

TRANSFORMING REASONABLENESS INTO A QUESTION OF LAW:

Strategies for Obtaining Summary Judgment in Insurance Bad Faith Cases

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INTRODUCTION

To the attorney who represents insurance companies, it can seem that few claims are less susceptible of summary judgment than allegations of an insurer's bad faith.¹ Typically fact-intensive, these claims also require evaluations of "subjective intent" and "reasonableness"—determinations often best suited for a fact-finder rather than a legal disposition. And, lest the skeptic attribute the perceived difficulty of obtaining summary judgment to a cognitive bias of the insurer's attorney, some courts have explicitly remarked that insurance bad faith claims tend to present "questions of fact" unsuitable for summary judgment.² Particularly in jurisdictions where a bad faith claim may stand even

¹ See generally, Alan J. Nisberg, *Florida's Bad Faith Quagmire: Is Summary Judgment Ever Available?*, MEALEY'S LITIG. REP.: INS. BAD FAITH, Mar. 26, 2009 (bemoaning difficulty of obtaining summary judgment in Florida insurance bad faith cases).

² See, e.g., *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1161 (9th Cir. 2002) ("The key to a bad faith claim [under California law] is whether or not the insurer's denial of coverage was reasonable.... [T]he reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact." (internal citations and quotations omitted)); *Tran v. State Farm Mut. Auto. Ins. Co.*, 999 F. Supp. 1369, 1372 (D. Haw. 1998) ("An analysis of what is reasonable is almost always de facto a question for the jury."); *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 276, 279 (Ariz. 2000) ("While an insurer may challenge claims which are fairly debatable its belief in fair debatability is a question of fact to be determined by the jury." (internal

if the insurer has complied with all terms of the written insurance contract,³ obtaining summary judgment may seem nearly impossible.

Cruelly enough, it is also on the bad faith claim—relative to the breach-of-contract claim—that summary judgment can be the most beneficial for an insurer. Bad-faith damages are less predictable and often more costly, and litigation is more convoluted and protracted, than in a coverage dispute. Because the insurance business model values predictability, reducing exposure to erratic bad-faith verdicts is crucial.

So how does one obtain summary judgment in an area so laden with “questions of fact”? Courts *do* grant summary judgment in bad faith cases. But while the motion may not be condemned *per se*, certain arguments will be. A motion that takes a gestalt approach and contends that the plaintiff does not offer sufficient evidence supporting the claim as a whole is likely to lose. A winning motion, by contrast, takes advantage of the fact that the burden is on the plaintiff to produce evidence showing that a reasonable jury

quotations and citations omitted)); *Safeco Ins. Co. v. Butler*, 823 P.2d 499, 506 (Wash. 1992) (“Whether an insurer acted in bad faith is a question of fact.”).

³ See, e.g., *Rawlings v. Apodaca*, 726 P.2d 565, 572 (Ariz. 1986) (“[T]he insurer’s eventual performance of the express covenant—by paying the claim—does not release it from liability for bad faith.”); *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1040 (Cal. 1973) (“[T]he insurer’s duty [of good faith] is unconditional and independent of the performance of plaintiff’s contractual obligations.”); *Enoka v. AIG Haw. Ins. Co.*, 128 P.3d 850, 865 (Haw. 2006) (“Surely an insurer must act in good faith in dealing with its insured and in handling the insured’s claim, even when the policy clearly and unambiguously excludes coverage. Inasmuch as [the plaintiff] has alleged that [the insurer] handled the denial of her claim for no-fault benefits in bad faith, we conclude that she is not precluded from bringing her bad faith claim even where there is no coverage liability on the underlying policy. Accordingly, we hold that the trial court erred in determining that, because [the plaintiff]’s breach of contract claim failed, her bad faith claim must fail.”).

could find against the defendant on each element of the bad faith claim. A motion that breaks down the plaintiff's allegations to unmask the precise deficiencies in individual elements of the claim can give the judge a legal hook for summary adjudication, even if questions of fact may remain on other issues.

