

THE EVOLUTION OF BAD FAITH CLAIMS

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I. HISTORICAL EVOLUTION OF BAD FAITH

A. The Genesis of Bad Faith: *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185.

- **Third Party Bad Faith Claim for Refusal to Settle Claim Against Insured Within Policy Limits, Resulting in Excess Judgment**

The Supreme Court of Ohio in *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185, framed the issue as follows:

Where, as here, a liability insurance company reserves the right to settle any claim or suit and to make such investigation or negotiation as may be deemed expedient by the company, what duty does it owe in defending the insured? Is it liable for failure to exercise ordinary care in settling or refusing to settle claims? Or is it liable only in the event that it fails to act in good faith?

The “better reasoned view” is that an insurer cannot be held liable in tort for mere negligence in failing or refusing to settle or compromise a claim, but will be held liable if it is guilty of fraud or bad faith. The court stated in *dicta* that an insurer’s decision not to settle within policy limits on behalf of an insured may not be an arbitrary or capricious one.

- **Bad Faith Standard:**

The conduct of the insurer must be based on “circumstances that furnish reasonable justification therefor.” *Id.* at 188. In its syllabus, the court held:

A liability insurance company which reserves the right to settle, as it deems expedient, any claim against its insured is not liable to the insured for negligence in settling or refusing to settle such a claim.

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B. The Law After *Hart* but before *Zoppo*

Slater v. Motorists Mut. Ins. Co. (1962), 174 Ohio St. 148, citing *Hart*, held that “* * * to support a recovery it was incumbent on Slater to allege and prove that his insurer’s behavior was of such a reprehensible and intolerable nature as to constitute bad faith.” *Id.* at 151.

- **Bad Faith Standard (Syllabus 2):**

A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

C. First Party Bad Faith Claim Recognized: *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272

Despite embracing the “dishonest purpose, moral obliquity, conscious wrongdoing, ulterior motive, or ill will” bad faith standard, the *Hoskins* court in *dicta* stated:

“[I]t is clear that whenever an insurance company denies a claim of its insured, it will not automatically expose itself to an action in tort. Mere refusal to pay insurance is not, in itself, conclusive of bad faith. But when an insurer insists that it was justified in refusing to pay the claim of its insured because it believed there was no coverage of the claim, “such a belief may not be an arbitrary or capricious one. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor.” Citing *Hart*, *supra*, 152 Ohio St. at 188.

1. *Staff Builders, Inc. v. Armstrong* (1988), 37 Ohio St.3d 298, noted that *Hart* stood for the proposition that a refusal to settle a claim “may not be arbitrary or capricious * * *. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor.” *Id.* at 302. Punitive damages may be recovered against an insurer that breaches its duty of good faith in refusing to pay a claim only on proof of actual malice, fraud, or insult on the part of the insurer.

2. *Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71, setting aside an award of punitive damages, observing that it was “* * * unable to comprehend how the trial court in this action failed to direct a verdict in favor of appellant [Republic Franklin] on the bad-faith and punitive damages claim at the conclusion of appellees' case or at the conclusion of all the evidence.” Id. at 75.

D. Failure to Investigate as Bad Faith: *Motorists Mut. Ins. Co. v. Said* (1992), 63 Ohio St.3d 690 Intentional Refusal Standard

1. “The insurers’ duty of good faith towards its insured is implied by law. This duty may be breached only by an intentional failure by the insurer to perform under its contract with the insured.” Id. at 695. Syllabus:
 - a. A cause of action for the tort of bad faith based upon an alleged failure of an insurance company to satisfy a claim by its insured may, under certain circumstances, be brought by its insured as a separate action, apart from an insured's action alleging breach of the insurance contract. [*Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272]
 - b. A cause of action arises for the tort of bad faith when an insurer breaches its duty of good faith by intentionally refusing to satisfy an insured's claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) an intentional failure to determine whether there was any lawful basis for such refusal. Intent that caused the failure may be inferred and imputed to the insurer when there is a reckless indifference to facts or proof reasonably available to it in considering the claim.
 - c. “No lawful basis” for the intentional refusal to satisfy a claim means that the insurer lacks a reasonable basis in law or fact for refusing to satisfy the claim. Where a claim is fairly debatable the insurer is entitled to refuse the claim as long as such refusal is premised on a genuine dispute over either the status of the law at the time of the denial or the facts giving rise to the claim.
2. Prior to *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, the Supreme Court of Ohio did not question, much less overrule, the 1962 decision in *Slater* or the 1992 decision in *Said*.

E. The Present “Reasonable Justification” Standard of Bad Faith: *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552.

Zoppo was decided by the Supreme Court of Ohio on December 30, 1994. The court's description of the facts in *Zoppo*:

1. Failure to properly investigate and pay first party fire loss claim.
2. Evidence of shoddy, result oriented claims investigation that focused exclusively on the insured as a possible arsonist.
3. Returns to “reasonable justification” standard of *Hart*, *Hoskins* and *Staff Builders*
4. Syllabus:

An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor. (*Hart v. Republic Mut. Ins. Co.* [1949], 152 Ohio St. 185, and *Staff Builders, Inc. v. Armstrong* [1988], 37 Ohio St.3d 298, approved and followed; *Slater v. Motorists Mut. Ins Co.* [1962], 174 Ohio St. 148, paragraph two of the syllabus, overruled; *Motorists Mut. Ins. Co. v. Said* [1992], 63 Ohio St.3d 690, overruled to the extent inconsistent herewith.)

5. For the first time in a bad faith case, the Supreme Court of Ohio affirmed a punitive damage award even though it was undisputed that the loss arose out of an arson, the insured gave contradictory statements about his whereabouts, and the insurer was given legal counsel not to pay the claim.

