill.Dec. 774 (1991).

The conduct of the insurer is tested against an objective--not a subjective--standard. It is not sufficient that the insurer sincerely believes that its insured will not be held liable. Its refusal to settle will be judged upon review of those factors with which the insurer was faced at the time it decided to forego settlement. *Shearer v. Reed*, 286 Pa.Super. 188, 428 A.2d 635, 638 (1981). The fact that the injured person has refused to consider settlement, or that the insurer reasonably believes it has a good defense to the claim, are also important factors. *Haas v. Mid America Fire & Marine Ins. Co.*, 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976); *Kavanaugh v. Interstate Fire & Cas. Co.*, 35 Ill.App.3d 350, 342 N.E.2d 116, 121 (1st Dist.1975).

Where no reasonable person, upon consideration of the interests of the insurer and the insured and those factors which led to the insurer's decision, would decide that the insurer had an affirmative duty to settle within the policy limits, there is no liability as a matter of law. *General Casualty Co. v. Whipple*, 328 F.2d 353, 357 (7th Cir.1964).

Where there are multiple claimants against the same policy, so long as the insurer acts reasonably and in good faith, the insurer may settle fewer than all the claims and thereby exhaust the policy limits without incurring liability to the nonsettling claimants. *Haas v. Mid America Fire & Marine Ins. Co.*, 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976).

The insurer's liability may arise from the negligence of its agent-attorney in the settlement negotiations. *Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.*, 224 Ill.App.3d 1083, 587 N.E.2d 81, 167 Ill.Dec. 199 (5th Dist.1992); *Smiley v. Manchester Ins. & Indem. Co.*, 71 Ill.2d 306, 375 N.E.2d 118, 16 Ill.Dec. 487 (1978). *Compare Steele v. Hartford Fire Ins. Co.*, 788 F.2d 441 (7th Cir.1986) (attorney's conduct as a matter of law was neither negligent nor bad faith).

In most cases, the insured will have suffered an excess judgment. However, in certain situations the insured may *settle* in excess of the policy limits, rather than suffer an excess judgment, and then recover the full amount of the settlement from the insurer. *National Union Fire Ins. v. Continental Ill. Corp.*, 673 F.Supp. 267, 272-274 (N.D.Ill.1987) (good discussion of this question).

Status of the Plaintiff

The insured is the party wronged by the insurer's breach; it is the insured that has sustained a judgment in excess of the policy limits, and the insured's assets and income are exposed to the excess liability.

The plaintiff in the underlying action may collect the excess part of the judgment from the insured, leaving the insured to maintain the bad faith action against the insurer. More often, however, the insured will assign the bad faith action to the original injured plaintiff in exchange for a covenant not to enforce, and the plaintiff will then maintain the bad faith action as the insured's assignee. Such assignments are valid *(Edwins v. General Cas. Co.,* 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232; 34 Ill.Dec. 274, 275 (4th Dist.1979); *Scroggins v. Allstate Ins. Co.,* 74 Ill.App.3d 1027, 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979); *Browning v. Heritage Ins. Co.,* 33 Ill.App.3d 943, 338 N.E.2d 912, 915-916 (2d Dist.1975); *Brown v. State Farm Mut. Auto. Ins. Ass'n,* 1 Ill.App.3d 47, 272 N.E.2d 261 (4th Dist.1971); *Bailey v. Prudence Mut. Cas. Co.,* 429 F.2d 1388 (7th Cir.1970)), and in fact may be ordered by the court. *See Nicholson v. St. Anne Lanes, Inc.,* 158 Ill.App.3d 838, 512 N.E.2d 127, 128; 111 Ill.Dec. 223, 224 (3d Dist.1987), and *Phelan v. State Farm Mut. Auto. Ins. Co.,* 114 Ill.App.3d 96, 448 N.E.2d 579, 69 Ill.Dec. 861 (1st Dist.1983), rejecting the contrary holding in *Roundtree v. Barringer,* 92 Ill.App.3d 903, 416 N.E.2d 675, 48 Ill.Dec. 402 (5th Dist.1981). As assignee of the insured, the plaintiff stands in the insured's shoes, and plaintiff's bad faith action is subject to any defenses that would have been available against the insured. *Sanders v. Standard Mut. Ins. Co.,* 142 Ill.App.3d 1082, 492 N.E.2d 917, 97 Ill.Dec. 258 (4th Dist.1986); *Edwins v. General Cas. Co.,* 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232; 34 Ill.Dec. 274, 275 (4th Dist.1979).