This Article highlights legal arguments that have been successfully asserted in the summary adjudication of insurance bad faith claims. The first Part of this Article discusses ways to capitalize on deficiencies in plaintiffs' evidence establishing each of the foundational elements of a bad faith claim (subjective unreasonableness, objective unreasonableness, and causation of damages). Part two addresses strategies for crippling the drivers of a bad faith claim's value through partial summary judgment. Finally, Part three addresses how failures on the part of the insured can form the basis of a favorable summary-judgment determination.

As a final prefatory note, while the burden of proof is, properly, always on the plaintiff to prove each element of the claim, often it is extremely beneficial for the defendant insurer to offer affirmative proof of its position rather than to simply highlight the plaintiff's lack of proof. For example, to secure partial summary judgment as to punitive damages, it is generally more persuasive to include compelling evidence that the insurer acted reasonably, rather than to merely argue that the plaintiff offers no evidence of unreasonable conduct. While such evidence may sometimes involve the extra effort of conducting studies, utilizing additional experts, or conducting additional discovery, the cost may be justified by reduction of exposure to the insurer.

DISCUSSION

I. Underscore Deficiencies in the Elements of the Bad Faith Claim

The elements of a bad faith claim are relatively straightforward. The insured plaintiff must prove that the insurer's behavior was both subjectively unreasonable (i.e., that it acted with bad-faith intent to deny the plaintiff the benefits of the insurance contract), and objectively unreasonable (i.e., that no reasonable person would have committed the acts in question).⁴ The plaintiff must also prove that the insurer's malfeasance caused damages.⁵ Each element of the bad faith claim presents an opportunity to secure summary judgment.

⁴ E.g., *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 923 (9th Cir. 2008) (“To commit bad faith [under Arizona law], an insurer must (1) act unreasonably toward the insured and (2) either know that it was acting unreasonably or demonstrate such reckless disregard to the reasonableness of its actions that knowledge of reasonableness may be imputed.”); *Parsons ex rel. Parsons v. Allstate Ins. Co.*, 165 P.3d 809, 814–15 (Colo. Ct. App. 2006) (“For an insured to prevail on a bad faith breach of contract claim against an insurer, the insured must establish the insurer acted unreasonably and with knowledge or reckless disregard of its unreasonableness.”); *Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368, 376 (Wis. 1978) (“To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.”).

⁵ E.g., *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 121 (Colo. 2010) (“[A]s with most tort claims, proof of actual damages is an essential element of a bad faith breach of an insurance contract claim.”); *Coventry Assocs. v. Am. States Ins. Co.*, 961 P.2d 933, 935 (Wash. 1998) (“As an element of every bad faith ... action, however, an insured must establish it was harmed by the insurer's bad faith acts.”); see also *A.W. Huss Co. v. Cont'l Cas. Co.*, 560 F. Supp. 513, 515 (E.D. Wis. 1983), *aff'd*, 735 F.2d 246 (7th Cir. 1984) (“If [the insurer's] maneuverings cross the line into bad faith, the insured will have a claim if it is harmed by an excess judgment. However, if the insurer manages to obtain a settlement which prevents an excess judgment, no legally cognizable damage has occurred.”).

A. Establishing a Lack of Subjective Intent

While a plaintiff may not have difficulty showing that an insurer failed to adhere to its insurance policy, neglected to follow its claim-handling protocols to the letter, or conducted a less-than-thorough investigation, frequently the plaintiff will fail to offer evidence that the insurer did so with the requisite subjective bad-faith mental state. While jurisdictions vary in the degree of animus required, all bad faith claims require evidence of some knowing or arbitrary unreasonability of the insurer.⁶ A successful summary judgment motion may either highlight the lack of proof or provide affirmative proof that the defendant acted properly.