F. Other Notable Supreme Court of Ohio Precedent:

1. *Wagner v. Midwestern Ind. Co.* (1998), 83 Ohio St.3d 287: First party fire loss bad faith claim and innocent spouse rule.
 - a. The Supreme Court of Ohio adopted an approach based on contract principles to determine whether the parties intended joint or several coverage. The contract language clearly and unambiguously contemplated that Mr. and Mrs. Wagner were jointly covered under the policy, and therefore she was not entitled to a separate recovery. The court of appeals properly found that her breach of contract claim would have been successful based on the jury’s verdict in favor of her husband.

- b. Distinction between bad faith and mere breach of contract:

Plaintiffs presented sufficient evidence to create a jury question on the issue of bad faith. Evidence revealed that Mr. Wagner was cooperative and candid during the investigation of the claim, and there was no evidence that he was ever officially questioned or charged with arson. There was expert testimony from which the jury could conclude that the fire could have been accidentally caused by an electrical spark that ignited the insecticide vapor. Finally, the jury could reasonably have found bad faith from the fact that the insurer waited nearly a full year after its physical investigation had been completed before denying the claim. *Id.* at 294.

- c. Justice Cook dissented with Chief Justice Moyer and Justice Lundberg Stratton on the ground that bad faith was not shown by the mere breach of a contractual duty. The record in the case demonstrated that the fire had been deliberately set.

“I fear that today’s application of *Zoppo* will further blur the distinction between the proof required to create a jury question on a breach of contract committed by an insurer and a cause of action in tort for bad faith.” *Id.* at 297.

- 2. *Dardinger v. Anthem Blue Cross and Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113: First party bad faith failure to approve off label drug use and inpatient hospitalization in cancer treatment: \$49 million punitive damage award

- a. Egregious facts against health insurer. Punitive damage remitter to \$30 million upheld because of the inconsistent reasons given for denial, the “Byzantine appeals process” of Anthem, delays by Anthem, and “obsession with process”. The Supreme Court of Ohio agreed with the trial court that “the jury could easily find that a pervasive corporate attitude existed with the defendants to place profits over patients” and that “defendants disregarded the rights of their insureds in an effort to obtain higher profits.”

II. ANALYTICAL FRAMEWORK FOR OHIO BAD FAITH

All of the seminal Supreme Court of Ohio decisions discussing the tort of insurance bad faith have tied the legal nature of the tort to the breach of a specific contractual obligation(s) under the express language of the policy. The Supreme Court of Ohio held

in *Hart v. The Republic Mutual Ins. Co.* (1949), 152 Ohio St. 185, 187, that a duty of “good faith with respect to the settlement of such a claim” specifically relates to the insurer’s policy based “right to settle” or “refus[al] to settle” clause relating to an insured’s claim or suit.¹ The bad faith claim created in *Hart* arose directly from the contractual “duty to defend” an insured and “right to settle” language in the policy. In *Hoskins v. Aetna Life Insurance Company* (1983), 6 Ohio St.3d 272, the Supreme Court of Ohio referred to bad faith as a “tort arising out of an insurance contract” and the insurer’s “duty * * * to pay the claims of its insured”² under the policy language.

The legal point is that the duty of good faith and, consequently, the tort of bad faith, must be directly tied to a breach of a specific policy provision imposing a specific obligation upon the insurer. For example, in the third-party liability context, a bad faith claim usually arises from the express provision in a policy of general liability insurance imposing a “duty to defend” and “right to settle any claim or suit” against its insured. Both are specific and expressly stated policy terms that impose specific duties to take action upon the insurer. See *Hart*, supra. Similarly, in first party bad-faith claims, insurance policies (such as the uninsured motorist claim in *Said*; the fire loss claim in *Zoppo*; the group hospitalization claim in *Hoskins*), all provide express procedures for the making, processing and payment of an insured’s claim, the breach of which may result in bad faith tort liability.

In Ohio, “an insurer has a duty to act in good faith *in the processing and payment of a claim of its insured.*” *Staff Builders Inc. v. Armstrong* (1988), 37 Ohio St.3d 298; *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552 (“An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor.”); *Tokles & Son, Inc. v. Midwestern Indem. Co.* (1992), 65 Ohio St.3d 621, 630. In other words, a bad faith claim, as a matter of law, must be premised upon conduct of an insurer acting unreasonably in failing to “process or pay” a covered claim. Without such allegations, the bad faith claim should fail as a matter of law. See, e.g., *Bob Schmitt Homes, Inc. v. The Cincinnati Ins. Co.* (Feb. 24, 2000), Cuyahoga App. No. 75263, at *13 (holding that the “initial factual prerequisite” for a bad faith claim was an allegation that the insured was denied some contractual coverage to which the insured was entitled); *Pasco v. State Auto. Mut. Ins. Co.* (Dec. 21, 1999), Franklin App. No. 99 AP-430, at *15, 17 (there can be no bad faith claim without an insurer having an “obligation to pay or settle a claim” covered by the policy. Bad faith claim is dependent on the existence and breach of a policy duty); *Toledo-Lucas County Port Auth. v. Axa Marine & Aviation Ins. (UK) Ltd.* (N.D. Ohio 2002), 220 F.Supp. 2d 868, 873 (“[A]n insured may not maintain a claim of bad faith in the absence of coverage under the policy.”); *Hahn’s Elec. Co. v. Cochran*, Franklin App. Nos. 01AP-1391, 01AP-1394, 2002-Ohio-5009 (without an underlying breach of contract claim, there can be no bad faith); *Emerson v. Medical Mut. of Ohio*,

¹ *Hart v. The Republic Mutual Ins. Co.* (1949) 152 Ohio St. 185, 187, syllabus one.

² *Hoskins v. Aetna Life Insurance Co.* (1983), 6 Ohio St.3d 272, 275.

Hamilton App. No. C-030074, 2004-Ohio-3892 (if there is no covered claim that the insurer unreasonably refused to pay, no bad faith claim exists).

