

Bad Faith Failure to Settle - The Plaintiff's Perspective

By

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The following article is intended to inform auto insurance policy holders, and their personal counsel, about the steps to take if an insurance company unreasonably refused, or is currently refusing, to settle an auto liability claim against the policy holder. In Tennessee, an insurer's unreasonable refusal to settle a claim against a policy holder/insured may result in an excess verdict and judgment for which the insured is personally liable. If this occurs, the insurance company may be guilty of bad faith and may be liable for payment of the excess judgment. If you are an insured, or insured's counsel, and wish to discuss a potential bad faith failure to settle a claim involving auto, life, or homeowner's insurance, call Bryan Capps at Gilreath & Associates 1-800-637-7024. Mr. Capps regularly handles bad faith insurance matters and was the lead plaintiff's counsel in the matter Johnson v. Tennessee Farmers Mutual Insurance Company, 205 S.W.3d 365, (Tenn. 2006), the Tennessee

Supreme Court's most recent pronouncement on bad faith failure to settle for automobile insurance policy limits.

Considerations Regarding the Underlying Auto Case

In the context of claims for bad faith failure to settle, we normally receive referrals from plaintiff attorneys who have contacted a defendant/insured after an excess verdict and advised him/her that he/she should seek counsel to review how the case against them was adjusted and/or defended. Sometimes personal counsel of a defendant, hired as the result of an excess letter, makes the referral. Occasionally we are contacted directly by a defendant/insured who has been strapped with an excess verdict and feels that he or she was not properly treated by hired counsel or the claims adjuster. In any case, do not assume anything you hear about the handling of the underlying claim is true. The underlying plaintiff's attorney, like many of us, can be unreasonably convinced that he was forced to try a case that warranted a policy limits settlement. Have you ever met a losing defendant that thought he got a fair shake? No matter your respect for the referring attorney, or the logical argument made by the wounded defendant, you have to start from scratch. Worse, you have to methodically review the facts and procedural history of the underlying case as well as the potential bad faith claim¹.

While the jury may understand and rely on the trial court's definition of "bad faith", they will first be focused on the issue of fairness. So in evaluating the bad faith

¹ Throughout this article, the original action which resulted in an excess verdict will be referred to as the "underlying case." The defendant in the underlying case will be referred to either as the bad faith plaintiff or the insured. The underlying defendant's insurance company, and therefore, the bad faith defendant, will be referred to as the insurer.

case, you are looking for facts which allow you to develop a story for trial which plays on the jurors' inherent sense of fairness. To script and tell that story, you must closely review the facts of the underlying case to make sure the underlying jury's verdict was fair. You then need proof that the insurer acted unfairly under all the circumstances.

Facts of the Underlying Case

The pre-suit review must always begin with an intense analysis of the underlying claim. Obtain a waiver of confidentiality for the entire file of the underlying plaintiff's counsel and/or the defendant's/insured's personal counsel. Get a complete copy of every document filed with the trial court and/or court of appeals including the complete trial transcript. Copy, set the originals aside, and put them in chronological order. If you accept the case and conduct discovery, you will intersperse with these documents the adjuster's claim file and the underlying defense counsel's file. This rather large stack of documents will give you the entire chronological history of the case from all perspectives. From this chronological stack you must create a detailed timeline of events. The timeline and documents will reveal to you the evolution of the claim and the mental impressions and opinions of all relevant participants as the claim evolved. You will refer to both a hundred times in writing discovery, in taking depositions and in trial.

Once you have the basic facts, ask yourself whether the decision by the underlying jury was fair. If you as an attorney feel that the total judgment or allocation of fault heaped on the underlying plaintiff was unfair, or unforeseeable, then the next jury may side with the insurer. After you consider the facts from the jurors' perspective, you

must begin evaluating the underlying facts through the lens of a reasonable insurance adjuster and/or defense attorney and from the perspective of your prospective expert.

Injuries to the Underlying Plaintiff

Although it may seem unorthodox, start by evaluating the proven damages to the underlying plaintiff. You should be looking at the case because the underlying damages, combined with the likely overall fault allocation, threatened a judgment that would exceed the insured's limits. Therefore, at this stage you will be evaluating the underlying plaintiff's claim as if you were planning to make a demand, mediate the case, and/or advise the plaintiff of a potential value range while keeping in mind the underlying applicable policy limits. While my list of potential damage elements is not unique and certainly not exhaustive, I consider the following with an initial emphasis on the first two:

1. Total medical specials
2. Total lost wages/projected lost future earnings
3. Severity of injuries, initial/current pain and suffering and loss of enjoyment
4. Length of hospitalization, immobility, and/or rehabilitation
5. Surgery
6. Disfigurement
7. Permanent impairment rating
8. Future pain and suffering and loss of enjoyment

I emphasize 1 and 2 because they are hard numbers and usually the first figures that the adjuster will have requested and/or received from the underlying plaintiff or his counsel. Consider them as a percentage of the relevant policy limits. Since none of us can accurately predict what a jury will award for past and future pain and suffering and loss

of enjoyment, you want 1 and 2 to account for most of the policy limits in the absence of a catastrophic injury. Then ask yourself whether the remaining elements are strong enough to convince a jury to make a total award in excess of the limits. If you look at all of the facts and elements of damage and can foresee a jury, in the pertinent venue, awarding something within the policy limits, you need to think very hard about whether you are looking at a valid bad faith claim.

Once your evaluation of damages is complete, you must then determine which of the elements the underlying plaintiff's counsel actually provided to the adjuster and/or proved at trial. Do not assume that the adjuster, underlying defense counsel, or the jury were provided and evaluated all elements of damages which you identify. We have evaluated potential bad faith cases where the underlying plaintiff's attorney, given low policy limits, apparently thought the damages would take care of themselves. In such cases, the insurer ultimately evaluated the claim only on the damages that were actually developed. So while an excess verdict occurred, it was not as far in excess of policy limits as it would have been with fully developed damages. Be careful in this scenario. Your bad faith expert needs to be able to testify clearly, and somewhat indignantly, that the adjuster made a mistake in refusing to pay policy limits. You do not want to put your expert in the position of having to admit that the adjuster's lower evaluation was proper because the underlying plaintiff's counsel excluded a significant category of damages in his or her proof or demand. Remember that although you start the case with a slight advantage in that jurors are suspicious of insurance companies, hundreds of surveys show

they have more suspicion and contempt for lawyers including underlying plaintiff's counsel.