1. No Evidence that Insurer Acted in Subjective Bad Faith

Summary judgment based on failure to offer any evidence showing that the insurer acted with the requisite mental state is surprisingly common considering that determining mental state would seem to be a natural question to refer to a fact-finder.⁷ While plaintiffs argue that mental state may be inferred from the evidence, they often cross the

⁶ See, e.g., *Sampson v. Am. Standard Ins. Co.*, 582 N.W.2d 146, 149 (Iowa 1998) (knew or had reason to know); *Long v. Am. Sec. Ins. Co.*, 52 So. 3d 260, 263 (La. Ct. App. 2010) (arbitrary, capricious, or without probable cause); *Pickett v. Lloyd's*, 621 A.2d 445, 457–58 (N.J. 1993) (knowledge or reckless disregard); *Greene v. United Servs. Auto. Ass'n*, 936 A.2d 1178, 1188 (Pa. Super. Ct. 2007) (knowledge or reckless disregard).

⁷ Somewhat to our surprise, a survey of summary-judgment cases contained in six months of Mealey's Litigation Reports from March 10, 2011 through September 8, 2011 revealed that in almost 20% of cases where summary judgment was granted, it was on grounds that the plaintiff did not proffer adequate evidence of the defendant's subjective mental state.

line from inference to pure speculation.⁸ Mere mistakes or claim-handling flaws do not establish bad-faith intent: “Merely because an insurer acts unreasonably does not mean that it is guilty of bad faith. Negligent conduct which results solely from honest mistakes, oversight or carelessness does not necessarily create bad-faith liability even though it may be objectively unreasonable.”⁹ If the insurer can demonstrate that the plaintiff merely alleges errors and has not presented evidence from which a reasonable jury could find bad-faith intent, summary judgment may be granted on these grounds.

The Pennsylvania case of *Kosierowski v. Allstate Insurance Co.*¹⁰ illustrates courts’ reluctance to permit pure speculation regarding an insurer’s mental state when the plaintiff alleges behavior that appears to be merely negligent. In *Kosierowski*, the defendant insurance company attempted to acquire a release of the plaintiff’s bad faith claim during settlement negotiations.¹¹ According to the plaintiff’s expert, such a release may have violated Pennsylvania’s Unfair Insurance Practices Act.¹² In addition to the expert testimony, the plaintiff offered an internal letter from the adjuster stating that a

⁸ *Echanove v. Allstate Ins. Co.*, 752 F. Supp. 2d 1105, 1109 (D. Ariz. 2010) (“It is not sufficient if the complaint merely establishes a sheer possibility that the defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” (internal citations and quotations omitted)).

⁹ *Deese v. State Farm Mut. Auto. Ins. Co.*, 172 Ariz. 504, 507–08 (1992).

¹⁰ 51 F. Supp. 2d 583, 593 (E.D. Pa. 1999), *aff’d*, 234 F.3d 1265 (3d Cir. 2000).

¹¹ *Id.* at 587.

¹² *Id.* at 593 n.9.

mistake had been made as to the status of the release of the bad faith claim.¹³ The trial court granted summary judgment to the insurer on the allegation that the release attempt constituted bad faith, finding that the plaintiff produced “no evidence that would indicate that [the insurer] attempted to mislead or deceive her; the only evidence before the court suggests, on the contrary, that a genuine mistake occurred in conversations between plaintiff’s counsel and [the insurer]’s adjustor.”¹⁴ In the absence of direct evidence of a culpable mental state, even objectively unreasonable conduct may not amount to bad faith.

2. *Insurer Acted Quickly to Rectify Problem*

Evidence that the insurer acted quickly to rectify a mistake can be particularly effective affirmative evidence that negates any reasonable inference of bad intent. A plaintiff may have difficulty explaining how a reasonable jury could conclude that a mistake was an intentional effort to deny the plaintiff benefits due under the policy if the insurer promptly corrected the mistake once it was recognized.

For example, in *Echanove v. Allstate Insurance Co.*,¹⁵ the insurer admitted to making errors in its payment calculations, but it rectified the errors once they were brought to its attention.¹⁶ In granting summary judgment, the court noted the diligence of

¹³ *Id.* at 593.

¹⁴ *Id.*

¹⁵ 752 F. Supp. 2d 1105.

¹⁶ *Id.* at 1109.

the insurer and concluded that “[a]n insurer’s ‘honest mistake, bad judgment or negligence’ does not constitute bad faith. There is no evidence in the record on which a reasonable trier of fact could find that [the insurer]’s actions amounted to more than a mistake or bad judgment.”¹⁷ Thus, affirmative evidence of the insurer’s good-faith intent can underscore the plaintiff’s lack of evidence of a culpable mental state.

