Missouri

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Causes of Action

Is there a statutory basis for an insured to bring a bad faith claim?

A "vexatious refusal" to pay benefits creates liability under Mo. Rev. Stat. §§375.420, 375.296 (non-Missouri insurers). An insured cannot bring a vexatious refusal claim in automobile liability cases. Mo. Rev. Stat. §375.420. The vexatious refusal to pay statute, Mo. Rev. Stat. §375.420, provides for statutorily calculated damages, "not to exceed twenty percent of the first fifteen hundred dollars of the loss, and ten percent of the amount of the loss in excess of fifteen hundred dollars and a reasonable attorney's fee." Certain Missouri mutual insurers, as provided for in Mo. Rev. Stat. §§380.011 and 380.221, are not subject to the vexatious refusal statutes. Mo. Rev. Stat. §380.511.

For purposes of the statute, an insurer's failure to pay a claim is "vexatious" when it is "willful and without reasonable cause or excuse, as the facts would have appeared to a reasonable person before trial." *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39, 42 (Mo. 1976).

There is no statutory basis for an insured's action against the insurer for bad faith refusal to settle claims against the insured. A bad faith refusal to settle a claim is a common law action, recognized in *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750 (Mo. 1950).

Can a third party bring a statutory action for bad faith?

Missouri has recognized that third-party beneficiaries who are covered under a policy have standing to bring vexatious refusal to pay claims pursuant to Mo. Rev. Stat. §375.420. *Drury Co. v. Mo. United Sch. Ins. Counsel*, No. ED100320, 2014 Mo. App. Lexis 319 (Mo. Ct. App. Mar. 25, 2014).

Missouri courts have not directly addressed whether a third-party non-beneficiary has standing to bring a claim under Mo. Rev. Stat. §375.420. But the court in *Drury* inferred that only primary and third-party beneficiaries have standing to bring a bad faith action against the insurer. *Drury Co. v. Mo. United Sch. Ins. Counsel*, No. ED100320, 2014 Mo. App. Lexis 319, at *3 (Mo. Ct. App. Mar. 25, 2014).

The Missouri Unfair Insurance Practices Act, codified at Mo. Rev. Stat. §375.936, does not support a private cause of action. *See*, *e.g.*, *Tufts v. Modesco Inv. Corp.*, 524 F. Supp. 484 (E.D. Mo. 1981).

A judgment creditor can bring a garnishment action to recover the policy funds. *Johnston v. Sweany*, 68 S.W.3d 398 (Mo. 2002).

Is there a common law cause of action for bad faith?

Not for claims based on the failure to pay policy benefits. Mo. Rev. Stat. §375.420 provides the exclusive remedy for extracontractual damages resulting from an insurer's failure to pay an insurance claim for a loss incurred by its own insured. *See*, *e.g.*, *Halford v. American Preferred Ins. Co.*, 698 S.W.2d 40 (Mo. Ct. App. 1985); *see also Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62 (Mo. 2000).

However, there is a common law cause of action for bad faith refusal to defend, *see Butters v. City of Independence*, 513 S.W.2d 418 (Mo. 1974), and for the failure to settle a third-party claim under a liability policy. *See*, *e.g.*, *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750 (Mo. 1950). A third party may not bring a common law bad faith claim against an insurer absent an assignment of the insured's right to bring such a claim. *See*, *e.g.*, *Linder v. Hawkeye-Sec. Ins. Co.*, 472 S.W.2d 412 (Mo. 1971). The Missouri Supreme Court has held that bad faith failure claims

are assignable by the insured to third parties, including other insurers. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 829–30 (Mo. 2014).

What cause of action exists for an excess carrier to bring a claim against a primary carrier?

An excess insurer may not directly bring a claim for bad faith failure to settle against a primary insurer. *American Guar. & Liab. Ins. Co. v. U.S. Fid. & Guar. Co.*, 693 F. Supp. 2d 1038, 1048 (E.D. Mo. 2010). But the Missouri Supreme Court has concluded excess carriers may bring a bad faith failure to settle against a primary insurer based on assignment, the theory of equitable subrogation to the insured's claim, or contractual/conventional subrogation. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 829–833 (Mo. 2014). Primary insurers do not owe a duty of good faith directly to excess carriers. *Id.* at 833.

What causes of action for extracontractual liability have been recognized outside the claim handling context?