Absent an assignment from the insured, the injured plaintiff in the original action has no claim against the defendant's liability insurer. The injured plaintiff is not a beneficiary of the insurance contract and does not have standing to maintain an action against defendant's insurer based upon the insurer's breach of a duty owed only to the insured. *Kennedy v. Kiss,* 89 Ill.App.3d 890, 412 N.E.2d 624, 629; 45 Ill.Dec. 273, 278 (1st Dist.1980); *Murphy v. Clancy,* 83 Ill.App.3d 779, 404 N.E.2d 287, 301; 38 Ill.Dec. 863, 867 (1st Dist.1980), *aff'd in part & rev'd in part on other grounds,* 88 Ill.2d 444, 430 N.E.2d 1079, 58 Ill.Dec. 828 (1981); *Scroggins v. Allstate Ins. Co.,* 74 Ill.App.3d 1027, 393 N.E.2d 718, 721; 30 Ill.Dec. 682, 685 (1st Dist.1979); *Yelm v. Country Mut. Ins. Co.,* 123 Ill.App.2d 401, 259 N.E.2d 83 (3d Dist.1970). *See also Powell v. Prudence Mut. Cas. Co.,* 88 Ill.App.2d 343, 232 N.E.2d 155 (1st Dist.1967) (bad faith claim may not be litigated in garnishment action by plaintiff-judgment creditor against defendant's insurer).

Damages

The measure of damages includes at least the full amount of the judgment rendered against the insured, less any amount the plaintiff has been paid by the insurer, other tortfeasors, and any other allowable offsets. Also, since the insured's liability includes statutory post-judgment interest (735 ILCS 5/2-1303 (1994)), this is also recoverable. *Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.,* 224 Ill.App.3d 1083, 587 N.E.2d 81, 85-86; 167 Ill.Dec. 199, 203-04 (5th Dist.1992).

There are no Illinois cases directly on point on the issue of whether attorneys' fees, or any other damages, are recoverable in a bad faith action.

The very fact of the entry of the excess judgment against the insured itself constitutes the damages; the plaintiff need not allege payment of the excess judgment. *Scroggins v. Allstate Ins. Co.,* 74 Ill.App.3d 1027, 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979); *Browning v. Heritage Ins. Co.,* 33 Ill.App.3d 943, 338 N.E.2d 912, 916 (2d Dist.1975). It does not matter that

the judgment may be uncollectible at that time, or ever. *Edwins v. General Cas. Co.*, 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232; 34 Ill.Dec. 274, 275 (4th Dist.1979) (insolvent estate); *Smiley v. Manchester Ins. & Indem. Co.*, 13 Ill.App.3d 809, 301 N.E.2d 19, 22 (2d Dist.1973) (same); *Wolfberg v. Prudence Mutual Cas. Co.*, 98 Ill.App.2d 190, 240 N.E.2d 176 (1st Dist.1968) (same). However, if the insured's entire personal liability has been contracted away, the excess judgment has caused the insured no damage that will support a bad faith claim. *Childress v. State Farm Mut. Auto. Ins. Co.*, 97 Ill.App.2d 112, 239 N.E.2d 492 (4th Dist.1968). *Accord*: *National Union Fire Ins. Co. v. Continental Ill. Corp.*, 673 F.Supp. 267, 274-275 (N.D.Ill.1987) (insureds not personally liable, so FDIC as insureds' assignee cannot maintain bad faith claim).

710.01 Insurance Bad Faith--Duty of Liability Insurer--Definition of Good Faith/Bad Faith--Definition of Ordinary Care

In handling the claim of [person] against [name of insured] under the insurance policy issued by [name of insurance company], it was the duty of [name of insurance company] to exercise [good faith] [and] [ordinary care] toward the interests of [name of insured].

["Good faith" means that [name of insurance company] was required to give as much consideration to [name of insured]'s interests as it gave to its own interests. A failure to exercise good faith is known as "bad faith."]