Evidence of rectifying a mistake can also aid the insurer’s lack-of-causation arguments, discussed below. If the insurer rectifies its mistake expediently, often the plaintiff has not suffered any material damages. Thus, evidence of a mistake rectified can present two grounds for summary judgment.

B. Demonstrating Objective Reasonableness

Demonstrating the objective reasonableness of the insurer’s actions or interpretation of the policy can be challenging if the insurer’s position is ultimately shown to have been incorrect—reasonableness in such contexts tends to be a question of fact. In such a situation, the insurer who can marshal compelling affirmative evidence of reasonableness may nevertheless prevail on summary judgment.

1. Reliance on Experts

One example of compelling affirmative evidence of reasonableness is an insurer’s reliance on an independent expert—or better yet, the plaintiff’s own expert. In *Montya Lopez v. Allstate Insurance Co.*,¹⁸ for example, the plaintiff contended that the

¹⁷ *Id.*

¹⁸ 282 F. Supp. 2d 1095 (D. Ariz. 2003).

defendant's offer of settlement for injuries sustained in a car accident was unreasonably low.¹⁹ During the claims process, the plaintiff requested \$14,500 from the insurer as compensation for medical bills and lost wages arising out of his whiplash injury.²⁰ The insurer rejected the request and offered the plaintiff a compromise settlement of \$1,000.²¹ The plaintiff called the offer "insultingly low" and proceeded to arbitration; the arbitrator ultimately awarded the plaintiff his entire \$14,500 request.²²

In justifying the reasonableness of its initial compromise settlement offer, the insurer presented evidence that experts, including the plaintiff's own doctors, had suggested that the plaintiff was exaggerating the injury, or at least that his medical treatment had been excessive.²³ The court reasoned that while this evidence did not conclusively prove that the plaintiff had received excessive treatment, it was sufficient to show that the insurer's questioning of the plaintiff's settlement demand was reasonable.²⁴

In other contexts, too, courts have held that reliance on the plaintiff's own expert renders a mistake objectively reasonable. For example, one court found that an insurer's

¹⁹ *Id.* at 1102.

²⁰ *Id.* at 1097.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1102.

²⁴ *Id.*

claim payment based on the repair estimate of the plaintiff's own chosen contractor was reasonable as a matter of law, even though the plaintiffs claimed that the insurer should have conducted a more thorough investigation which would have revealed that the plaintiffs were entitled to more.²⁵ And another court granted summary judgment to an insurer that paid for repairs recommended by the plaintiffs' chosen repair shop, even though plaintiffs argued that the insurer should have followed the recommendation of the insurer's appraiser who had declared plaintiffs' vehicle a total loss.²⁶ Although not always a complete safe harbor, showing reliance on the opinion of an expert chosen by the insured usually suffices to show that the insurer's position—even if ultimately mistaken—was objectively reasonable.

2. *Agreement of a Neutral Arbitrator*

While proving objective reasonableness by showing reliance on the advice of the insurer's counsel has yielded mixed results because the reliance must still be reasonable,²⁷ evidence that more impartial legal authorities have endorsed the insurer's position can establish, as a matter of law, that the position was at least reasonable, even if

²⁵ *Moncada v. Allstate Ins. Co.*, 471 F. Supp. 2d 987, 996 (N.D. Cal. 2006).

²⁶ *Schaller v. Nat'l Alliance Ins. Co.*, 496 F.Supp.2d 890, 894, 899 (S.D. Ohio 2007).