Defamation. In *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62 (Mo. 2000), the Missouri Supreme Court stated that the insured's tort claim for defamation was not dependent on the elements of the contract claim. *Id.* at 68. It would be possible for the insurer to defame the insured even if it decided to pay the insured's claim. *Id.* For example, an insurer could announce that it believed its insured was an arsonist, but was going to pay the claim to avoid litigation costs. *Id.* Thus, an insured's defamation claim is based on conduct distinct from conduct that might constitute a breach of contract. *Id.* The court was not willing to infer that the legislature intended, by providing the vexatious refusal to pay remedies in Mo. Rev. Stat. §375.420, to immunize insurers against all other claims made by an insured. *Id.*

The Eighth Circuit Court of Appeals has suggested that an insured could raise a claim for intentional infliction of emotional distress, although the court rejected the claim on the merits. *Safeco Ins. Co. of America v. Costello*, 799 F.2d 412 (8th Cir. 1986) (applying Missouri law).

An insurer who denies coverage and refuses to defend and indemnify an insured may be liable for the entire judgment entered against its insured regardless of the insurer's limit of liability or whether an extracontractual or bad faith claim was asserted by the insured. *Columbia Cas. Co. v. HIAR Holding, LLC*, 411 S.W.3d 258, 273–274 (Mo. 2013).

Damages

Are punitive damages available?

Yes. In a first-party vexatious refusal to pay claim, the penalty amount may be recovered, limited to the amount allowed by Mo. Rev. Stat. §375.420 ("the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed twenty percent of the first fifteen hundred dollars of the loss, and ten percent of the amount of the loss in excess of fifteen hundred dollars and a reasonable attorney's fee").

In connection with a bad faith failure to settle action, *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 756 (Mo. 1950), authorizes an award of punitive damages upon a showing that the insurer acted "maliciously, willfully, intentionally or recklessly" in causing injury to the insured. "Punitive damages are justified where the evidence supports an inference that the insurer acted with reckless indifference to the interests of its insured." *Shobe v. Kelly*, 279 S.W.3d 203, 213 (Mo. Ct. App. 2009) (affirming punitive damages award in bad faith failure to settle action based on, *inter alia*, inadequate investigation prior to erroneous denial of coverage).

Are attorneys' fees recoverable?

Yes. Attorneys' fees are recoverable for vexatious refusal claims under Mo. Rev. Stat. §375.420. Furthermore, an award of attorneys' fees without a penalty award (and vice versa) is permitted. *De Witt v. Am. Family Mut. Ins. Co.*, 667 S.W.2d 700, 711 (Mo. 1984).

In a bad faith action for failure to settle within policy limits, the Missouri Supreme Court rejected a claim for statutory attorneys' fees because a bad faith claim is a tort action, not an action on a contract. *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 756 (Mo. 1950). But, in a bad faith failure to settle

action, the insured may recover as actual damages the attorneys' fees paid in defense of the underlying action following the wrongful denial of settlement or defense. *See Shobe v. Kelly*, 279 S.W.3d 203, 212 (Mo. Ct. App. 2009).

Are consequential damages recoverable?

While consequential damages are not available under Mo. Rev. Stat. §375.420, consequential damages may be recovered on the underlying breach of contract claim. *See Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 67 (Mo. 2000).

Missouri courts have not specifically addressed whether consequential damages may be recovered in bad faith refusal to settle claims. Such a claim would appear inconsistent with the general rule that damages recoverable in such an action "equal the amount of money which the insured was forced to pay on the claim not settled by virtue of a judgment of liability in excess of the policy limits." *Dyer v. Gen. Am. Life Ins. Co.*, 541 S.W.2d 702, 704–05 (Mo. Ct. App. 1976).

Can a plaintiff recover damages for emotional distress?

While damages for emotional distress are not available under Mo. Rev. Stat. §375.420, in a bad faith case for failure to settle within policy limits, an insured can recover damages for emotional distress. *See Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 590 (Mo. Ct. App. 2008).

Elements of Proof

What is the legal standard required to prove bad faith in a first-party case?

For the purposes of Mo. Rev. Stat. §375.420, an insurer's failure to pay a claim is "vexatious" when it is "willful and without reasonable cause or excuse, as the facts would have appeared to a reasonable person before trial." *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39, 42 (Mo. 1976); *Hocker Oil Co. Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, 523 (Mo. Ct. App. 1999) (holding handling of claim is not vexatious where there is open question of law or fact). In *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 457 (Mo. 2006), the Missouri Supreme Court reaffirmed that under Missouri law, the elements of vexatious refusal of an insurance carrier to pay a claim are: (1) the existence of an applicable insurance policy; (2) a refusal by the insurer to pay; and (3) the refusal to pay was without reasonable cause of excuse. In *De Witt v. Am. Family Mut. Ins. Co.*, 667 S.W.2d 700, 710 (Mo. 1984), the court also noted that an insurer can be liable under the statute whenever it displays a vexatious and "recalcitrant" attitude, a standard largely in the mind of the beholder.