Evaluation of damages was not an issue in Johnson v. Tennessee Farmers. In Johnson the underlying plaintiff, Chris Moore, had catastrophic injuries with more than \$70,000 in medical expenses in 1992 dollars. His counsel, Zane Daniel, of course did a great job of timely and completely documenting Moore's damages. The medical specials were collected and provided to the adjuster early on, and the other economic and non-economic damages were developed in deposition and at trial. Therefore, Tennessee Farmers (TFMIC), and its adjuster always conceded that any verdict against Johnson would be significant and in excess of his \$25,000 policy limits. TFMIC's bad faith defense rested squarely in their ostensibly good faith belief that Johnson had no fault in causing or contributing to Moore's injuries. Which brings us to the second prong of evaluating the underlying claim: determining the comparative negligence of the underlying plaintiff and defendant/insured.

Liability of the Underlying Defendant/Insured and Comparative Fault

In the perfect case, liability of the underlying defendant would be crystal clear, and sometimes this happens. However, you are not likely to see bad faith failure to settle where a drunk driver runs a stop sign and ruins the career of a promising brain surgeon. You are more likely to see a nuanced situation where: 1) the liability is clear but the damages are at issue, 2) the damages are high and some liability may be allocated to the plaintiff and defendant, or 3) the damages are high and the liability allocation is unclear in that the plaintiff, defendant and/or a potential third-party may have some fault. In

these situations, you have to be certain that the underlying plaintiff's counsel developed every fact possible that could result in fault being placed on the insured. Preferably, the facts, including good circumstantial facts, will have been developed like those in the underlying action in Johnson

The Johnson case fell under example 3. In Johnson, the defendant/insured Robert Johnson, was southbound on four lane Highway 33. Each lane was 12 feet wide and there was a four foot wide median. Johnson was driving a 5 foot wide Mazda RX7, in the inside southbound lane, and potentially a few miles in excess of the speed limit. The underlying Plaintiff Moore was traveling northbound in a small pick-up truck also in the inside lane. As Johnson and Moore approached each other, on a straightaway with at least 500 feet of sight distance, an unidentified van pulled into Johnson's lane of travel. Johnson swerved out of his lane, across the median and several feet into Moore's lane resulting in a head-on collision between Moore and Johnson. Although the existence and actions of the van were independently confirmed by eyewitnesses, the van left the scene and was never found. Both Moore and Johnson were insured by TFMIC with policy limits of \$25,000/\$50,000 liability, uninsured motorist, and underinsured motorist coverage. The injuries to both Johnson and Moore were severe. Moore was without fault. Both had medical expenses in excess of their \$25,000 policy limits. Within weeks of the collision, TFMIC's adjuster noted in his claim file that the sole proximate cause of the collision was the phantom van and that liability would be denied relative to any claim by Moore against Johnson.

Based on these facts, another attorney might have just accepted Moore's uninsured motorist limits based on the van's action and subscribed to TFMIC's position as to Johnson's fault. McIntyre and modified comparative fault had just been adopted in Tennessee. Zane Daniel felt that Johnson could have and should avoided have the collision despite the actions of the phantom van. Therefore, he filed suit against Johnson and the van as John Doe. He knew that Moore's damages would be great enough that even if the jury put a small amount of fault on Johnson, 8-10%, the verdict would likely meet or exceed Johnson's policy limits and provide another \$25,000 in recovery for Moore. He set out to develop facts that would point to Johnson's fault. Through depositions and witness interviews, here is what Daniel and Moore's counsel discovered:

Moore's undisputed injuries included a fractured skull and resulting damages to the frontal lobes of his brain; a crushed right eye; broken nose; broken jaws; chipped teeth; upper lip ground off; fingers of his left hand partially ground off; scars on his face, shoulders, and hands; broken back; and a loss of hearing in his right ear. This resulted in memory problems; speaking problems; vision problems; difficulty playing his guitar; and a loss of smell and taste. His medical bills were stipulated to be \$ 75,000.00.

According to Johnson's testimony, John Doe, the driver of the phantom van, came about 6 feet into his lane; each lane of the highway was 12 feet wide; the paved median separating the northbound and southbound lanes was 4 feet wide; Johnson's vehicle was 5 feet wide; so Johnson swerved 10-15 feet to his left to collide with Moore; Johnson was traveling at 53-57 mph and the speed limit was 55 mph; there was no contact between the white van and Johnson; Johnson could remember the name of the rock group that was playing on the radio at the time of the crash; and Johnson never observed Moore approaching him in the on-coming lane before the crash.

Based on these facts, the underlying jury found Johnson 50% at fault and the John Doe van driver 50% at fault and awarded \$387,500. The verdict was for the full amount of the ad damnum.

The lesson to be learned from Zane Daniel's work in the Moore v. Johnson action is twofold. First, it is great example of how to vigorously develop facts on behalf of any plaintiff in an automobile case. Second, the insurer must view cases with high damages and nominal fault on their insured very seriously. They must consider all potentially relevant facts as to their insured's liability. Even those that their attorney feels are not relevant to the jury's analysis. In Johnson, defense counsel and the adjuster, despite Zane Daniel's arguments to the contrary, insisted that no matter the facts, a jury would never put any fault on Johnson. Trying to predict fault as to two parties is difficult for seasoned attorneys and adjusters. Where third-parties like a John Doe are involved, the ultimate comparative fault allocation is even more difficult to predict.

So as you collect the underlying facts, plan to question the adjuster about all facts tending to show fault on the insured. Never assume that the adjuster considered everything. In Johnson, the same claims adjuster handled both the liability and uninsured motorist claims of Johnson and Moore. Despite his involvement in all claims, he ultimately admitted that he only scanned the deposition summaries provided by Johnson's hired counsel. At the time of his deposition in the bad faith case, ten years after the collision, he did not know the measurements of the subject roadway lanes and median. He even argued that the measurements were incorrect despite the fact that they had been stipulated in the underlying trial. He then conceded that if he had known all of the actual facts, he might have been concerned for Johnson.