²⁷ *See, e.g., Gentry v. State Farm Mut. Auto. Ins. Co.*, 726 F. Supp. 2d 1160, 1170 (E.D. Cal. 2010) (holding that California case law does “not hold that if an insurer relied on counsel that it cannot be liable for insurance bad faith. Rather the question is whether such reliance was reasonable”); *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 11 P.3d 162, 174 (Okla. 2000) (“Although reliance on the advice of counsel can be a defense to a bad faith suit, the reliance on counsel's advice must be reasonable.”).

erroneous. In particular, judges are quite receptive to arguments that their own colleagues or similar neutral arbiters have endorsed the defense's position. As one commentator notes:

Perhaps the most reliable method of establishing that the insurer's legal position is reasonable is to show that some judge in the relevant jurisdiction has accepted it as correct After all, if an impartial judicial officer informed by adversarial presentation has agreed with the insurer's position, it is hard to argue that the insurer could not reasonably have thought that position viable.²⁸

Many courts have granted summary judgment following this reasoning. In one Arizona Court of Appeals case, where two courts had already endorsed the insurer's policy interpretation before the supreme court disagreed and remanded, the court of appeals reasoned: "Regardless of the eventual outcome of this question on appeal, the fact that two courts agreed that plaintiff was not covered by the policy, after hearing the arguments of counsel for both parties, clearly demonstrates that the insurance company had a reasonable basis for denying the claim."²⁹ Decisions in numerous other jurisdictions have held similarly.³⁰

²⁸ William T. Barker & Paul E.B. Glad, *Use of Summary Judgment in Defense of Bad Faith Actions Involving First-Party Insurance*, 30 TORT & INS. L.J. 49, 83-84 (1994).

²⁹ *Aetna Cas. & Sur. Co. v. Superior Court*, 778 P.2d 1333, 1336 (Ct. App. 1989). *But see Lennar Corp. v. Transamerica Ins. Co.*, 256 P.3d 635, 640-41 (Ariz. Ct. App. 2011) (stating that *Aetna's* analysis on prior court rulings was not essential to its holding and refusing to hold that a prior erroneous ruling means that the claim is fairly debatable as a matter of law).

³⁰ *Starkville Mun. Separate Sch. Dist. v. Cont'l Cas. Co.*, 772 F.2d 168, 170 (5th Cir. 1985) (holding liability for bad faith was not justified where the insurer "convinced the able district court that it reasonably refused to pay the claim in full. There can be no doubt that it had

In a similar vein, evidence that a neutral arbiter in an underlying proceeding considered the insurer's position to be reasonable establishes the insurer's good faith as a matter of law.³¹ In the Iowa case of *Gardner v. Hartford Insurance Accident & Indemnity Co.*,³² the parties filed an application with the Iowa Industrial Commission for approval of a settlement arising out of a dispute as to the cause of the claimant's alleged injuries.³³ Information was submitted to support a finding of a bona fide dispute, and the commissioner approved the settlement.³⁴

a tenable position.”); *Safeco Ins. Co. v. Guyton*, 692 F.2d 551, 557 (9th Cir. 1982) (affirming trial court's dismissal of bad faith claim, even where the appellate court ultimately found coverage, because the trial court's decision demonstrated that “the policy in dispute involved a genuine issue concerning legal liability” and, therefore, the insurer “could not, as a matter of law, have been acting in bad faith by refusing to pay on the Policyholders' claims.”); *LG Infocomm U.S.A., Inc. v. Euler Am. Credit Indem. Co.*, 419 F. Supp. 2d 1248, 1256 n.2, 1258 (S.D. Cal. 2005) (reasoning that, although case relied upon by insurer to prove that its policy interpretation was reasonable was unpublished, “such opinions still may provide an insurer with valuable insight as to how policy language might reasonably be interpreted by a court,” and finding that the insurer's interpretation based on unpublished case was therefore objectively reasonable); *State Farm Mut. Auto. Ins. Co. v. Bass*, 201 S.E.2d 444, 445 (Ga. 1973) (holding that where other neutral decision makers agreed with the insurer, it “was legally justified in litigating the issue and cannot, as a matter of law, be liable for the statutory penalty for bad faith”).

³¹ As another example, an administrative law judge's findings regarding benefits owed to a workers' compensation claimant may establish reasonableness as a matter of law. See *Zolman v. Pinnacol Assurance*, 261 P.3d 490, 499 (Colo. Ct. App. 2011) (“As to [the plaintiff]'s requests for a change of physician, we also conclude these requests were fairly debatable as a matter of law [T]he ALJ had already made specific findings of fact that [the plaintiff] was not entitled to a physician change [The plaintiff]'s repeated requests were therefore fairly debatable, and we conclude that [the insurer] acted reasonably as a matter of law when it refused to authorize a change.”).