What is the legal standard required to prove bad faith in a third-party failure to settle a claim?

A bad faith failure to settle claim requires proof of the following elements: the "insurer: (1) reserves the exclusive right to contest or settle any claim; (2) prohibits the insured from voluntarily assuming any liability or settling any claims without consent; and (3) is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy." *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 827 (Mo. 2014). The existence of a settlement demand is not an element of the cause of action, but is highly relevant in determining whether the insurer acted in bad faith in refusing to settle the cause of action. *Id.* at 827 n.5. The requirement of an excess verdict or settlement, however, is not required in order to maintain an action for bad faith refusal to settle. *Id.* at 828. Furthermore, a bad faith refusal to settle claim can still be maintained even if the insurer ultimately does settle within or tender its policy limits toward settlement. *Id.*

Bad faith is a state of mind, and consists of the insurer's intentional disregard of the financial interests of its insured in the hope of escaping its responsibilities under the policy. *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 754 (Mo. 1950). Negligence is not sufficient to state a claim for bad faith. *Id.* at 753.

Is there a separate legal standard that must be met to recover punitive damages?

Yes. In a failure to settle case, punitive damages are available when an insurer acted maliciously, willfully, intentionally or recklessly. *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 756 (Mo. 1950). An allegation of

bad faith on the part of an insurer is insufficient, in itself, to state a claim for punitive damages. *Dyer v. Gen. Am. Life Ins. Co.*, 541 S.W.2d 702, 706 (Mo. Ct. App. 1976). Punitive damages require a showing that the defendant committed a wrongful act, knowing it to be wrongful, without just cause or excuse. *Id.*

Does a bad faith claim require evidence of a pattern or practice of unfair or deceptive conduct?

No. While Missouri courts have not specifically addressed this issue, it is clear that neither the language of Mo. Rev. Stat. §375.420 nor the standard established for bad faith failure to settle cases require evidence of a pattern or practice of unfair or deceptive conduct. *See Shobe v. Kelly*, 279 S.W.3d 203, 211 (Mo. Ct. App. 2009) (concluding sufficient evidence supported bad faith award without discussing evidence of any unfair or deceptive conduct by insurer).

On what issues is expert evidence required to establish bad faith?

Missouri courts have not required expert testimony to establish a bad faith action. Note, however, that "[t]estimony by an expert is almost always useful as to what facts are critical in the assessment of whether or not the insurer acted in bad faith." *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 593 (Mo. Ct. App. 2008).

On what issues is expert evidence precluded?

An expert probably cannot testify as to whether the insurer's actions constituted bad faith. Expert testimony may not be admitted if the subject of the expert's testimony is within a layperson's experience. *Van Meter v. Dahlsten Truck Line*, 943 S.W.2d 680, 682 (Mo. Ct. App. 1997). Because the bad faith standard relates to an insurer's preference for its own financial interests above its insured's, financial self-interest is arguably within a juror's understanding. Missouri courts have permitted expert testimony on whether the facts of a case presented a reasonable basis to deny coverage. *Shobe v. Kelly*, 279 S.W.3d 203, 208 (Mo. Ct. App. 2009).

Is a bad faith claim viable if a coverage decision has been determined to be correct?

Yes, but only in limited circumstances. Vexatious refusal requires that the refusal to pay a claim be without reason or probable cause or excuse, as examined at the time coverage was requested. Thus, while a coverage determination may be correct, if it was reached without reason or probable cause, it may be found to be vexatious. Several scenarios have been recognized as indicative of a vexatious and recalcitrant attitude, including: (1) the insurer's delay or refusal to pay; (2) the insurer's denial of liability without stating any ground for denial; (3) the inadequacy of the insurer's investigation of the claim; (4) an inadequate explanation given by the insurer for denying the claim; and (5) the insurer's disparate treatment of coinsureds. *Hensley v. Shelter Mut. Ins. Co.*, 210 S.W.3d 455, 466 (Mo. Ct. App. 2007) (internal citations omitted); *see also Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.*, 449 S.W.3d 16 (Mo. Ct. App. 2014) (affirming bad faith award and excluding as irrelevant evidence of declaratory judgment; concluding policy did not cover claims in underlying action where insurer refused to settle after failing to adequately reserve its rights to contest coverage).

Is a bad faith claim asserted in connection with a policy that provides third-party coverage viable if the third party does not prevail in the underlying claim?