Insured's Actual Damages and Actions by the Underlying Plaintiff's Counsel

These two seemingly unrelated topics are combined because they are hopelessly linked in most bad faith failure to settle actions. You want the jury to know that your bad faith client has lain awake at night concerned that the pending judgment will be pursued; he or she has faced the prospect of borrowing money or selling assets to pay the judgment; or worse, he or she has considered filing bankruptcy. If the judgment has made it to the credit agencies, there may have been an effect on borrowing power or an increased cost of borrowing.

Whether this fear is real or imaginary, and therefore whether the jury will believe it, will depend on how the underlying plaintiff's counsel has handled the judgment and post-trial negotiations. Again, there is no way to emphasize enough the importance of reviewing the claims files and all documents exchanged between the insurer and underlying plaintiff's counsel. You want to know at least the following:

- Did counsel enter a timely judgment
- Did he provide a satisfaction of judgment
- Did he conduct post-judgment discovery of the insured's assets
- Did he maintain a relationship with the plaintiff after the verdict
- Did he correspond with plaintiff about the fact of a potential bad faith action
- Did he correspond directly with the insured about a bad faith action
- Will he maintain a fee interest if the insurer is forced to pay the excess judgment
- What is the relationship between his firm and your firm
- Is there an agreement to stay execution on the judgment
- Is there an agreement never to execute any judgment or to accept *any* monies paid by the bad faith defendant in satisfaction of the judgment

Once you know these facts, you must decide how they should be presented and how they will be received by the jury. In Johnson, judgment was timely entered. TFMIC paid Johnson's \$25,000 policy limits into the trial court shortly after the verdict. There was informal discussion, initiated by TFMIC, that TFMIC would pay some amount over the

limits to obtain a satisfaction of judgment which Zane Daniel declined. He referred Johnson to our firm. He explained to us at that time, and ultimately testified, that he considered himself entitled to a one-third fee from any additional monies paid by TFMIC as a result of the bad faith verdict. He testified that he had agreed not to pursue the judgment pending the outcome of the bad faith case, but he would pursue it should Johnson not prevail. TFMIC never asked him whether he entered an agreement with our firm to accept, in satisfaction of the judgment, *any* amount of money obtained from TFMIC as a result of the bad faith action. If they had, he would have testified that: 1) if TFMIC loses they have to pay all they owe my client plus interest, so yes, 2) if the case settles, it depends. Zane Daniel was simply satisfied that TFMIC owed the money. One of the last things Zane Daniel did before his untimely death was renew the judgment against Johnson.

The lesson here is that the underlying plaintiff's counsel is key to your success. He or she has to have competently handled not only the underlying trial but post-trial matters associated with the insurer's bad faith. You must be very careful how you document your relationship with his firm in the pursuit of the bad faith action. Remember, he will be key in explaining to the jury how he made a case for the underlying plaintiff which should have alerted the insurer to tender limits. Still, he will be painted with the same brush of suspicion as the other attorney witnesses in the case. The insurer will desperately try to show his bias by cross examining him on his referral of the insured to you, his involvement in fees, and any formal or informal agreements on how the judgment will be handled in conjunction with the bad faith action.

Insurer's Stated Bases for Refusal to Settle

Based on the underlying facts, you must determine whether the stated bases for refusal to pay policy limits was reasonable. These bases for denial can vary, and some if not all, will become defenses to the bad faith claim. They may include:

- Good faith or honest belief that the insured was not exposed beyond policy limits based on evaluation of liability and damages
- Advice of counsel
- Contractual or policy defenses and setoffs
- No demand made by plaintiff offering to settle within policy limits
- Insistence by insured that he was without fault and/or request that no payment be made

Analyzing the validity of these bases/defenses begins with understanding the basic relationship and duties between insurer and insured. The insured paid the insurer a premium and in return the insurer agreed to provide defense and indemnity according to the terms and conditions of its insurance policy. The insured owed the insurer a duty of full cooperation. In discharging its obligations under the policy, the insurer was required to exercise good faith and diligence in protecting the insured because the insurer maintained exclusive control over the investigation, settlement, and litigation of the claim. The insured surrenders to the insurer the right to investigate and compromise or contest claims knowing that, in event of a claim, the insurer will have its own interests to consider. But an insured also has a right to assume that his interests will not be abandoned merely because the insurer faces the prospect of a full loss under the policy. The relation is one of trust calling for reciprocity of action. The insured owes the duty of full co-operation -- the insurer the duty of exercising good faith and diligence in protecting the interest of its insured. Southern Fire & Casualty Co. v. Norris, 35 Tenn.

App. 657, 668, 250 S.W.2d 785, 790 (1952). In order to honestly discharge its duty to compromise within the policy limits, an insurer must exercise ordinary care and diligence in the investigation of the accident and the extent of the damage for which the insured may be held liable. Southern Fire & Casualty Co. v. Norris, 250 S.W.2d at 790.

Based on this authority, the trend has been for insurers to defend by affirmatively pleading that they had an honest belief that there was no threat of an excess verdict. Generally the honest belief will be supported by what is characterized as a diligent investigation, evaluated by a competent adjuster, and supported by advice of counsel. In your analysis, the honest belief defense, which was the primary defense of TFMIC in Johnson, must be assessed based on whether the adjuster actually reviewed *all relevant facts* concerning the insured's exposure, in a timely manner, and in conjunction with relevant legal principles, in particular comparative fault. In making a decision of whether to settle remember that:

the material question [is] not what the actual facts were but what facts relative to the accident and injuries . . . were known to the insurer and its agents which they should have considered in deciding whether it should or should not settle an action brought against the insurer as the reasonable thing to be done. State Automobile Ins. Co. v. Rowland, and Perry v. United States Fidelity & Guaranty Company, 49 Tenn. App. 674, 359 S.W.2d 1 (1962).

Your expert will be critical in countering the honest belief defense. He or she must be able to look at all relevant facts and state that the insurer could not have honestly believed there was no risk of an excess verdict if all of the facts and law had been considered.