³² 659 N.W.2d 198 (Iowa 2003).

³³ *Id.* at 201.

³⁴ *Id.*

A few months later, the claimants filed suit against the insurer alleging bad-faith denial of workers' compensation benefits.³⁵ The insurer filed a motion for summary judgment on the plaintiff's bad faith claim, arguing that it was barred because the commissioner had already determined that a bona fide dispute existed and, therefore, that the insurer's actions were reasonable as a matter of law.³⁶ The trial court agreed that the plaintiff's claim was barred after the finding of a bona fide dispute and granted the insurer's motion.³⁷ The Iowa Supreme Court affirmed, holding that a "finding of a bona fide dispute constituted a finding that the issue of causation was fairly debatable."³⁸ Accordingly, "[t]he industrial commissioner's finding [that the plaintiff]'s claim was fairly debatable and the existence of a good faith controversy as to whether there was a non-work-related cause of [the plaintiff]'s injury is simply an alternative way of finding [the insurer] may have had a reasonable basis for denying [the plaintiff]'s claim."³⁹ Therefore, evidence of a neutral arbiter's agreement with the propriety of the insurer's actions can establish grounds for summary judgment based on objective reasonableness.

³⁵ *Id.*

³⁶ *Id.* at 201–02.

³⁷ *Id.* at 201.

³⁸ *Id.* at 207.

³⁹ *Id.* at 206–07.

C. Proving That the Insurer's Actions Did Not Cause Damages

It is in the causation arena where perhaps some of the most underutilized and interesting legal arguments for summary judgment can be made. Causation tends to lend itself more naturally to a legal analysis than a reasonableness inquiry sometimes does. Thus, the defense should identify and emphasize any facts that sever the causal link between bad faith and damages.

By way of example, in *Aetna Casualty & Surety Co. v. Superior Court*,⁴⁰ the plaintiff alleged that the insurer conducted an inadequate investigation, but failed to show what additional relevant facts a more thorough investigation would have uncovered.⁴¹ Without even evaluating the comprehensiveness of the investigation, the court found in favor of the insurer: “An insurance company’s failure to adequately investigate only becomes material when a further investigation would have disclosed relevant facts.”⁴² Because the plaintiff articulated no relevant facts that the investigation would have uncovered, the plaintiff “failed to establish that the insurance company’s pre-denial investigation could amount to bad faith.”⁴³

A summary judgment motion highlighting the plaintiff’s lack of evidence of causation is also useful in cases alleging delay. Although the delay in claim handling or

⁴⁰ 778 P.2d 1333.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

investigation may have been unreasonable, the plaintiff still must articulate what actual harm was caused. Thus, one Washington⁴⁴ appellate court affirmed the trial court's grant of summary judgment for the insurer even though the plaintiffs presented evidence that the insurer's investigation was delayed beyond the prescribed statutory period.⁴⁵ The court reasoned that the plaintiffs had "fail[ed] to establish with specific evidence that they were harmed by [the defendant's] alleged bad faith acts."⁴⁶ Although the plaintiffs claimed that the delays harmed them because they were forced to hire an insurance expert, the court rejected this argument, reasoning that the plaintiffs did "not specify who was hired as an insurance expert or why such an expert was necessary under these circumstances."⁴⁷ Additionally, the "expenses were incurred only after [the insurer] reasonably denied recovery, not due to an act of bad faith."⁴⁸

Under the analysis of these cases, the burden is on the plaintiff to produce evidence of specific, actionable harms that would have been avoided had the insurer performed differently. Such an argument can be especially valuable in jurisdictions

⁴⁴ Washington law requires the plaintiffs to produce evidence of damage causation in first-party bad faith cases, but in third-party bad-faith-failure-to-settle cases plaintiffs are granted a rebuttable presumption of harm once they meet the burden of establishing the insurer's bad faith. *Coventry Assocs. v. Am. States Ins. Co.*, 961 P.2d 933, 936, 938 (Wash. 1998).

