

N E W S	<h1 style="margin: 0;">Recent Developments in the Law.®</h1>
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In order to keep our clients abreast of pertinent recent developments in the law, Saunders & Schmieler, P.C. creates Recent Developments in the Law® to inform regarding the substance of several decisions of importance recently rendered in and on the jurisdictions of Maryland, Virginia, and the District of Columbia.

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BAD FAITH STATUTES/CASE LAW IN MARYLAND, VIRGINIA, AND THE DISTRICT OF COLUMBIA

MARYLAND

Controlling Authority:

Maryland's good faith statute, which became effective on October 1, 2007, permits an insured to recover expenses and litigation costs in an action "[t]o determine the coverage that exists under [an] insurance policy" if the insured can show that the insurer did not act in good faith when handling an insurance claim. MD. CODE ANN., CTS. & JUD. PROC. § 3-1701(d)(1)-(2) (2011). For property and casualty insurance claims under the new MD. CODE. ANN., INS. § 27-1001

(2001), "good faith" is defined as "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim."

Pursuant to MD. CODE ANN., INS. § 27-1001(d) (2011), those insureds who wish to state a cause of action alleging failure to act in good faith must first bring an administrative claim before the Maryland Insurance Administration. This requirement does not apply: (1) to claims alleging less than \$5,000 in damages (small claims); (2) if the insured and the insurer agree to waive this requirement; or (3) to claims brought on commercial insurance policies where the applicable policy limit exceeds \$1,000,000. The complaint must allege that the insurer failed to

act in good faith and must seek actual damages, litigation costs and expenses (with accompanying interest) (*see below for more on damages*). Claims submitted to the Maryland Insurance Administration should be accompanied by every document the insured has previously submitted to the insurer for proof of loss. The insured should specify the applicable insurance coverage and should state the amount claimed under that coverage. The insured must further state the amount of actual damages and the amount of the claim for expenses and litigation costs.

Upon receiving the insured's complaint, the Administration will forward the complaint to the insurer. The insurer then has 30 days to respond to the Administration with a written response and documents from the claims file that will allow the Administration to reconstruct the insurer's claim activities. These documents include transaction and communication documents (claim logs, letters, file memos), work papers (internal claims evaluation materials), claim forms, bills and any explanation of benefits related to the claim. The insurer must also forward a copy of its response and submitted documents to the Insured.

Under MD. CODE ANN., INS. § 27-1001(e) (2011), once all materials are submitted to the Administration, it has 90 days to make a determination on the issues before it. The decision will resolve: (1) whether the claim falls within the policy; (2) the amount, if any, the insured is entitled to receive; (3) whether the insurer has breached its obligation to cover and/or pay the claim; (4) whether the insurer failed to act in good faith; and (5) the amount of actual damages, expense, litigation costs and interest the insured should receive. Note that if the Administration does not act within 90 days, the failure to act will be considered a determination that the insurer did not breach its obligation to the insured.

MD. CODE ANN., INS. § 27-1001 (2011) permits either party to request that the Office of Administrative Hearings (OAH) review the decision of the Maryland Insurance Administration. Review hearings must be requested within 30 days of the mailing of the original decision; otherwise, the decision becomes final. The OAH's review of the Administration's decision will be *de novo*, without consideration of the Administration's findings. If the insurer wishes to remove the case from the administrative

process, it can file a petition for appeal of the final decision—either after the OAH issues a decision or after 30 days have lapsed from the date the Administration issues its original decision—with the Circuit Court for Baltimore City (the only court the legislation allows to review the administrative decision).¹ This

¹ See, e.g., *Thompson v. State Farm Mut. Auto Ins. Co.*, 196 Md. App. 235 (Md. Ct. Spec. App. 2010). Thompson filed a Complaint in the Circuit Court for Baltimore City, with a request for a jury trial, alleging that State Farm acted in bad faith when it declined coverage. State Farm filed a motion for *forum non conveniens* and moved that the case be transferred to Anne Arundel County, where the accident occurred. MD. CODE ANN., INS. § 2-215(c) (permitting a claimant to file a Petition in Baltimore City for judicial review of decisions made by the Insurance Commissioner). The Court of Special Appeals has held that claims against an insurer for failure to act in good faith must follow the venue restrictions set forth in MD. CODE ANN., CTS. & JUD. PROC. § 6-201. Unless otherwise allowable by law, claimants may not file declination of coverage cases in Baltimore City under MD. CODE ANN., INS. § 2-215(c). The Court of Special Appeals found that the separation of powers doctrine prohibits the court from allowing a jury to perform an agency's function because the Legislature only vested that power in the Maryland Insurance Commissioner. Therefore, with the exception of workers compensation, a statute permitting administrative review cannot also allow for a jury trial. MD. CODE ANN., CTS. & JUD. PROC. § 3-1701 provides for a jury trial, while MD. CODE ANN., INS. § 2-215(c) provides for judicial review. Since the two statutes would violate the constitution if read