["Ordinary care" means that [name of insurance company] was required to exercise the care that a reasonably careful insurance company would use under circumstances similar to those shown by the evidence in giving as much consideration to [name of insured]'s interests as to its own interests.]

[A failure to exercise ordinary care is also known as negligence.]

Notes on Use

Bad faith and negligence are alternative bases of recovery; a plaintiff may seek recovery under either or both theories. The instruction should include the appropriate bracketed parts depending on which theory or theories are claimed.

Comment

See Introduction.

710.02 Insurance Bad Faith--Issues Made by the Pleadings

[The plaintiff claims that [name of insurance company] had a reasonable opportunity to settle [name of injured person]'s claim against [name of insured] within the policy limits.]

The plaintiff [further] claims that in failing to settle [name of injured person]'s claim against [name of insured] within the policy limits, [name of insurance company] [was negligent] [or] [acted in bad faith] in one or more of the following respects:

[Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the bad faith or negligence of the insurance company which have not been withdrawn or ruled out by the court and are supported by the evidence.]

The plaintiff further claims that one or more of the foregoing proximately caused the judgment in excess of the policy limits to be entered against [name of insured].

[Name of insurance company] [denies that it did any of the things claimed by the plaintiff,] denies that it was [negligent] [or] [acted in bad faith] in doing any of the things claimed by the plaintiff, and denies that any claimed act or omission on the part of [name of insurance company] proximately caused the judgment in excess of the policy limits to be entered against [name of insured].

[[Name of insurance company] also sets up the following affirmative defense(s):]

[Here set forth in simple form without undue emphasis or repetition those affirmative defenses (except contributory negligence) in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[The plaintiff denies that (summarize affirmative defense(s)).]

Notes on Use

The first paragraph of this instruction is bracketed because in many cases, there will be no fact issue for the jury as to whether the insurer had an opportunity to settle at or below the policy limits. If the trial court rules that this is a submissible issue, the first paragraph should be used.

Ordinarily, there will be no issue as to the dollar amount of the plaintiff's damages. If there is, the instruction should be modified to add an appropriate claim and denial.

If the plaintiff makes separate claims as to bad faith and negligent conduct, they may be stated in separate paragraphs.

The plaintiff in an insurance bad faith case must prove that the insurer's bad faith or negligent conduct proximately resulted in the judgment in excess of the policy limits. It is not enough to show that the insurer's conduct was only *one* of the reasons for the excess judgment. The issues and burden of proof instructions have been drafted accordingly. IPI 710.04, a definition of proximate cause for bad faith cases, should also be given.

710.03 Insurance Bad Faith--Burden of Proof

The plaintiff has the burden of proving all of the following propositions:

[First, that [name of insurance company] had a reasonable opportunity to settle [name of injured person]'s claim against [name of insured] within the policy limits.]

[First,] [Second,] that [name of insurance company] acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, [name of insurance company] [was negligent] [or] [acted in bad faith] with respect to [name of insured]'s interests;

[Second,] [Third,] that [name of insurance company]'s [negligence] [or] [bad faith] proximately caused the judgment in excess of the policy limits to be entered against [name of insured].

[[name of insurance company] has asserted the affirmative defense that [summarize affirmative defense]. [name of insurance company] has the burden of proving this affirmative defense.]

If you find from your consideration of all the evidence that all of the propositions required of the plaintiff have been proved [and that the defendant's affirmative defense has not been proved], then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of the propositions required of the plaintiff has not been proved [or that [name of insurance company]'s affirmative defense has been proved], then your verdict should be for [name of insurance company].

Notes on Use

IPI 21.01 should also be given.

See Notes on Use to IPI 710.02.

710.04 Insurance Bad Faith--Proximate Cause--Definition

When I use the expression "proximate cause," I mean that cause which, in natural or probable sequence, resulted in the judgment against [name of insured] in excess of the policy limits.

Notes on Use

In an insurance bad faith case, this proximate cause instruction should be used. Do not use IPI 15.01.