Giving this opinion will be made a little harder, but not impossible, if as in Johnson, the insured's counsel advised the insurer not to pay limits. As discussed in more detail below, your expert can counter this issue by explaining to the jury the reality of the

tripartite relationship between the insured, insurer-hired counsel, and the adjuster. Once the jury understands the inherent potential conflict of the defense counsel defending the insured, but being paid by the insurer, and the independent duty of the insurer to evaluate the case and protect the insured, you should be able to overcome the advice of counsel defense.

Occasionally you will see a situation in which the insurer refused to pay based on a policy interpretation or alleged setoff provision. As a general rule, these policy defenses will have been dealt with through the filing of a declaratory judgment action. If such an action was filed during the pendency of the underlying claim, you must evaluate the behavior of the insurer before such an action was filed and after the action has been decided by the court. If the declaratory judgment action was filed to delay and harass, it could be considered along with all other circumstantial evidence in support of bad faith. If the insurer refused to proceed or negotiate consistent with court's ruling in the action, this would be clear evidence of bad faith. In any event, if such an action was filed in the underlying case, make certain you obtain all pleadings and testimony. At a minimum, you must make sure the pleadings and testimony are consistent with your bad faith claims and all other testimony, and they could provide useful evidence in the bad faith action.

Of course, if contractual defenses are raised in the bad faith action, and no declaratory judgment action was filed, you need to determine whether such contractual issues were ever actually raised or considered in refusing to settle. My best example of such a defense is TFMIC's motion for summary judgment in the Johnson case. TFMIC argued that its payment to Moore of his own uninsured motorist policy limits reduced the

\$25,000 liability limits payable under Johnson's policy to zero. This was not raised during underlying negotiations because the TFMIC adjuster would never have dreamed it up. Nonetheless, TFMIC argued that its policy setoff provision should have been construed such that its insured's (Johnson) liability limits were reduced or eliminated by the amount of any uninsured motorist coverage paid Moore. Not surprisingly, the motion was overruled. But such a maneuver may arise.

You should also pour over the applicable policy to see what if any provisions help with your bad faith claim. Specifically, you want to review the sections referring to the insurer's duties and when it becomes obligated to pay on behalf of the insured. Pay close attention to set off provisions. In Johnson, the adjuster had two competing \$25,000 policies. Prior to the underlying trial, he paid both Moore and Johnson their uninsured motorist limits based on the negligence of the phantom van. Based on the policy, and arguably then existing case law, if he had paid Johnson's \$25,000 liability limits to Moore and obtained a release for Johnson, instead of Moore's own UM limits, Moore would not have been entitled to receive any additional funds. That is, any liability limits received by Moore had to be set off against his own UM limits. Therefore, TFMIC could have paid one liability limit to Moore, one UM limit to Johnson and met all contractual obligations to both policyholders. Johnson would have been released and no bad faith would have occurred. The adjuster testified that he knew such a setoff provision existed when he paid Moore his own limits instead of Johnson's liability limits.

There is no portion of the policy, and no cases, requiring that a policy limits demand be made before an insurer has to tender limits or before bad faith can occur.

Therefore failure of the underlying plaintiff's counsel to demand policy limits prior to trial is not fatal. While you will prefer a case where a timely demand was made, remember that the insurer has an independent duty to evaluate the claim and exercise its rights under the policy. There is nothing to prevent the insurer from offering limits in the absence of such a demand.

In State Auto. Ins. Co. v. Rowland, 221 Tenn. 421 (Tenn. 1968), the Tennessee Supreme Court refused to hold as matter of law that bad faith could not be found in the absence of a policy limit demand:

We are asked to hold as a matter of law that an insurance company cannot be held liable for bad faith for failing to settle a case when there is no demand for settlement for an amount of money which is within the limits of coverage afforded by the policy of insurance. We are of the opinion that such is not the law nor should it be so

Finally, if the insured made strong statements about his own liability and/or made verbal or written requests that no settlement be made, the insurer will highlight these in its defense. But whether this is a real or imaginary threat to your bad faith action depends on the totality of the insured's action. Johnson testified that he did not feel he was at fault and that he did not think he could avoid the collision. But he conditioned his statements by saying that he was no expert, and he had counted on his insurer and insurer hired counsel to advise him if he was wrong. His personal counsel reiterated that position to TFMIC in his work to secure payment of Johnson's UM limits. Despite Johnson's position, he and his personal counsel ultimately demanded that TFMIC tender his limits to Moore based on principals of comparative fault. If the insured in your potential case made stronger statements or demands on the insurer, be aware of the Perry and Goings

cases. In Goings, there was a valid question of the insured's liability. The opinion states that:

It would seem strange to us indeed if an insured who had advice of private counsel and who maintained at all times, that he would win the suit against him, was not negligent, not liable and owed nothing to a plaintiff, could, after an adverse verdict is rendered, successfully claim that the insurer was guilty of bad faith for having taken the exact same position espoused by the insured. See Perry v. United States Fidelity & Guaranty Company 359 S.W.2d 1, (Tenn. App. 1962) Goings v. Aetna Casualty & Surety Co., 491 S.W.2d 847 (Tenn. App. 1972)

Filing Suit – Accrual of the Action - Statutory vs. Common Law Claims

Bad faith failure to settle is a tort claim. Therefore, the statute of limitations for filing the claim is one year. Although the reported cases have not dealt directly with how to calculate the date, it is clear that a claim arises when the damage occurs to the insured and that the insured does not have to actually pay the excess judgment in order for a claim to arise. In Southern Fire & Casualty Co. v. Norris, 250 S.W.2d 785 the Court of Appeals favorably cited the Wisconsin Supreme Court's holding that:

One who has been subjected to a judgment by reason of fraud practiced upon him by another standing in the relation of insurer is entitled to relief even though he has not paid the judgment. A cause of action in his favor arises and his damage occurs when the liability becomes thus fixed. Neither the right of action nor the measure of damages depends upon the fact of payment.

Out of an abundance of caution, I recommend filing actions for bad faith within one year from the date of the jury's verdict. Based on the Southern Fire language, if you cannot get the claim filed within one year from the verdict, you definitely should have it filed within one year from the entry of judgment which would be when the actual damage to the insured becomes fixed.