⁴⁵ *Rizzuti v. Basin Travel Serv. of Othello, Inc.*, 105 P.3d 1012, 1021–22 (Wash. Ct. App. 2005).

⁴⁶ *Id.* at 1021.

⁴⁷ *Id.* at 1022.

⁴⁸ *Id.*

where an insurer can be liable for bad faith despite a fairly-debatable coverage dispute;⁴⁹ although plaintiffs in some cases need not prove a breach of the written contract, they still must show that they suffered some harm as a result of the insurer's bad faith. Thus, showing a lack of causation of harm from specific alleged bad-faith conduct can eliminate or considerably narrow the scope of potential liability. In addition, the element of causation, or "nexus," is particularly useful in defense of allegations of institutional bad faith, as discussed in more detail below.

II. Identifying Discrete Issues for Partial Summary Judgment

In cases where full summary judgment is a long shot due to evidence raising a genuine issue of fact as to each element of the bad-faith tort, counsel should give careful consideration to seeking partial summary judgment to eliminate specific issues or damage claims. Especially in potentially high-value cases in which the plaintiff seeks punitive damages or invokes evidence of "institutional" bad faith, partial summary judgment can significantly reduce the insurer's potential exposure. Giving the judge a hook to enter partial relief may also help winnow issues for trial where a plaintiff's primary bad faith claim may be thin, but is viable enough to survive complete summary judgment.

⁴⁹ *Cf., e.g., id.* at 1020–22 (noting early in analysis that "[b]ecause an insurer's duty of good faith is separate from its duty to indemnify, an insured may maintain an action for bad faith investigation of the claim even if the insurer was ultimately correct in denying coverage," but then ultimately affirming summary judgment for insurer partially on basis that the plaintiffs offered no evidence of harm). For cases holding that an insurer may be liable for bad faith despite compliance with the written policy, see *supra* note 3.

A. *Institutional Bad Faith: Nexus*

Many plaintiffs' lawyers do not simply bring individual bad faith claims; they allege that the decisions or claim-handling activities at issue are the product of "institutional" practices that warrant imposition of a large punitive-damages award. "Institutional" bad faith claims are generally based on allegations that the insurer has, as a company-wide policy, placed profits ahead of the interests of its insureds and implemented claim practices that undervalue or deny claims in order to enhance profits. One way an insurer can dispose of an institutional bad faith claim, however, is by showing that the plaintiff was not affected by the insurer's alleged institutional improprieties. Like rumors of police officers required to meet speeding-ticket quotas, plaintiffs' allegations about insurance companies having profit targets or claim-payment goals are intended to elicit a sense of unfairness, arbitrariness, and insecurity in jury members. Indeed, jurors may be more likely to inaccurately find bad faith, despite reasonable handling of a particular claim, if their judgment is clouded by accusations of institutional impropriety. As one court has stated, bad-faith law "is not intended to be a means for individual plaintiffs to attack an entire insurance industry; rather, it 'addresses only whether ... [an insurer] acted ... [in bad faith] in a particular case, not whether its business practices are reasonable in general.'"⁵⁰ The concern that a plaintiff's verdict in

⁵⁰ *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 594 (E.D. Penn. 1999).

an institutional bad faith case would be motivated by distaste for the insurance business model in general makes such claims particularly appropriate for summary judgment.⁵¹

The nexus between the plaintiff's claim and allegations of institutional impropriety may be severed in a number of ways. First, the defense can show that the allegedly deficient practices were limited to areas that did not affect the plaintiff. Because insurance is a state-regulated industry with state-specific considerations, and because claims are typically managed at the level of a particular office or geographic region, it is not uncommon for insurance companies to have different practices, procedures, or management dynamics in different locations. Severing the geographical connection between the plaintiff's situation and his proffered evidence of institutional bad faith can thus eliminate the institutional issues from the case. Such an argument was successful in *Montoya Lopez v. Allstate Insurance Co.*,⁵² where the plaintiff claimed institutional bad faith by alleging that the insurer (1) arbitrarily refused capped recovery amounts for certain types of claims, (2) created excessive burdens for insureds with claims like the plaintiff's, and (3) unreasonably profiled and discriminated against certain claims or