III. COMPENDIUM OF DECISIONS FROM FREQUENTLY LITIGATED BAD FAITH CLAIMS

A. Failure to Pay Claim

1. Insurer Favorable

- a. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621. (No bad faith if the underlying claim is “fairly debatable”; applies the *Said* case).
- b. *Connor Murphy & Co. v. Cincinnati Ins. Co.* (2001), 143 Ohio App.3d 151. (No bad faith where insurer demonstrated the reason for denial. Summary judgment affirmed where the insurer had advanced money, retained an accounting firm to determine the actual loss, and had provided documentary and testimonial evidence supporting its method for determining the amount of loss. This demonstrated a rational basis for refusing the insured’s calculation).
- c. *Johnson v. State Farm Ins. Co.* (Dec. 16, 1999), Cuyahoga App. No. 75497 (No bad faith where the insurer did not refuse to pay. Plaintiff homeowners could not prove bad faith because the insurer never refused to pay. The insurer’s only duty was to pay a contractor per the insured’s authorization).
- d. *Mehl v. Motorists Mut. Ins. Co.* (1992), 79 Ohio App.3d 550. (Refusal to pay a covered med pay claim was not bad faith where subrogation rights were lost).
- e. *Hooten v. Safe Auto Ins. Co.*, Hamilton App. No. C-01056, 2004-Ohio-451. (Disputed facts provide “reasonable justification” for failure to pay. Summary judgment for insurer was affirmed on bad faith failure to pay claim since confusion surrounding the validity of the insured’s license was “reasonable justification” for the insurer’s refusal to pay).
- f. *Sprenulli’s American Service v. Cincinnati Ins. Co.* (1992), 91 Ohio App.3d 317. (No bad faith where the insurer assigned conflicting claims to separate personnel. Summary judgment for the insurer on alleged bad faith refusal to pay property loss claim).

was affirmed since the insured's belief that the insurer had acted in bad faith was insufficient as a matter of law).

- g. *Carpenter v. United Ohio Ins. Co.* (May 9, 1997), Crawford App. No. 3-96-16. (No bad faith where insurance policy limits were placed in escrow pending the resolution of the wrongful death and liability suits in another county).
- h. *Farmers Ins. of Columbus, Inc. v. Lister*, Fairfield App. No. 2005-CA-29, 2006-Ohio-142 (Insured's property sustained fire damage when the insured's wife attempted to commit suicide by igniting a fire in the house. The verdict finding that the insurer had a reasonable justification to deny the claim was not against the manifest weight of the evidence).

2. Insured Favorable

- a. *CSS Publishing Co., Inc., v. American Economy Ins. Co.*, 138 Ohio App.3d 76, 2000-Ohio-1863. (Bad faith claim remanded for trial where insurance agent questioned denial of claim of fire loss claim under commercial property policy; insured offered a letter written by the insurer's agent expressing concern with insurer's "get tough" position, and testimony from an employee who claimed to have overheard insurer's representatives expressing pleasure in "keeping the pressure on, keeping them moving, keeping them squirming," and anticipating meeting where they would make the insured "take what we offer or they don't get anything").
- b. *Banks v. Nationwide Mut. Fire Ins. Co.* (Nov. 28, 2000), Franklin App. No. 99 AP-1413. (Insufficient payment can be the basis for a bad faith claim. A claim asserting insufficient payment stated actionable bad faith even though there was never a complete refusal to pay).

B. Failure to Timely Pay Claim

1. Insurer favorable

- a. *Fry v. Walters & Peck Agency, Inc.* (2001), 141 Ohio App.3d 303 (No bad faith where the insured caused delay. Summary judgment for the insurer on a fire loss claim affirmed where the insureds' refusal to sign a sworn proof of loss statement was the reason for the insurer's delay in tendering payment.)

- b. *Hess v. Auto-Owners Ins. Co.* (Feb. 28, 1997), Lucas App. No.L-96-171. (No bad faith where insured caused delay. The insurer did not fail to timely pay the arbitration award because plaintiffs refused to execute the trust agreement as required by the policy.)
- c. *Horak v. Nationwide Ins. Co.*, Summit App. No. CA 23327, 2007-Ohio-3744 (No bad faith where the insurer tended the insured several checks during the investigation process. The fact that the insured was mistaken as to the amount of coverage available under their policy did not entitle him to additional coverage).

2. Insured favorable

- a. *Stefano v. Commodore Cove East, Ltd.* (2001), 145 Ohio App.3d 290. (Delay in payment states actionable bad faith claim. Summary judgment reversed on alleged bad faith delay in paying condominium unit owner's property damage claim even though the insurer ultimately paid unit owner's claim. Questions of fact existed as to whether there was a reasonable justification for the delay.)
- b. *Kehoe v. Lightning Rod Mut. Ins. Co.* (1996), 115 Ohio App.3d 234. (Delay in paying undisputed portion of claim created a fact issue on bad faith. Summary judgment reversed on bad faith delayed payment of UM/UIM claim under *Zoppo* standard requiring reasonable justification.)
- c. *Beever v. Cincinnati Life Ins. Co.* (June 10, 2003), Franklin App. Nos. 02AP-543, 02AP-544, 2003-Ohio-2942. (Delayed payment required reversal of summary judgment for insurer on bad faith claim for failure to investigate a life insurance claim. Plaintiff's experts opined that reliance on the medical records alone was unwarranted; given the conflicting information, they asserted, the insurer should have conducted a more thorough investigation, including interviewing the witnesses and physicians itself).
- d. *Zaychek v. Nationwide Mut. Ins. Co.*, Summit App. No. 23441, 2007-Ohio-3297. (Question of fact as to whether the insurer acted in bad faith as the evidence showed that the adjustor responsible for the claim admitted that he did not timely process the claims, the insurer did not make the insureds a settlement offer until one year after the date that the insureds made their claims, and the insurer did not fully pay the insureds' med-pay claims until more than two years after being provided the insureds' medical records).