appeal must be filed within 30 days of either the OAH decision or the date the Commission's decision becomes final. An appeal before the Circuit Court will be *de novo*, and either party may request a jury trial. If neither party is satisfied with the judgment rendered by the Administration, and one party appeals to the Circuit Court while the other requests a review by the OAH, jurisdiction over the request for a hearing is transferred to the Circuit Court and will be consolidated with the request for a trial.

Available Damages:

Pursuant to MD. CODE ANN., INS. § 27-305 (2011) and MD. CODE ANN., INS. § 27-1001(e)(2) (2011), the insured is permitted to recover damages (in addition to actual damages, not to exceed the limits of the applicable policy) from an insurer in the form of: (1) expenses and litigation costs, including attorneys' fees up to one-third of the actual damages recovered; and (2) interest on all

together, the Court of Special Appeals found that the two statutes were separate and provided for two separate causes of action. Since Thompson requested a jury trial, the Court of Special Appeals found that she filed a civil claim for damages under MD. CODE ANN., CTS. & JUD. PROC. § 3-1701 and not a claim for judicial review. As such, she was subject to the normal venue restrictions and the Court of Special Appeals transferred the case to Anne Arundel County.

actual damages, expenses and litigation costs. In addition, the bill allows the Administration to assess statutory fines up to \$125,000 for each instance of failing to act in good faith in violation of § 27-303(9) for an unfair claims settlement practice.

Recent Case Law:

MD. CODE ANN., INS. § 27-1001 (2011), codified the good faith test that the Court of Appeals of Maryland set forth 40 years ago in *State Farm Mut. Auto Ins. Co. v. White* when ruling on the duty of a liability insurer to the insured in attempting to settle a claim within the limits of that insured's liability policy. 248 Md. 324 (1967).² A finding

² *White* discussed six factors when analyzing whether an insurer acted in good faith: "the severity of the plaintiff's injuries giving rise to the likelihood of a verdict greatly in excess of the policy limits; lack of proper and adequate investigation of the circumstances surrounding the accident; lack of skillful evaluation of plaintiff's disability; failure of the insurer to inform the insured of a compromise offer within or near the policy limits; pressure by the insurer on the insured to make a contribution towards a compromise settlement within the policy limits, as an inducement to settlement by the insurer; and actions which demonstrate a greater concern for the insurer's monetary interests than the financial risk attendant to the insured's predicament." *State Farm Mut. Auto Ins. Co. v. White*, 248 Md. 324, 332 (1967).

against the insurer of "failure to act in good faith" will be based on evidence contained in the insurer's file or evidence that the court believes should have been in the insurer's file if it had done a proper investigation. Such a finding, which will not be based on delay in determining coverage alone, will constitute an unfair claims settlement practice under the amended Maryland Insurance Code.³

³ An "unfair claims settlement practice" is defined as the failure to act in good faith. "Good faith" is defined as "an informed judgment based on honesty and diligence, supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim. MD. CODE ANN., INS. § 27-1001(a) (2011). The code prohibits an insurer from: "(1) misrepresent[ing] pertinent facts or policy provisions that relate to the claim or coverage at issue; (2) refus[ing] to pay a claim for an arbitrary or capricious reason based on all available information; (3) attempt[ing] to settle a claim based on an application that is altered without notice to, or the knowledge or consent of, the insured; (4) fail[ing] to include with each claim paid to an insured or beneficiary a statement of the coverage under which payment is being made; (5) fail[ing] to settle a claim promptly whenever liability is reasonably clear under one part of a policy, in order to influence settlements under other parts of the policy; (6) fail[ing] to provide promptly on request a reasonable explanation of the basis for a denial of a claim; (7) fail[ing] to meet the requirements of Title 15, Subtitle 10B of this article for preauthorization for a health care service; (8) fail[ing] to comply with the provisions of Title 15, Subtitled 10A of this article; or (9)