This is an unsettled question under Missouri law. Traditionally, Missouri courts had held no bad faith action could lie unless the adverse party recovered a judgment in excess of the policy limits. However, the Missouri Supreme Court has more recently held that an insured may bring a bad faith action even when the insurer settles within its policy limits if the insurer previously declined to do so. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 828 (Mo. 2014).

Practice and Procedure

Statute of limitations

The statute of limitations for a contractual action for the payment of money is ten years. Mo. Rev. Stat. §516.110(1). Bad faith refusal to settle is considered

a tort action in Missouri, *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 556 (Mo. Ct. App. 1990) (bad faith action for refusal to settle sounds in tort), for which the statute of limitations is five years. Mo. Rev. Stat. §516.120. The statute of limitations for actions brought under statutory penalties, such as Mo. Rev. Stat. §375.420, is three years. Mo. Rev. Stat. §516.130(2).

Under what circumstances will bad faith claims be dismissed or stayed pending the resolution of the underlying claims?

A claim under Mo. Rev. Stat. §375.420 for vexatious refusal to pay a claim under an uninsured or underinsured motorist policy may be brought even if the liability of the uninsured or underinsured motorist has not been established by final judgment, and such a claim may be brought in conjunction with the same petition as the claim for underlying damages against the uninsured or underinsured motorist. *Walker v. Commercial Union Ins. Co.*, 879 S.W.2d 596, 600 (Mo. Ct. App. 1994).

Under what circumstances will bad faith claims be severed for trial from the underlying claim?

Rule 66.02 of the Missouri Rules of Civil Procedure provides that a court "may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, crossclaims, counterclaims, third party claims or issues," in "furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Missouri courts have not applied this rule to determine whether, and under what circumstances, a bad faith claim should be severed for trial from the underlying action.

Under what circumstances will the compensatory and punitive damages claims be bifurcated?

Claims for compensatory and punitive damages must be bifurcated upon the request of any party. Mo. Rev. Stat. §510.263. However, in the first trial, the fact finder determines whether the defendant's conduct would allow the imposition of punitive damages, leaving only the question of the amount for the second stage trial.

How does a bankruptcy petition (by either the insured or the insurer) affect the prosecution and defense of bad faith and extracontractual claims?

Pursuant to 11 U.S.C. §362(a), a bankruptcy petition acts as an automatic stay of the commencement or continuation of judicial proceedings brought against the bankrupt party. To date, Missouri courts have not applied this law in the context of a bad faith insurance claim. In *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 559 (Mo. Ct. App. 1990), after the plaintiff obtained a judgment against the insured, an involuntary bankruptcy petition was filed against the insured. The court upheld the assignment by the insured's trustee of his unliquidated bad faith claim against the insurer to the tort plaintiff.

How does insolvency or the intervention of a state guaranty fund affect the prosecution and defense of bad faith and extracontractual claims?

A claimant or insured may obtain payment from the Missouri Property and Casualty Insurance Guaranty Association for losses that arise out of and are within the coverage of an insurance policy that is issued by an insurer. Mo. Rev. Stat. §375.772(2). The Association does not provide coverage for "[a]ny amount awarded as punitive or exemplary damages." *Id.* A claimant must exhaust all rights under a policy issued by a solvent insurer before presenting a claim with the Association. Mo. Rev. Stat. §375.778(1).

All proceedings in which an insolvent insurer is a party or is obligated to defend a party shall, subject to waiver by the Association in specific cases involving covered claims, be stayed until the last day fixed by the court for the filing of claims and such additional time thereafter as may be determined by the court from the date the insolvency is determined or an ancillary proceeding is instituted in the state, whichever is later, to permit proper defense by the

association of all pending causes of action. Mo. Rev. Stat. §375.778(6).

The Missouri Supreme Court has held that a vexatious refusal action under Mo. Rev. Stat. §375.420 cannot be pursued against the Missouri Property and Casualty Insurance Guaranty Association for its own conduct in handling a claim, although the opinion suggests that the Association may be responsible for damages under Mo. Rev. Stat. §375.420 for the insolvent insurer's conduct in handling the claim. *Mo. Prop. & Cas. Ins. Guar. Ass'n v. Pott Indus.*, 971 S.W.2d 302, 306 (Mo. 1998).

Defenses and Counterclaims

Is evidence regarding the reasonableness of the conduct of the insured or third-party claimant admissible?