C. Failure to Make Good Faith Offer

1. Insurer Favorable

- a. *Centennial Ins. Co. v. Liberty Mut. Ins. Co.* (1980), 62 Ohio St.2d 221. (No bad faith for requesting insured to contribute to settlement as long as contribution was not the price of insurer making a settlement offer).
- b. *Miskins v. Metropolitan Prop. & Liab. Ins. Co.* (Jan. 9, 1992) Cuyahoga App. No. 59273. (Low offer based on skill of plaintiff's lawyer is not bad faith. Evaluating the opposing attorney is one factor in a negotiation strategy).
- c. *Piedmont Corp. v. Midwestern Indem. Co.* (Nov. 30, 2000), Wood App. No. WD-00-018. (Offer to compromise undisputed portion of claim not bad faith. Summary judgment affirmed on alleged bad faith failure to pay business interruption coverage following fire loss. Antecedent to any bad faith claim, there must be a denial or unreasonable delay in providing coverage).
- d. *Gruhin v. USF&G Co.* (Nov. 21, 1984), Cuyahoga App. No. 48034. (Mere refusal to increase an initial settlement offer is not in and of itself evidence of bad faith).

2. Insured Favorable

- a. *Dietz-Britton v. Smythe Cramer Co.* (2000), 130 Ohio App.3d 337. (Disregarding counsel's advice to settle raised a question of fact on bad faith claim).

D. Failure to Investigate

1. Insurer Favorable

- a. *Dorsey v. Campbell Hauling*, Franklin App. No. 02AP-961, 2003-Ohio-3341. (Summary judgment for insurer affirmed on claim asserting failure to investigate and evaluate UIM claim. Attorney retained to defend UIM claim had continually re-evaluated sudden emergency defense as new medical evidence became available. There was no bad faith in waiting to negotiate the UIM claim until after the liability claim was resolved).

2. Insured Favorable

- a. *Furr v. State Farm Auto Ins. Co.* (1998), 128 Ohio App.3d 607. (UM claim denial after perfunctory investigation was bad faith. The insured presented UM claim 19 months after the accident. The insurer did no additional investigation, made no offer for an additional 16 months, then offered \$15,000 and finally increased its offer to \$30,000 immediately before trial).
- b. *Estate of Baxter v. Grange Mut. Ins. Cas. Co.* (1992), 73 Ohio App.3d 512. (Failure to follow up on unopposed legal opinion of insured's counsel is bad faith. The insurer denied the UM claim despite plaintiff's attorney's legal memorandum, an accident report, the coroner's determination on the death certificate that the decedent's death was "caused by an accident" and a letter from one of the investigating police officers).
- c. *LeForge v. Nationwide Mut. Fire Ins. Co.* (1992), 82 Ohio App.3d 692 (Bad faith found where investigation did not support arson defense).
- d. *Asmaro v. Jefferson Ins. Co. of New York* (1989), 62 Ohio App.3d 110. (Conflicting results of insurer's arson investigation supported bad faith verdict. The insurer's investigation strongly supported the conclusion that the fire had been started by an upstairs tenant who had recently been evicted by the insured).
- e. *Ohio Nat'l Life Assur. Corp. v. Satterfield*, Summit App. No. 25282, 2011-Ohio-2116. (Evidence at trial revealed that the insurer's counsel did little research before recommending that the company deny the claim).

E. Failure to Defend

1. Insurer Favorable

- a. *Spitler v. State Auto Mut. Inc.* (1980), 61 Ohio St.2d 242. (No bad faith for refusing to appeal verdict in excess of limits).
- b. *Redhead Brass, Inc. v. Buckeye Union Ins. Co.* (1999), 135 Ohio App.3d 616. (No bad faith for failure to prosecute insured's counterclaim. An insurer must act in good faith in carrying out its contractual duties to defend and indemnify. An insurer has no obligation to prosecute a compulsory counterclaim on behalf of the

insured and failure to do so was not a breach of the duty of good faith).

- c. *Am. Family Ins. Co. v. Chamunda, Inc.*, Summit App. No. 23524, 2008-Ohio-1910. (The trial court correctly granted summary judgment to the insurer on its claims that it had no duty to defend or indemnify the insured where the policy excluded all coverage to an insured who sells alcoholic beverages to a person under the legal drinking age).

2. Insured Favorable

- a. *Zalac v. St. Paul Fire and Marine Ins. Co.* (Nov. 18, 1997), Franklin App. No. 97APE04-544. (Summary judgment for insurer reversed in suit alleging bad faith refusal to defend and indemnify under CGL and professional liability policies for fraudulent misrepresentation and RICO violation).
- b. *Grange Mut. Cas. Co. v. Rosko*, 146 Ohio App.3d 698, 2001-Ohio-3508. (Bad faith claim for exhausting limits defending one of two insured tortfeasors is a question for the jury when the insurer exhausted its limits settling claims against the driver, even though it knew or should have known that a passenger was also an insured due to his alleged “use” of the vehicle in causing the accident).
- c. *Andrade v. Credit General Ins. Co.* (Nov. 20, 2000), Stark App. No. 2000 CA 00002. (Verdict for the insurer on bad faith reversed where insured’s contradictory testimony about the vehicle as “additional” or “replacement” presented a genuine issue of material fact as to whether the insurer had reasonable justification for refusing to defend the underlying litigation).
- d. *Ohio Bar Liab. Ins. Co. v. Hunt*, 152 Ohio App.3d 224, 2003-Ohio-1381. (Summary judgment for the insured’s legal malpractice carrier was reversed where the insurer refused to defend or indemnify an insured in malpractice claim due to alleged late notice. The failure to defend could provide a basis for bad faith, even if the verdict was within policy limit).

F. Miscellaneous

1. *Mentor Chiropractic Center, Inc. v. State Farm Fire & Cas. Co.* (2000), 139 Ohio App.3d 407. (No bad faith for refusal to pay personal counsel’s fees. The insurer had retained defense counsel, but declined to pay for a second, personal counsel of insured).