Do not rely on a pending appeal to toll your statute of limitations. While an appeal by the underlying defendant/insurer might obtain a new trial and avoid bad faith for the insurer, it would likely not affect the statute date for the bad faith claim. While I have found no reported cases where the statute date has been argued, I always assume that the insured was on notice of potential bad faith at the time of the verdict and/or entry of the judgment. If an appeal is pending at the end of the first year, file the bad faith claim and have it stayed pending the outcome of the appeal.

Finally, remember that bad faith actions survive the death of the insured. See Tenn. Code Ann. § 20-5-120(a):

Any cause of action belonging to an insured person against the insured's automobile liability insurance carrier, based upon the negligence or bad faith of such insurance carrier in failing or refusing to settle any claim against such insured person within the limits of the insured's automobile liability insurance policy, shall survive the death of such insured person and shall pass to the insured's personal representative.

In preparing the complaint, I do not include many, if any, of the facts from the underlying case. I simply identify the plaintiff as an insured of the defendant; state that an excess judgment occurred; and allege that the excess was proximately caused by the bad faith actions of the defendant. In alleging the bad faith, at a minimum, I will plead that the insurer was guilty of bad faith by failing to conduct a proper investigation; failing to evaluate insured's exposure to liability under comparative fault; failing to evaluate the claim using internal and industry-wide standards for claims evaluation and settlement; failing to consider the insured's interest at least equally to its own in refusing to settle; subjecting the insured to an unreasonable risk of personal liability; and failing to reasonably negotiate a compromise settlement based on knowledge of facts which should

have notified the insurer that an excess judgment could or would occur. In the absence of fraud, this will be sufficiently specific. Finally, make sure to pray for the full amount of the underlying excess judgment plus all accrued interest since the entry of the underlying judgment. It will have continued to accrue at 10% simple interest per annum since the entry of judgment.

In the context of bad faith refusal to settle, I have been asked whether the bad faith statute, Tenn. Code Ann. § 56-7-105, and the Tennessee Consumer Protection Act should be pled in the alternative given their potential for a 25% penalty and treble damages, respectively. My question in return is do you have *affirmative proof of intentional acts and/or fraud* by the insurer in refusing to settle? If not, I am not interested in statutory remedies. One of the main points of the Johnson opinion is that bad faith may be proven by circumstantial evidence showing that the insurer's conduct in refusing to settle was more than negligent but less than fraudulent. In Johnson, TFMIC wanted desperately to have the Supreme Court adopt a definition of bad faith which required an insurer to act intentionally, maliciously or with moral obliquity in refusing to settle. The Court declined. Therefore, the plaintiff's burden in proving bad faith refusal to settle is to show behavior greater than simple negligence. For example, indifference towards the insured's financial interest. I do not want to be held to the definition of bad faith as envisioned by Tenn. Code Ann. § 56-7-105, and as referred to in footnote one of the court's opinion in MacLean:

In Norris, as in most of the cases dealing with this question, the courts generally use the phrase "bad faith" for behavior by an insurer that can support an award of damages in excess of the policy limits. However, this sort of bad faith must be distinguished from the bad faith dealt with by Tenn. Code Ann. § 56-7-105. That

statute permits the imposition of punitive sanctions against insurers that refuse to make timely payments to policyholders for losses they suffer under their policies. As the trial court in this case pointed out in refusing to assess the statutory penalties against the insurer, "bad faith" under the statute denotes far more egregious behavior than does the lack of good faith and due diligence that must be shown before an insurer can be required to indemnify its insured against a judgment that exceeds the policy limits. MacLean v. Tennessee Farmers Mut. Ins. Co., 1994 Tenn. App. LEXIS 735.

As for the Consumer Protection Act, which of course covers insurance practices via Myint v. Metropolitan Gov't, 1996 Tenn. App. LEXIS 429, the only real incentive is the potential for treble damages. But remember that in order to win treble damages you have to satisfy the trial judge, not the jury, that the insurer acted knowingly or intentionally in violating the statute. Tenn. Code Ann. § 47-18-109. The usual level of behavior in a bad faith failure to settle case will not suffice.

If you plead either statute in the alternative, you will ultimately have to elect a course and therefore a remedy. If you have a fraud case, try a fraud case. But if as I suspect, you lack proof of fraud in refusing to settle, your focus should be pleading the tort of bad faith and finding evidence of negligence and indifference toward the insured.

Discovery

As discussed above, there are numerous pre-suit documents which you must collect. However, once suit is filed, the task of making sure you received every piece of information from the insurer and its hired counsel begins. Opinions vary as to whether you should first depose a representative of the insurer to determine its document retention policies, document categories, etc. Personally, I want the first deponent to be the insurance adjuster that handled the subject claim for the defendant insurer. His or her deposition will be exhaustive. It should be conducted the same day as the deposition of

the bad faith plaintiff so that he or she never has the advantage of having reviewed any other testimony in the case. Frankly, the adjuster should know everything you need to know about the insurer's claims handling procedure and documentation and retention policies. If not, his or her lack of knowledge may be used to your advantage. In fact, if you depose an adjuster that purports to have a lack of knowledge on any subject vital to proper claims handling, then consider deposing his or her supervisor to nail down the actual claims handling procedure and tuck it away for cross examination at trial. I suggest that this is unlikely. What you are more likely to see is an adjuster prepared to defend his or her decisions based on stated internal procedures and evaluation guidelines and upon the facts of the case. Therefore, you need to be armed with all documents and your timeline prior to the deposition. Here is a non-exhaustive summary of what you need to obtain for completion of the timeline and proper preparation for depositions.

Written Materials

- Claims files including associated uninsured/underinsured motorist claim files
- Certified copies of all applicable policies
- Claims manuals showing the insurer's procedures for setting reserves, claims investigation, evaluation and settlement
- Promotional material regarding the applicable policies issued by the insurer or any agent
- Documentation regarding adjuster compensation and incentive plans for claims handling
- Adjuster seminar and training materials
- All documents concerning reserves and/or reinsurance as to the claim

E-Discovery

It is no secret that adjusters are trained to record and/or furiously type a record of all conversations they have with individuals regarding a given claim. Since all insurers

handle information somewhat differently, you have to make sure your discovery requests are broad enough to encompass all relevant e-mails, internal memoranda, reserve settings, typed activity summaries or any other data which may only be stored digitally. If you believe you are missing any category of document or digital information, depose a records custodian or adjuster other than the main adjuster on the subject claim. Use it specifically to determine the flow and storage of claims information within the company.