In *Johns Hopkins Fed. Credit Union v. Cumis Ins. Soc’y, Inc.*, the United States District Court for the District of Maryland clarified that Maryland’s good faith statute is expressly limited to first-party claims under property and casualty insurance policies. No. RDB-09-2009, 2010 U.S. Dist. LEXIS 29351 (D. Md. Mar. 26, 2010). In other words, Maryland’s good faith statute does not cover liability policies inasmuch as they are third-party claims. See MD. CODE ANN., CTS. & JUD. PROC. § 3-1701(b) (2011), stating that the subtitle only applies to first-party claims under property and casualty insurance policies issued, sold, or delivered to the State.

In *Cecilia Schwaber Trust Two v. Hartford Accident & Indem., Co.*, No. JFM-06-0956, 2009 U.S. Dist. LEXIS 61379 (D. Md. July 14, 2009), the Court reiterated that Maryland’s good faith statute now provides insureds with a right to file first-party claims against insurers for failure to act in good faith. MD. CODE ANN., CTS. & JUD. PROC. § 3-1701. The good faith statute provides that if the plaintiff in action seeking “to determine coverage that exists under [an]

fail[ing] to act in good faith, as defined under § 27-1001 of this title, in settling a first-party claim under a policy of property and casualty insurance.” MD. CODE ANN., INS. § 27-303 (2011).

insurance policy” can show that “the insurer failed to act in good faith” with respect to an insurance claim, the plaintiff may recover expenses and litigation costs, including reasonable attorneys’ fees, as well as interest on those costs. MD. CODE ANN., INS. § 27-1001(e)(2)(ii)(2011); MD. CODE ANN., CTS. & JUD. PROC. § 3-1701(d)(1)-(2)(2011).

VIRGINIA

Controlling Authority:

Virginia, by statute, prohibits unfair claim settlement practices. VA. CODE ANN. § 38.2-510 (2011) provides a list of practices an insurer may not engage in with such frequency as to suggest that it is their general business practice. Some practices include failing to acknowledge and/or timely respond to claims pursuant to an insurance policy; arbitrarily refusing to pay claims; and forcing insureds to institute litigation to recover amounts that are due under an insurance policy by offering amounts significantly less than the amounts ultimately recovered in actions brought by the insureds.

Available Damages:

Pursuant to VA. CODE ANN. § 38.2-209 (2011), attorneys’ fees and costs may be awarded to the insured if the insurer is found to have acted in bad faith either when denying coverage or

failing/refusing to make a payment to the insured under the insurance policy. Under this section, an insured can be a person, group, business, company, organization, receiver, trustee, security, corporation, partnership, association, or governmental body.

VA. CODE ANN. § 8.01-66.1 (2011) provides the remedy for arbitrary refusal of motor vehicle insurance claims. Under subsection A of this statute, an insurance company licensed in Virginia will be liable to an insured in an amount double the amount due and payable under the insured’s motor vehicle insurance policy, and reasonable attorneys’ fees and expenses if it is found it refused or failed to pay to its insured a claim of \$3,500 or less in excess of the deductible, if any, under the provisions of the insurance policy issued and a court finds that the refusal or failure to pay was not made in good faith. The provisions of this statute also includes an insurance company’s refusal or failure to pay the medical expenses of those individuals covered under the terms of any medical payments coverage under the insurance policy, if the amount of the claim is \$3,500 or less and the refusal/failure to pay was made in bad faith. Under subsection B of this statute, whenever an insurance company licensed in

Virginia refuses or fails to pay a third party claimant (on behalf of an insured with the insurance company), a claim of \$3,500 or less and the court finds that the refusal or failure was made in bad faith, then the insurer will be liable to the third party claimant in an amount double the amount of the judgment awarded to the third party claimant, and reasonable attorneys' fees and expenses. Under subsection D, if an insurer licensed in Virginia refuses or fails to pay its insured a claim of more than \$3,500 in excess of the deductible, if any, under the provisions of the motor vehicle insurance policy, including paying for medical expenses to persons covered under the policy, and is found by the court that such refusal or failure was made in bad faith, then the insurer is liable to the insured in the amount due with interest at double the rate provided in § 6.2-301 from the date the claim was submitted to the insurer, and reasonable attorneys' fees and expenses.