2. *Doetz-Britton v. Smythe Cramer Co.* (2000), 130 Ohio App.3d 337. (Failure to timely reserve rights can be the basis of bad faith claim. The duty of good faith required the insurer to timely reserve its rights even though the allegations against the insured asserted fraud and public policy would prohibit the insurer from indemnifying the insured for damages caused by her intentional conduct. Good faith required the insurer not to prejudice the insured's ability to make an informed decision to obtain independent counsel).
3. *Baker v. State farm Ins. Co.* (April 27, 2000), Ashland App. No.99-COA-1314. (No bad faith for disputing the value of a collision claim. Summary judgment for insurer affirmed because "a dispute as to the value of a claim does not in and of itself constitute bad faith").
4. *Intercity Auto Sales, Inc. v. Evans*, Cuyahoga App. No. 95778, 2011-Ohio-1378. (Insurer owes no duty to third parties. A third party has no cause of action for bad faith against the tortfeasor's insurance company).
5. *Schneider v. Eady*, Lorain App. Nos. 07CA009273, 07CA009305, 2008-Ohio-6747. (Victims of negligent drivers are not third party beneficiaries of contracts between a tortfeasor and their insurance companies. As such, there is no cause of action for bad faith failure to negotiate for third parties).

IV. PROCEDURAL ISSUES

A. Statute of Limitations - Four Year Stature Applies Under O.R.C. §2305.09(D)

1. *Bullet Trucking, Inc. v. Glen Falls Ins. Co.* (1992), 84 Ohio App.3d 327. (As a tort claim, a bad faith claim is subject to the four year statute of limitations established by R.C. §2305.09(D)).
2. *Stevenson v. First Am. Title Ins. Co.*, Fairfield App. No. 05-CA-39, 2005-Ohio-6461 (Actions alleging that an insurer acted in bad faith in the handling of an insurance claim are governed by the four-year statute of limitations).

B. Burden of Proof - Insured Has Burden of Proving Bad Faith

1. *Asmaro v. Jefferson Ins Co. of New York* (1989), 62 Ohio App.3d 110. (Insured has the burden of proving that the insurer's refusal to pay a claim was arbitrary and capricious).

C. Discovery of Insurer Claim Files, Including Attorney-Client Communications of Insurer Retained Coverage Counsel

1. Insurer Favorable

- a. *Eller Media Co. v. DGE Ltd.*, Cuyahoga App. Nos. 83273, 83286, 2004-Ohio-4748. (No *Boone* discovery permitted if bad faith claim is not properly asserted. The insured sought the title insurer's claims files, but never attempted to amend its third party complaint to assert a bad faith claim until the day of trial).
- b. *Marcella v. Nationwide Mut. Ins. Co* (Feb. 22, 1996) Cuyahoga App. No. 69086. (Discovery of claims files and adjuster depositions were unnecessary to resolve bad faith claim when the coverage dispute was based solely on the unsettled nature of the law).
- c. *Kraus v. Maurer* (2000), 138 Ohio App.3d 163. (No right to discover claim file of non-party insurer. The claim file was protected by both the attorney/client privilege and the work product doctrine).
- d. *Breech v. Turner* (1998), 127 Ohio App.3d 243. (No right to discover claims file absent a bad faith claim).
- e. *Kirtos v. Nationwide Ins. Co.*, Mahoning App. No. 07-MA-97, 2008-Ohio-870. (Insurer could depose the insured's attorney in the underlying lawsuit about settlement negotiations).

2. Insured Favorable

- a. *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 2001-Ohio-27. (No privilege for insurer's coverage counsel's communications to insurer made prior to coverage decision. Insured was entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage).
- b. *Garg v. State Auto Mut. Ins. Co.*, 155 Ohio App.3d 258, 2003-Ohio-5960. (Work product discoverable where bad faith alleged. Privileged communications relevant to bad faith are discoverable even if not "related to issue of coverage.").

- c. *McHenry v. General Acc. Ins. Co.* (1995), 104 Ohio App.3d 350. (No final appealable order prior to *in camera* inspection. An insurer can avoid irreparable harm by moving the trial court for an *in camera* inspection of its files. The trial court is obliged to provide such inspection prior to granting a motion to compel when issues of work-product of attorney-client privilege are raised).
- d. *Mid-American National Bank and Trust Co. v. Cincinnati Ins. Co.* (1991), 74 Ohio App.3d 481. (Insurer waived privilege in communications to insured's counsel).
- e. *Unklesbay v. Fenwick*, 167 Ohio App.3d 408, 2006-Ohio-2630. (The fact that the insurer eventually paid the insured the benefits did not preclude the insured from discovery of the claims file. The insurer's bad faith could occur from a delay in the payment of benefits).
- f. *Nat'l Union Fire Ins. Co. v. Ohio State Univ. Bd. of Trs.*, Franklin App. No. 04-AP-1340, 2005-Ohio-3992. (The entire contents of the claims file, including the attorney's advice and analysis, are discoverable to demonstrate a "lack of good faith" in settlement of the claims).

D. Bifurcation of Bad Faith Claim From Breach of Contract Claim

- 1. *Garg v. State Auto Mut. Ins. Co.*, 155 Ohio App.3d 258, 2003-Ohio-5960. (Insurer entitled to bifurcation of claims where privileged communications discoverable. Refusal to bifurcate breach of contract from bad faith claim and to stay bad faith discovery is abuse of discretion).
- 2. *Hahn's Electric Co. v. Cochran*, Franklin App. Nos. 01AP-1391, 01AP-1394, 2002-Ohio-5009. (Stay of bad faith discovery pending coverage determination affirmed. A lack of discovery on bad faith claim did not prohibit entering summary judgment. Denial letter in the record provided ample basis for the trial court to assess insurer's reason for denial of coverage).

E. Intervention

- 1. *Bennett v. Butler* (June 30, 2000), Lucas App. No. L-99-1151. (No bad faith for intervening in insured's default proceeding against tortfeasor. Exercising right to intervene under Civil Rule 24 was not bad faith, even though insurer had option to pursue intervention, arbitration or subrogation).