Deposing the Claims Adjuster

Once all of the above-referenced documents have been received and a timeline and case theory have been formulated, the adjuster can be deposed. Because of the amount of information this deponent will have, it is nearly impossible to outline all of the issues that will need to be covered. The following is again a non-exhaustive list of topics on which the adjuster should be questioned:

- **Education** – formal and all training within the industry.
- **Work History** – Experience in adjusting auto liability claims, experience in adjusting claims based on modified comparative fault.
- **Claims Handling Procedures**
 - Setting reserves
 - Adjuster's settlement authority
 - Claims evaluation
 - Usually a four step process: 1) verify coverage, 2) investigate, 3) assess damages and liability, 4) settle or deny. Identify the process and take adjuster through each step of the evaluation. Have him justify each alleged underlying decision.
- **Investigation** – What is the normal procedure for investigation; what statements taken; measurements taken, photos; reconstruction; etc.
- **Assessing damages**- What did adjuster obtain on his own; what provided by plaintiff and defense counsel; identify each element considered and value or value range assigned.
- **Assessing liability** – How did he allocate fault in the case to each potentially liable party; what was the basis for each allocation; any similar settlements or jury

- verdicts upon which he relied in assessing liability and fault allocation; was it a best guess.
- **Settle or deny** – state each and every fact upon which you relied in refusing to pay the policy limits; when was the decision made; did you ever re-evaluate that position; was it based on any policy provisions; any other employee of insurer participate in or affect the decision not to settle.
 - **Hired counsel** – how long known; how long worked with; have personal relationship; what is counsel’s duty to insurer and insured; to what extent may adjuster direct activities of counsel; does adjuster have duty to continually re-evaluate case based on reports of counsel; what was counsel’s settlement advice; did counsel communicate to adjuster foreseeable awards of damages and/or liability allocations before or after the refusal to settle or prior to trial; did counsel accurately and timely report case developments and facts to adjuster; did adjuster actually review all information as developed by counsel.
 - **Interaction with insured and insured’s personal counsel**
 - **Relationship with underlying plaintiff’s counsel**
 - **Participation at trial**

Deposing Insured’s Counsel

Consider the deposition of insured’s hired counsel to be the next most important witness. You will want to depose him/her after the adjuster and after you have retained and conferred with your own expert. Since one of your experts, or your sole expert, will also be an insurance defense attorney, this is your chance to have insured’s counsel lend credibility to your expert’s opinions. Without telegraphing your expert’s testimony, ask questions that will lead him/her to agree with your expert on such broad topics as normal claims handling procedures; the tripartite relationship; the reasonable evaluation of the subject and similar claims; duty of insurer to evaluate a claim independent of hired counsel’s advice, etc. If the insurer relies on advice of counsel as a defense, it will make it hard for the insurer’s retained expert to criticize both your expert and insured’s hired counsel.

Then move on to the relationship between the hired counsel and the insurer. In Johnson, the attorneys hired to defend Johnson and TFMIC in the UM claims had been working with TFMIC for most of their careers. They made a good percentage of their annual income by defending TFMIC insureds. Develop this in order to show bias. Then use the same questions with the counsel as you used with the adjuster: how long known adjuster; how long worked with adjuster; have personal relationship; what is counsel's duty to insurer and insured; to what extent may adjuster direct activities of counsel; does adjuster have duty to continually re-evaluate case based on reports of counsel; what was counsel's settlement advice; did counsel communicate to adjuster foreseeable awards of damages and/or liability allocations before or after the refusal to settle or prior to trial; did counsel accurately and timely report case developments and facts to adjuster; did adjuster actually review all information as developed by counsel.

Selecting and Deposing Experts -Using The Seasoned Attorney as Insured's Expert

In every bad faith failure to settle case, there exists an underlying relationship between the insured, insured's company-hired defense counsel, and the claims adjuster. This relationship has been referred to as a dual-agency relationship in that the insurer-hired counsel has duties to both the insurer and the insured. It has also been referred to as the tripartite relationship. See Givens v. Mullikin, 75 S.W.3d 383, 395 (Tenn.2002). In Givens, the Court held that circumstances exist, because of the reality of the insurer-insured-counsel, where the usually independent counsel for the insured serves as the insurer's agent. Id. It is **imperative** that the jury understand this relationship. The jury must understand the duties that the parties in this relationship owe to one another and

how they work together to move a claim through an insurance company, to defense counsel and into the hands of a jury. If you allow the insurer to convince the jury that hired counsel is completely independent and that he/she has the final say in deciding, based on the merits of the case, whether the case should be settled, you will likely lose your bad faith case. The way to avoid this mistake is to carefully select your expert(s) and to have your expert(s) fully explain the relationship within the context of the underlying case and his/her opinions.

Qualifications

Your chosen expert needs to be qualified to explain the relationship from the perspective of all three parties. You may choose to hire an expert claims adjuster to discuss industry standards for claims evaluation and a defense attorney to discuss the duties of the insured, insurer and defense counsel. However, I recommend that you hire one very competent attorney that has extensive experience in defending cases on behalf of insurance companies. Although not every attorney will qualify, you are looking for the following areas of experience:

- Evaluation of claims for settlement and trial in conjunction with adjusters and other insurance employees
- Work for multiple statewide or national insurers
- Knowledge of investigative techniques, use of accident reconstruction etc.
- Knowledge of general auto liability policies, policy defenses, and declaratory judgments
- Knowledge of the underlying negligence laws and the law of bad faith
- Extensive experience in negotiating and trying auto cases as plaintiff and defense counsel
- Participation in other bad faith actions
- Board Certified Civil Trial Specialist
- Memberships and ratings

- Published

Anticipated Opinions

Based on his or her experience, you should be able to obtain qualified opinions on the following areas:

- Industry standards for claims evaluation
- Sufficiency of investigation and industry standards
- Accuracy of damages and liability evaluation
- Duties of the insurer and insured
- Insurance policy analysis
- Comparative fault analysis
- The tripartite relationship and Givens
- Ultimate opinion as to bad faith by the insurer

The Bad Faith Trial

Pretrial Stipulations

- All documents and photos
- The maximum damages

Motions in Limine

- The underlying fee arrangement
- The enforceability of the judgment
- Post-trial negotiations
- Competing UM/UIM Claims

Plaintiff's Advantage - Juror Bias and Voir Dire

For those of you who have attended an AAJ (formerly ATLA) seminar on jury bias or on why ATLA changed it's name, you know that we lawyers are not held in high regard by the general public. Personal injury plaintiffs, as a general rule, are viewed with suspicion, and non-economic damages are often seen as a windfall by jurors.