710.05 Insurance Bad Faith--Factors to be Considered in Determining Breach of Duty

In determining whether [name of insurance company] [acted in bad faith] [or] [was negligent] in failing to settle [name of injured person]'s claim against name of insured within the policy limits, you may consider what the evidence shows concerning the following factors:

1. What [name of insurance company] [and its agent(s)] knew or should have known concerning the probability of a verdict in favor of [name of injured person] if [name of injured person]'s claim against [name of insured] was not settled, and what [name of insurance company] [and its agent(s)] knew or should have known concerning the amount by which such a verdict might or might not exceed the policy limits;

[2. The willingness of [name of insurance company]'s (and its agent's(s')) and [name of injured person] to negotiate;]

[3. The reasonableness of the negotiating parties' conduct during the negotiations;]

[4. The extent of [name of insurance company]'s (and its agent's(s')) investigation of [name of injured person]'s claim;]

[5. [name of insurance company]'s proper consideration of, or its failure to properly consider, the advice of counsel;]

[6. (*Insert here any other factor or factors which the court rules are supported by the evidence and are legally relevant to a determination of the insurer's bad faith or negligence.*)]

Notes on Use

The first factor will be appropriate in any action in which the insurer is charged with a bad faith or negligent failure to settle within the policy limits. Include any of the remaining factors which have support in the evidence. The wording of the factors may be modified as necessary to conform to the facts of each case.

If plaintiff's claim is based in whole or in part on the conduct of an agent of the insurance company, such as defense counsel, include the bracketed references to agents as appropriate. In such cases, IPI 50.02 may also be given.

Since the insurance company will be a corporation, IPI 50.11 may also be given.

710.06 Insurance Bad Faith--Status of the Plaintiff

The plaintiff in this case is [name of plaintiff]. [Name of plaintiff] brings this action as the assignee of [name of insured], who was the [person] [corporation] [[describe entity, e.g., partnership]] to whom [name of insurance company] issued the insurance policy in question. Therefore, you should decide the issues in this case just as if [name of insured] was the actual plaintiff.

Notes on Use

This instruction should be given whenever the plaintiff sues as assignee of the insured.

Comment

See Sanders v. Standard Mut. Ins. Co., 142 Ill.App.3d 1082, 492 N.E.2d 917, 97 Ill.Dec. 258 (4th Dist.1986); *Scroggins v. Allstate Ins. Co.*, 74 Ill.App.3d 1027, 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979).

710.07 Insurance Bad Faith--Measure of Damages

If you decide for the plaintiff on the question of liability, you must then award the amount of money which will compensate the plaintiff for the damages proved by the evidence to have resulted from [name of insurance company]'s negligence or bad faith. The plaintiff's damages are $[insert sum] [which is the amount of the judgment entered in favor of the plaintiff and against [name of insured] (minus the amount received by the plaintiff from [name of insurance company] under the policy) (and) (minus the amount received by the plaintiff from another insurance company) (and) (minus [describe any other allowable offset(s)])].

Notes on Use

In most cases, there will be no dispute as to the dollar amount of the damages to which the plaintiff is entitled if the insurance company is found liable, and this instruction has been drafted accordingly. This instruction also assumes that any additional damages to which the plaintiff may be entitled (such as interest) can be added to the verdict by the court and included in the judgment.

If the dollar amount of the damages is not calculable by simple addition and subtraction as shown in this instruction, then modify this instruction accordingly and use a verdict form such as IPI B45.01.A.

Whether the jury should be instructed as to how the sum claimed by the plaintiff was calculated is a matter left to the discretion of the court and counsel, and therefore the last part of this instruction is bracketed.

710.08 Insurance Bad Faith--Instruction on Use of Verdict Forms

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it into court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

If you find for the plaintiff [name of plaintiff] and against the defendant [name of insurance company] then you should use Verdict Form A.

If you find for the defendant [name of insurance company] and against the plaintiff [name of plaintiff] then you should use Verdict Form B.

710.09 Insurance Bad Faith--Verdict Forms

Verdict Form A

We, the jury, find for the plaintiff [name of plaintiff] and against the defendant [name of insurance company]. We assess plaintiff's damages in the sum of $_____.

[Signature lines]

Notes on Use

If the amount of the damages recoverable if the jury finds in favor of the plaintiff is a fixed sum, it may be inserted in place of the blank line "$_____."

Verdict Form B

We, the jury, find for the defendant [name of insurance company] and against the plaintiff [name of plaintiff].

[Signature lines]