2. *Redhead Brass, Inc. v. Buckeye Union Ins. Co.* (1999), 135 Ohio App.3d 616. (Requesting jury to determine whether damages were for covered claims was not bad faith. An insurer did not breach its duty of good faith by hiring separate counsel to prepare and submit to the jury interrogatories that would determine whether the damages in the underlying case were being assigned to covered or non-covered claims).

F. Compulsory Counterclaims

1. *Colelli & Assoc. Inc. v. Cincinnati Ins. Co.*, Tuscarawas App. No. 2004-AP-04-0029, 2004-Ohio-6924. (Bad faith waived if not asserted as compulsory counterclaim to insurer's declaratory judgment action).

G. Waiver of Policy Requirements

1. *Thomas v. Nationwide Mut. Ins. Co.*, 177 Ohio App.3d 502, 522, 2008-Ohio-3662. (Insured provided sufficient evidence that the insurer waived its written notice requirement when the agent handling the claim never suggested there was a problem with notice during repeated interactions with the insured).

V. COVERAGE AS PREREQUISITE FOR BAD FAITH

A. Insurer Favorable

1. *Bob Schmitt Homes, Inc. v. Cincinnati Ins. Co.* (Feb. 24, 2000), Cuyahoga App. No. 75263. (*Zoppo* does not stand for the right to bring a bad faith claim without coverage. *Zoppo* presupposes the claim in question is covered).
2. *Westfield Ins. v. Barnett*, Noble App. No. 306, 2003-Ohio-6278. ("Where a duty to defend has not been established, it cannot be held that the insurer was negligent, breached contract, or acted in bad faith when it refused to defend or provide coverage.").
3. *Whitaker v. Grange Mut. Cas. Co.*, Montgomery App. No. 20474, 2004-Ohio-5270. (Summary judgment affirmed on bad faith and breach of contract claims where the policy was unambiguous in requiring the insured to maintain the premises as their principal residence in order to qualify for coverage).
4. *Pasco v. State Auto Mut. Ins. Co.* (Dec. 21, 1999), Franklin App. No. 99-AP-430. (Insurer cannot act in bad faith where it both defends under a reservation or rights and prevails on coverage).

5. *Mid-American Fire & Cas. Co. v. Broughton*, 154 Ohio App.3d 728, 2003-Ohio-5305. (Trial court properly dismissed bad faith claim because plaintiff's success on her bad faith claim was dependent on proving coverage).
6. *Schrock v. Feazel Roofing Co.*, Delaware App. No. 02 CAE10049, 2003-Ohio-3742. (No bad faith as a matter of law because the absence of coverage for the property loss was a "reasonable justification" for insurer's failure to pay).
7. *Hahn's Electric Co. v. Cochran*, Franklin App. Nos. 01AP-1391, 01AP-1394, 2002-Ohio-5009. ("If a reason for coverage denial is correct, it is per se reasonable").
8. *Riggs v. Motorists Mut. Ins. Co.*, Franklin App. No. 02AP-876, 2003-Ohio-1657. (Trial court properly held that the bad faith claim could not survive absent coverage).
9. *Caliman v. American Gen. Fire & Cas. Co.* (1994), 94 Ohio App.3d 572. (Plaintiff had no right to claim the death benefits and therefore cannot recover in tort for a bad faith refusal to pay insurance proceeds).
10. *Dutch Maid Logistics, Inc. v. Acuity*, Cuyahoga App. Nos. 91932, 92002, 2009-Ohio-1783. (Summary judgment was properly granted based on a plain reading of the word "accident" in the policy. The insurer's adherence to the policy language in denying additional coverage was not only reasonably justified, but correct under the law. The insured's bad faith claim was baseless).
11. *Bogner Constr. Co. v. Field & Assocs.*, Knox App. No. 08-CA-11, 2009-Ohio-116. (Defective workmanship did not constitute an "occurrence" under a commercial policy. Since there was no coverage, there was no bad faith).
12. *Schneider v. Eady*, Lorain App. Nos. 07CA009273, 07CA009305, 2008-Ohio-6747. (The insured's subjective failure to understand the policy language was irrelevant where the language was unambiguous to a reasonable person. Since there was no coverage, there was no bad faith).
13. *Figetakis v. Owners Ins. Co.*, Summit App. No. 22874, 2006-Ohio-918. (The cause of action for coverage under the policy accrued on the date that the damage occurred. Since the insured's suit was brought more than one year after the damage occurred, it was untimely pursuant to the policy time limitation for filing suit).

B. Insured Favorable

1. *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St.3d 287. (Jury issue on coverage does not prove absence of bad faith).
2. *Essad v. Cincinnati Cas. Co.*, Mahoning App. No. 00CA199, 2002-Ohio-1947. (Bad faith claim based on “failure to investigate” without reasonable justification could be asserted without proving coverage).
3. *Simpson v. Permanent General Ins. Co.*, Cuyahoga App. No. 81216, 2003-Ohio-1157. (In first party claim, duty of good faith is independent from any contractual duties and bad faith can exist in the absence of coverage. In a third party claim, bad faith cannot survive if the insured is not entitled to defense and indemnification).

VI. AT WHAT STAGE OF CLAIM PROCESS IS REASONABLE JUSTIFICATION REQUIRED?

A. Insurer Favorable

1. *Brionez v. Auto-Owners Ins.* (Nov. 15, 1996) Sandusky App. No. S-95-049. (Evidence of bad faith occurring after suit is filed is relevant so long as it relates to the bad faith handling of or refusal to pay the claim. The suspicious nature of the fire and evidence indicating plaintiff’s possible involvement provided a rational basis for delay in paying the claim).
2. *La Plas Condominium Assoc. v. Utica National Ins. Group*, Hancock App. No. 5-04-15, 2004-Ohio-5347. (Insurer’s investigation of the claim was adequate as a matter of law even though the conclusion of water damage was later disproved. Retention of an independent adjuster and an independent engineer to perform the inspection were key facts).
3. *Lawson v. Taylor* (1995), 105 Ohio App.3d 191. (Trial court abused its discretion in awarding attorneys fees to Plaintiff because the insurer did not act in bad faith).
4. *Savage v. Am. Family Ins. Co.*, 178 Ohio App.3d 154, 2008-Ohio-4460. (Under the conditions precedent clause in the policy, submitting to an examination under oath and providing relevant financial records were conditions of the contract. Because the insured refused to satisfy those conditions, the insurer was not obligated to perform under the contract).