Recent Case Law:

In *CUNA Mut. Ins. Soc'y v. Norman*, the Supreme Court of Virginia explained that VA. CODE ANN. § 38.2-209 is both punitive and remedial in nature. 237 Va. 33 (1989). The statute "is designed to punish an insurer guilty of bad faith in denying coverage or withholding payment and to reimburse an insured who has been compelled

by the insurer's bad-faith conduct to incur the expense of litigation." *Id.* at 38. The Court further held that the standard to be applied in evaluating an insurer's conduct is a reasonableness standard. Thus, a bad-faith analysis would necessitate a consideration of questions such as whether reasonable minds would disagree in the interpretation of policy provisions on coverage and exclusions; whether the insurer had conducted a reasonable and thorough investigation of the facts and circumstances of the insured's claim; whether there is evidence to support a denial of liability; and whether the insurer's refusal was meant to be a tactic in settlement negotiations.

In *Nationwide Mut. Ins. Co. v. St. John*, the Supreme Court of Virginia found that § 8.01-66.1 is similar to § 38.1-209, as it both has a remedial and punitive purpose. 259 Va. 71 (2000). Since both statutes have essentially the same purpose, the Court held that the standard of reasonableness as applied in §38.1-209 should also be applied in § 8.01-66.1. Next, the Court considered the quantum of proof required to prevail under this standard. It ultimately held that, absent legislative direction, an insured's evidentiary burden under the statute is the preponderance of the evidence standard.

WASHINGTON D.C.

Controlling Authority:

The District of Columbia does not recognize the tort of bad faith relating to insurance. The District of Columbia does recognize under general contract principals, however, that every contract contains an implied covenant of good faith and fair dealing.

Available Damages:

In Washington, D.C., attorneys' fees are potentially available as general contract damages when an insurer's conduct was willfully oppressive or vexatious in refusing or failing to pay an insured his or her benefits.

Recent Case Law:

In *Fireman's Fund Ins. Co. v. CTIA-The Wireless Ass'n*, the United States District Court for the District of Columbia considered at length the issue of the existence of a bad faith tort relating to insurance in the District of Columbia. 480 F. Supp. 2d 7 (D.D.C. 2007). Ultimately, the court reaffirmed the rejection of the tort. *Id.* However, in *Choharis v. State Farm*, the District of Columbia Court of Appeals held that, under District of Columbia law, "every contract contains within it an implied covenant of both parties to act in good faith and damages may be recovered for its breach as part of a contract

action.” 961 A.2d 1080, 1087 (D.C. 2008). Therefore, if there are any disputes regarding each party’s responsibilities under an insurance policy, it should be addressed within the principles of contract law for breach of the implied contractual covenant of good faith and fair dealing.

In 2010, in *Nugent v. Unum Life Ins. Co.*, the United States District Court for the District of Columbia restated that the District of Columbia does not recognize the tort of bad faith refusal to pay insurance benefits. 752 F. Supp. 2d 46 (D.D.C. 2010). *See also Am. Registry of Pathology v. Ohio Cas. Ins. Co.*, 401 F. Supp. 2d 75, 79 (D.D.C. 2005).

The District Court further held that punitive damages are not available for a claim with a basis for breach of contract alone, even if the insured can prove that the breach of contract was willful, wanton, or malicious. The Court explained that the rule in the District of Columbia is that “only where the alleged breach of contract merges with, and assumes the character of, a willful tort will punitive damages be available.” *Nugent*, 752 F. Supp. 2d at 57. However, despite the “American Rule” where, unless modified by statute or contract, each litigant is responsible for his or her own attorneys’ fees and litigation costs, the Court held that one

exception to that rule is when an insurance company’s conduct was willfully oppressive or vexatious in refusing or failing to pay an insured his or her benefits. This holding has the potential effect of making insureds’ rights in the District of Columbia broader than in Maryland. Maryland, by statute, merely permits those insureds with a first-party claim under a property or casualty policy to sue the insurer for breach of the duty of good faith. The District of Columbia in the *Nugent* decision, on the other hand, appears to allow insureds to sue for bad faith for any type of insurance policy, including liability policies.