Fortunately, insurers and insurance adjusters are not as beloved as Mother Teresa either.

While I cannot reiterate all of AAJ's research in this seminar, these seemingly self-

evident axioms, now proven empirically by AAJ, are informative on how to approach the bad faith trial.

In my experience, you begin the trial with the following advantages:

- The defendant is an insurance company;
- Most jurors have had what they perceive to be a bad experience with an insurer;
- Most jurors have insurance, pay significant premiums, and have expectations of their insurers;
- You allege that the insurer acted unfairly and in its defense the insurer will rely on its own attorneys to justify its actions;
- You have a finite and justified damages figure which you seek to recover;
- You do not have to, and cannot, offer proof of any emotional or physical injury to your client; and
- Your client will not receive any monies. The money will go to an injured individual that was only seeking to recover your client's insurance coverage.

This is why I enjoy the true bad faith claim. You are able to avoid the jury's natural bias or discomfort with claims of emotional pain and suffering; determining a fair compromise of non-economic damages; and a large award against an individual guilty of normal negligence. You also have a relatively unpopular defendant that can counter the jury's bias as to plaintiffs and their attorneys.

Try to play to these advantages in voir dire and in opening statement. I suggest that in addition to your normal questions, you work in a few of the following:

- Has anyone had what they would describe as a bad experience with an insurance company. Without belaboring the point ask what happened and what he or she had *expected* to happen.
- Do you know your automobile policy limits. Did you know you may become personally liable for a judgment against you in excess of your limits.

- For those who may have been a defendant in an automobile accident case, did your insurance company choose your attorney. You have a choice. Know why they chose him or her.
- Did he/she explain his/her duties to you versus duties to the insurance company. What did you understand his/her job to be relative to you and your insurer.
- Do you understand that any award in this case will not be received by my client but will be used to satisfy a judgment against him in another lawsuit.

Creating Suspicion in Opening Statement

- Premiums paid – Settlement denied
- High damages – Low limits
- The Tripartite Relationship – Dual Agency
- Reliance on Advice of Counsel

Proper Jury Instructions

There is no pattern instruction for the tort of bad faith. The case law prior to Johnson focused mainly on what does not constitute bad faith. Fortunately, the Johnson Court did not redefine bad faith, but it also did not clarify the definition within the context of the disjointed bad faith decisions of the 1950s-70s. Therefore, you will need to construct an accurate proposed jury charge while fending off the insurer's requested instructions. I suggest that your proposed instructions cover the following:

- Underlying auto negligence law and comparative fault
- Duties of insurer
- A definition of bad faith - More Than Negligence, Less Than Fraud
- Proof of bad faith by circumstantial evidence
- Insurer's Reliance on Advice of Counsel
- Insurer's Honest Belief (Limit Alford to its facts)
- Calculation of Damages

Duties of the Insured and Insurer

The insured owes his insurer a duty of honesty and full cooperation. Southern Fire and Cas. Co. v. Norris 250 S.W.2d 785 (Tenn.Ct.App.1952).

An insurer owes a duty to of good faith and fair dealing to every insured. To discharge this duty, an insurer must exercise ordinary care and diligence in the investigation of the accident *and* the extent of the damage for which the insured may be held liable. Southern Fire and Cas. Co. v. Norris 250 S.W.2d 785, 786; 790-791 (Tenn.Ct.App.1952) citing, American Mutual Liability Ins. Co. v. Cooper, 5 Cir., 61 F.2d 446 (emphasis supplied).

Care and diligence in investigation requires the company to investigate the claim to such an extent that it would be in a position to exercise an honest judgment as to whether the claim should be settled. Perry v. United States Fidelity & Guaranty Company, 49 Tenn.App. 674, 359 S.W.2d 1, 6 (Tenn.Ct.App.1962). In the investigation, the material question is not what the actual facts were but what facts relative to the accident and injuries to the plaintiff were known to the insurer and its agents which they should have considered in deciding whether it should or should not settle. Id.

Where the claim against the insured exceeds his/her policy limits there is a possible conflict of interest between the insure and the insured, and the insurer's conduct is therefore subject to closer scrutiny than that of the ordinary agent. Tennessee Farmers Mutual Ins. Co. v. Wood, 277 F.2d 21, 35 (6th Cir. 1960).

Definition of Bad Faith and Proof by Circumstantial Evidence

Bad faith refusal to settle is defined, in part, as an insurer's disregard or demonstrable indifference toward the interests of its insured. See S. Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785, 790-91 (Tenn. Ct. App. 1952).

Bad faith is generally proven by circumstantial evidence. Facts which may support a finding of bad faith are negligence, or lack of diligence, in the investigation of the case; an indifference to the interest of the insured; failure of the insurer to consider the insured's interest equal to its own; willingness on the part of the insurer to gamble with the insured's money in an attempt to save its own money, and failure to keep the insured advised of the status of the case. Aycock Hosiery Mills v. Maryland Casualty Co., 11 S.W.2d at 892; Goings v. Aetna Casualty & Surety Co., 491 S.W.2d at 851; Southern Fire & Casualty Co. v. Norris, 250 S.W.2d at 791; Coppage v. Fireman's Fund Ins. Co., 379 F.2d 621, 623 (6th Cir. 1967) Roberts v. American Fire & Casualty Co., 89 F. Supp. 827 (1950); Vanderbilt University v. Hartford Accident & Indemnity Co., 109 F.

Supp. 565 (1952); Tennessee Farmers Mutual Ins. Co. v. Wood, 277 F.2d 21, 34 (6th Cir. 1960).

Negligence alone will not constitute bad faith, but it may be considered along with other circumstantial evidence to suggest an indifference toward an insured's interest. Southern Fire & Cas. Co. v. Norris, 250 S.W. 785, 790-791 (Tenn.Ct.App. 1952).