B. Insured Favorable

1. *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 2001-Ohio-27. (Claim alleging bad faith failure to settle involves conduct that may continue throughout the entire claims process. Bad faith in determining coverage involves conduct that occurs at the time the assessment is made).
2. *Furr v. State Farm Mut. Auto Ins. Co.* (1998), 128 Ohio App.3d 607. (Evidence discovered after the insurer had denied the claim was not relevant to the issue of whether the insurer had reasonable justification for its denial).
3. *Nationwide Mut. Fire Ins. Co. v. Masseria* (Dec. 17, 1999), Geauga App. No. 98-G-2197. (Insurer's right to bring a declaratory judgment action is conditioned on having a good faith basis for believing that no coverage is owed. An insurer's good faith belief of no coverage must be supported by evidence known to and relied upon by the company at the time the declaratory judgment action is filed).
4. *Simpson v. Permanent General Ins. Co.*, Cuyahoga App. No. 81216, 2003-Ohio-1157. (Insurer denied the UIM claim and during litigation demonstrated that the tortfeasor was in fact insured. Genuine issue of material fact existed as to whether insurer acted in bad faith at the time it denied the claim).
5. *Ohio Bar Liab. Ins. Co. v. Hunt*, 152 Ohio App.3d 224, 2003-Ohio-1381. (Absence of an excess judgment against the insured did not preclude a claim for bad faith as a matter of law).

VII. AMBIGUOUS POLICY LANGUAGE

- A. *Ohio Bar Liab. Ins. Co. v. Hunt*, 152 Ohio App.3d 224, 2003-Ohio-1381. (Bad faith is not shown by an insurer's mistake in actions relating to an unclear contractual provision).
- B. *Edmunds Management Co. v. Century Surety Co.* (June 12, 1997), Cuyahoga App. No. 70441. (Exclusion relied upon by insurer was ambiguous. The insurer's refusal to give an independent adjuster authority to value the loss after a reservation of rights letter was issued fell below the standard of care for processing insurance claims).

VIII. RELATED CLAIMS AND DEFENSES

A. Insured's Bad Faith and/or Submission of False Policy Application or Claim

1. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621. (An insurer can deny the claim and counterclaim against its insured for fraud. There is no "reverse bad faith" under Ohio law).
2. *Sweeney v. Hunter* (1991), 76 Ohio App.3d 159. (Rule 11 sanctions affirmed for filing a fraudulent bad faith claim).
3. *Murrell v. Williamsburg Local School Dist.* (1993), 92 Ohio App.3d 92. (Court rejected insured's assertion that he had a good faith argument for an extension or modification of existing law).
4. *Owens-Corning Fiberglass Corp. v. American Centennial Ins. Co.* (1995), 74 Ohio Misc.2d 263. (Insured had a duty of good faith to disclose risks of which he was aware and the failure to do so rendered the contract voidable at the insurer's option).
5. *Jaber v. Prudential Ins. Co. of America* (1996), 113 Ohio App.3d 507. (Insured's material misrepresentations of fact in the policy application voided the policy *ab initio*, and provided reasonable justification for the insurer's refusal to pay).
6. *Van Nostran-Young Ins. Agency v. State Auto Ins. Co.*, Stark App. No. 2002-CA-00371, 2003-Ohio-4393. (No recognized claim in Ohio for the tort of breach of contract, no matter how willful the breach).
7. *Dover Lake Park, Inc. v. Scottsdale Ins. Co.*, Summit App. No. 21324, 2003-Ohio-3312. (Directed verdict affirmed on claim asserting bad faith failure to reimburse for defense costs under a CGL policy. The absence of prejudice from the late notice was insufficient as a matter of law to sustain a bad faith claim).
8. *Logsdon v. Fifth Third Bank of Toledo* (1994), 100 Ohio App.3d 333. (Insurer not liable to the non-policyholder plaintiff on negligence theory because plaintiffs could prove no special duty owed by the insurer to the borrower arising out of the insurer's issuance of the insurance policies insuring collateral to bank).
9. *Reece v. Grange Guardian Ins. Co.*, Lucas App. No. L-03-1290, 2004-Ohio-5668. (Insurer denied claim under a policy provision revoking coverage for fraudulent conduct in connection with the reporting of a loss).

The insurer justifiably relied on the insured's misrepresentation in denying the claim).

10. *Banks v. Nationwide Mut. Fire. Ins. Co.* (Nov. 28, 2000), Franklin App. No. 99 Ap-1413. (Insured suffered a covered property auto damage loss when insurer denied the promised level of repairs that insured expected by use of non-OEM parts for repair).
11. *Permanent General Ins. Co. v. Bedwell* (2001), 111 Ohio Misc.2d 8. (Insurer can provide good faith defense and not waive its rights under policy by giving insured notice of reservation of rights).
12. *Caccavale v. W. & S. Life*, Lorain App. No. 07CA009124, 2008-Ohio-825. (False statements in the application regarding drug use were material under R.C. 3911.06, such that denial of coverage was proper).