Yes, in bad faith refusal to settle actions. If the claimant is unwilling to settle within the policy limits, there can be no bad faith refusal to settle. *See Landie v. Century Indem. Co.*, 390 S.W.2d 558, 563 (Mo. Ct. App. 1965). Similarly, although it is not an element of the cause of action, evidence that the insured demanded the insurer settle within its limits is highly relevant to whether the insurer's declination of coverage or defense was undertaken in bad faith. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 827 n.5 (Mo. 2014); *see also Shobe v. Kelly*, 279 S.W.3d 203, 210 (Mo. Ct. App. 2009) (holding insured was not required to show insured demanded insurer settle case within policy limits where insurer refused to defend).

Is "advice of counsel" a recognized defense?

Probably. The reasonableness of the insurer's refusal to pay is a defense to a vexatious refusal action. *State ex rel. John Hancock Mut. Life Ins. Co. v. Hughes*, 152 S.W.2d 132, 134 (Mo. 1941).

The insurer's "good faith" in refusing to defend the insured is likewise a defense to a bad faith refusal to defend action. *Landie v. Century Indem. Co.*, 390 S.W.2d 558, 563 (Mo. Ct. App. 1965). In a refusal to settle case, the insurer's honest belief that there is no coverage under the policy or that the insured has a viable defense to the claim can provide the basis for insurer's good faith belief. *Id.* Such a belief may be based upon the advice of counsel, unless the advice is patently unreasonable.

What other defenses are available?

In defense of a vexatious refusal claim, reasonable cause or excuse, unambiguous policy language defeating coverage, other contractual defenses, and material misrepresentations that void policy are recognized defenses. *State ex rel. John Hancock Mut. Life Ins. Co. v. Hughes*, 152 S.W.2d 132, 134 (Mo. 1941). The statutory penalty for vexatious refusal to pay cannot be recovered where the insured sought recovery of more than that to which he or she was entitled. *Cross v. Peerless Ins. Co.*, 351 S.W.2d 826 (Mo. Ct. App. 1961). A vexatious refusal claim is preempted by the Employee Retirement Income Security Act ("ERISA"). *Kelly v. PanAmerican Life Ins. Co.*, 765 F. Supp. 1406 (W.D. Mo. 1991). The insurer's honest belief that there is no policy coverage, or that insured has a valid defense to that claim, such that settlement is not warranted, is a recognized defense. *See Landie v. Century Indem. Co.*, 390 S.W.2d 558, 563 (Mo. Ct. App. 1965).

Defenses to a bad faith refusal to settle claim include the lack of opportunity to settle within the policy limits. *Landie v. Century Indem. Co.*, 390 S.W.2d 558, 563 (Mo. Ct. App. 1965).

Is there a cause of action for reverse bad faith?

Missouri courts have not yet addressed whether a claimant's failure to cooperate in settlement, a "bad faith setup," or an insured's "reverse bad faith" are defenses.

Other Significant Cases

Insurers should be aware of Mo. Rev. Stat. §537.065. If the insurer refuses to defend, chooses to defend under a reservation of rights that the insured rejects, and/or refuses to settle within policy limits, the insured is entitled to enter into an agreement with the claimant pursuant to Section 537.065. That statute provides that the claimant "can enter into a contract with such tortfeasor… whereby… the person asserting the claim agrees that in the event

of a judgment against the tortfeasor neither he nor any person… will levy execution, by garnishment or otherwise… except *against the specific assets listed in the contract*…" (emphasis added). Almost always, the specific asset identified is the policy issued by the insurer that refused to defend or settle within policy limits.

Following the execution of an agreement pursuant to Mo. Rev. Stat. §537.065 the claims against the insured are reduced to a judgment, usually in an uncontested trial. If an insurer had the opportunity to control and manage the litigation, it may be bound by the determination of liability and damages against the insured(s) as a result of an uncontested "trial" in a subsequent action by the claimants to garnish the policy proceeds to satisfy the judgment. *Schmitz v. Great Am. Assur. Co.*, 337 S.W.3d 700, 709 (Mo. 2011). An insurer's defenses may be limited in the subsequent equitable garnishment action to the insurer's coverage defenses, the reasonableness of the underlying settlement if a trier of fact did not hear evidence regarding liability and damages, and/or fraud and collusion between the claimant and insurer in entering into an agreement pursuant to Mo. Rev. Stat. §537.065.

The Missouri Supreme Court held that the insurer's failure to defend and refusal to settle within policy limits constituted a breach of the policy, and the insurer was responsible for all damages flowing from the breach irrespective of the policy's limits of insurance. In so ruling, the Missouri Supreme Court specifically noted that the case *did not* involve any claims for bad faith or extracontractual damages. *Columbia Cas. Co. v. HIAR Holding, LLC*, 411 S.W.3d 258, 273–74 (Mo. 2013).

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