Reliance on Counsel

Reliance on the advice of counsel is just one factor to review in considering whether the insurer acted with due diligence and does not insulate the insurer from a bad faith excess judgment. Cotton States Mutual Ins. Co. v. Trevethan, 390 So. 2d 724, 728 (Fla. Dist. Ct. App. 1980), See dissenting opinion of Judge Sharon Lee, Johnson v. Tennessee Farmers Mut. Ins., 2005 Tenn. App. LEXIS 142, citing Annotation, Reliance On, Or Rejection Of, Advice Of Counsel As Factor Affecting Liability In Action Against Liability Insurer For Wrongful Refusal To Settle Claim, 63 A.L.R. 3d 725 (1975).

Honest Belief

This is the instruction which the insurer will most want and which you must avoid or make completely accurate. I suggest requesting a simple instruction as follows:

The insurer cannot escape liability for bad faith by making only what it believes to be an honest dollar evaluation of the claim against its insured. Goings v. Aetna Casualty & Surety Co., 491 S.W.2d at 850-851 (Tenn. Ct. App. 1972).

However, your bad faith defendant will invariably seek a broader instruction that purports to define "honest belief" as any unfounded mental impression on the part of the insurance adjuster. Specifically, the insurer may suggest an instruction stating that bad faith does not exist where: 1) the insurer relies on advice of agents, adjusters, eminent lawyers and facts revealed by careful examination of witnesses, and 2) a claim is denied in the presence of an honest belief that insured's act was not the cause of the accident and that all liability could be avoided. Such an instruction can only be devised by taking substantial liberties in interpreting certain authorities while completely ignoring whether

the cases are in any way factually analogous. Do not let Perry and Alford be construed against you. Argue to limit their application by showing the court their procedural history and facts.

At most the Perry holdings are limited to the very specific facts of that case. At the least, Perry was not intended to set forth a general defense to bad faith in which simple reliance on an investigation and qualified employees would, as a matter of law, defeat a claim of bad faith. Perry 359 S.W. 2d at 1-6. What the court saw in Perry was a radically different set of facts from the average bad faith case. In Perry, Mr. Perry sued the insurer to recover reimbursement of payment by him of liability in excess of coverage based upon alleged negligence of the insurer in investigating and defending and bad faith in failing to settle within policy limits. The trial judge directed a verdict for the insurer. Perry 359 S.W. 2d at 1-8.

In the underlying case, Perry had been sued due to an incident involving his tow truck by Ben Griffith and Cleveland Mangham. The liability issue centered on whether the tow truck and vehicle in tow entered the Griffith and Mangham's lane of travel or vice versa. There were no independent eyewitnesses. In the underlying case, Mr. Mangham, represented by attorney Harry Camp, only sued for property damage and his case was heard in General Sessions Court. That trial was attended by the insurer's top claims agent, Mr. Zinn, as well as Mr. Molloy the attorney for Mr. Perry. All of that General Sessions trial, which included considerable facts surrounding the accident, were recorded. In addition to the sworn testimony in that trial, multiple adjusters and attorneys extensively investigated the case and took depositions in the Mangham case.

Furthermore, Mr. Camp and Mr. Green, another attorney hired to represent Perry, both testified that the case was always too close to call and one for the jury. Worse, Mr. Molloy gave an opinion stating that he had reviewed the record (in the underlying case) and could find nothing in it which would convince him the case should have gone to the jury, and he intimated that in his opinion it was a gross miscarriage of justice by the jury. Id.

The Court then held that a “finding of bad faith has to be from the circumstances and the proof, with inferences to be drawn therefrom, as a fact to arrive at the conclusion of bad faith, and it can not be arrived at by speculation, imagination and afterthoughts of immaterial matter.”

On that basis and because of all of the prior trial, substantial activity and opinions by attorneys representing those alleging bad faith the Court stated “there has never come a record to this Court that shows that there was a more careful investigation from all the facts of the case and the law applicable to it.” The Court then did not create any bad faith standard, but rather found that:

There is, as we see it, no way to find the defendant **in this case** guilty of bad faith, when they have the advice and counsel of claim agents, adjusters and eminent lawyers, based upon facts revealed by careful investigation, careful examination of witnesses under the right of discovery of evidence, and have reached an opinion that there is no liability on the part of the carrier of insurance. . .

Perry 359 S.W.2d at 18-22 (emphasis supplied).

In context, Perry then did not set forth a general defense to bad faith in which simple reliance on an investigation and qualified employees would, as a matter of law, defeat a claim of bad faith. Rather such an incredible effort by all involved, and the

admission by plaintiff's own attorneys that the case was bad from the start, was indicative of that insurer had met the standard of care in making a good faith evaluation of the case.

Similarly, Alford was not intended to absolve insurers from bad faith by the simple pronouncement that they acted in good faith with an honest belief. In Alford, an insured while driving struck and injured a boy on a bicycle. The insurance company/bad faith defendant investigated and hired an experienced attorney to defend the insured. This is all we know about the insurance company's actions. Alford, 469 S.W.2d at 381-382. The analysis then turns to whether the *attorney*, and thereby the insurer, acted in bad faith by failing to interview the investigating police officer and by refusing to negotiate with the original plaintiff. In his defense, and the insurer's defense, the attorney simply stated that he felt he did not need the police officer and he thought he could win the case. Id. The plaintiff presented no countervailing testimony. Id. at 383-384. Unfortunately Alford is not helpful on what constitutes an honest belief since the Court, in the absence of other proof, was forced to take the attorneys assertion as true. On these facts, or lack thereof, the Court held that refusal to negotiate alone is not bad faith and affirmed the underlying verdict. Id. This rather abbreviated, factually deficient opinion offers little help in determining when an *insurer* might have acted in bad faith.

Thus while Perry and Alford will likely be relied upon, they must be considered on their facts. And though Alford was the Tennessee Supreme Court's most recent opinion on bad faith prior to Johnson, it is unlikely that it was intended to be an exhaustive pronouncement on the issue. Both Perry and Alford require that the insurer act

with an honest belief that there will be no liability placed on the insured. Finally, neither case considered bad faith in the context of comparative fault after McIntyre v. Ballentine.