IX. RED FLAG INDICATORS OF POTENTIAL BAD FAITH

A. First-Party Bad Faith Cases

1. Insurer fails to properly investigate, e.g.:
 - a. Investigation focuses on securing evidence simply to deny benefits to insured;
 - b. Inaccuracies in investigation reports;
 - c. Reports slant facts to justify denial of claim;
 - d. All significant information reasonably available not obtained; many facts undeveloped and unresolved;
 - e. Unnecessary and substantial delays before investigation begun or completed;
 - f. Investigation not conducted by competent personnel;
 - g. No retention or delayed retention of independent and qualified experts;
 - h. Retained experts not provided with records or resources necessary to make a proper evaluation;
 - i. Experts unreasonably limited in conducting their investigation;

- j. Inadequate investigation into legal principles; reliance on outdated policy standards or case law that has been overruled.
 - k. Investigation improperly documented.
2. Insurer fails to evaluate claim objectively, *e.g.*:
 - a. Claim decision made before investigation complete;
 - b. Claims personnel predisposed to deny claim; focus primarily on facts justifying denial;
 - c. Claims personnel received training materials reflecting anti-claimant bias;
 - d. “Claims committee” or supervisor approval not independent, but rather “rubber stamp” of action recommended by original claims examiner;
 - e. Claims personnel not provided with objective standards to follow in evaluation process, or did not follow such standards;
 - f. Claim decision not made promptly; unnecessary and unexplained delays; neutral (*e.g.*, appraiser in property dispute or arbitrator in UM/UIM dispute) awards substantially more than insured’s evaluation/offer;
 - g. Denial based on unverified information;
 - h. Denial not based on whole factual record, but rather isolated facts or events;
 - i. Insurer not willing to conduct an additional inquiry where appropriate (*e.g.*, insurer does not consider new information or does not conduct further investigation or re-evaluate claim decision based thereon);
 3. Insurer applies unreasonably restrictive requirements regarding claim form or information intake in denying or reducing claim.
 4. Insurer denies or reduces claim based on standards known to be improper.
 5. Insurer unreasonably delays payment or processing of claim (*e.g.*, insurer does not promptly pay undisputed amount(s), withholds payment until all

claims resolved, until coverage issues resolved, pending outcome of criminal charges against insured, etc.).

6. Insurer utilizes unfair practices to avoid payment of claim (*e.g.*, misrepresenting coverage, intimidating witnesses, hostile attitude by claims personnel, threats to “retire the file without payment”, groundless accusations against insured, groundless attempt or threat to rescind policy, paying benefits conditionally, *i.e.*, absent good faith dispute, arbitrary cut-off of benefits, etc.).
7. Other insurer conduct evidencing disregard for insured’s rights (*e.g.*, unreasonable accounting, inadequate communication with insured, failure to notify insured of certain remedial rights, etc.).
8. Insurer engages in “post-claim underwriting” (*i.e.*, insurer waits until claim has arisen before investigating insurability of risk, then rescinds policy to avoid payment of claim).
9. Insurer engages in unreasonable litigation conduct (*e.g.*, commencing declaratory relief action where insurer’s position in a coverage dispute is inherently unreasonable, “nuisance value” or unreasonably low settlement offers during litigation, etc.).

B. Bad Faith Cases Arising Out of Third-Party Claims

1. Insurer fails or refuses to conclude allegedly reasonable settlement:
 - a. Excess judgment is rendered against insured;
 - b. Insurer fails to provide “excess letter” to insured advising of possibility of excess judgment;
 - c. Insurer fails to keep insured informed of settlement negotiations (particularly where risk of excess liability is apparent);
 - d. Insurer fails or refuses to settle after excess judgment is rendered against insured;
 - e. Insurer fails to properly and neutrally investigate the facts relevant to the issues of liability and damages (*e.g.*, inaccurate gathering or reporting of facts, improper focus of investigation, investigation not conducted under supervision of responsible persons, investigation not conducted promptly or while facts still fresh, etc.);

- f. Insurer fails to evaluate third party's settlement demand objectively/fairly;
 - g. Insurer fails to seek competent legal advice or disregards such advice;
 - h. Insurer seeks declaratory relief without reasonable basis for denying coverage (e.g., declaratory relief is sought on basis of knowingly erroneous interpretation of policy); and
- 2. Insurer settles third-party claim, *but*:
 - a. Terms of settlement are prejudicial to insured's interests (e.g., settlement without provision for lien release, settlement reducing coverage for other claims or impacting future insurability, settlement prejudicial to insured's rights against third party, settlement causing increase of premiums, etc.);
 - b. Insurer coerces contribution from insured.
 - 3. Insurer wrongfully refuses to defend insured.

C. Other Red Flag Indicators

- 1. Institutional bad faith or "pattern & practice" allegations that could form basis of extra-contractual/punitive damages exposure, injunctive relief, disgorgement of profits, claim on behalf of "general public", and/or onerous discovery into other claim files.
- 2. Substantial non-compliance with statutory, regulatory or internal claim-handling standards or procedures, especially when coupled with "pattern & practice" allegations.
- 3. Inflammatory adjuster notes in claim file.
- 4. Conflicting and/or otherwise problematic testimony of company personnel (including conflicting and/or problematic internal documentation).
- 5. Conflicts or inconsistencies among or between branch claims offices, claims workgroups, adjusters, etc. regarding claim-handling practices.
- 6. Questionable denial of claim based on fraud, misrepresentations, arson, failure to cooperate and/or comply with other obligations under applicable policy.

7. Conflicting and/or otherwise problematic reserve-setting practices (particularly in third-party cases).
8. Unfair/improper assertion of contractual limitations period in denying claim.
9. Problematic/ineffective reservation of rights or non-waiver agreements.
10. Improper cancellation or non-renewal.
11. Issues of concern regarding agent.
12. Claim of insurer spoliation of evidence and/or loss, withholding or destruction of pertinent documentation.
13. Sanctions against insurer or its counsel.
14. Significant adverse rulings.
15. Disgruntled former company employees and/or independent contractors/adjusters as hostile witnesses; other witness problems.
16. Plaintiff attorney has strong bad faith litigation reputation, significant jury verdicts and/or noted history of litigation against the company.
17. Insured and/or insured's representative(s) engage in "set up" tactics in advance of bad faith litigation.
18. Potential for high-ranking company officer/director depositions.
19. Potential discovery of company personnel files and incentive/compensation programs (e.g., profit-sharing plan).