⁵¹ The no-nexus argument may also be used to avoid or limit the scope of expensive, burdensome, or irrelevant discovery, where allegations of institutional impropriety can be shown to bear little or no relation to the underlying alleged bad faith. *See, e.g., Knoell v. Metro. Life Ins. Co.*, 163 F. Supp. 2d 1072, 1078 (D. Ariz. 2001); *Cardiner v. Provident Life & Accident Ins. Co.*, 158 F. Supp. 2d 1088, 1106 (C.D. Cal. 2001) ("This Court does not need to address the legitimacy of [the insurer]'s business reorganization. Even if this Court accepted Plaintiff's evidence, Plaintiff fails to establish any link between [the insurer]'s actions with respect to this specific claim and the alleged plan attributed to Provident.").

⁵² 282 F. Supp. 2d 1095 (D. Ariz. 2003).

claimants.⁵³ The plaintiff's evidence supporting these allegations consisted of Market Conduct Examinations by the insurance departments of Virginia, California, Alaska, and Pennsylvania.⁵⁴ In part because the plaintiff's claim was adjusted in Arizona, however, the court found "no connection between those reports and the specific allegations of misconduct" relating to the plaintiff's claim.⁵⁵

Second, the insurer's allegedly flawed practices may have been applied to a different class of claims than the plaintiff's. The U.S. Supreme Court discussed both this and the geographic limitation issue in *State Farm v. Campbell*.⁵⁶ In assessing an alleged "national scheme to meet corporate fiscal goals by capping payouts on claims companywide," the Court first noted that "[m]ost of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the Company."⁵⁷ The Court explained that "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm caused by the plaintiff."⁵⁸

⁵³ *Id.* at 1104.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 538 U.S. 408 (2003).

⁵⁷ *Id.* at 1518–19.

⁵⁸ *Id.* at 1522.

Third, evidence of “other acts” must have some similarity to the type of conduct that allegedly injured the plaintiff. The Court in *Campbell* also spoke to this issue, indicating that the “Campbells had identified scant evidence of repeated misconduct of the sort that injured them.”⁵⁹ While evidence of the other acts does not have to be identical, the trial court erred by allowing extensive evidence of claims that had “nothing to do” with third-party claims like the plaintiffs’.⁶⁰

Even general allegations that the insurer systematically denies or underpays valid claims as part of a company-wide policy will not survive summary judgment in the absence of evidence that this policy was applied to the plaintiff’s specific claim. In *Young v. Allstate Insurance Co.*,⁶¹ the plaintiffs alleged that the goals of the insurance company had shifted from fairly paying claims to “improving the company’s bottom line by focusing on ways to unfairly low-ball and avoid the payment of claims.”⁶² This was supposedly part of a company-wide scheme to underpay its insureds’ claims. The court granted partial summary judgment to the insurer on the institutional bad faith claim, holding that the plaintiffs failed to offer “any significant probative evidence that the

⁵⁹ *Id.* at 1523.

⁶⁰ *Id.*

⁶¹ 296 F. Supp. 2d 1111 (D. Ariz.).

⁶² *Id.* at 1123.

alleged bad faith claim handling practices ... had any effect on the handling of [the plaintiff's] claim.”⁶³

Likewise, in *Milhone v. Allstate Insurance Co.*,⁶⁴ the plaintiffs alleged that the insurers used internal procedures that (1) targeted claimants without counsel and attempted to settle their claims early to avoid the insured getting counsel, and (2) systematically targeted claimants who had counsel which resulted in “needless litigation.”⁶⁵ The evidence revealed, however, that the alleged tactics were not used when processing the plaintiff's claim.⁶⁶ The court granted the insurer's motion for summary judgment on the institutional bad faith claim, reasoning that

because all of the above general allegations of bad faith, assuming they are true, did not affect the processing of Plaintiff's claim in this case the Court finds that a cause of action for bad faith cannot lie based on these allegations. In other words, if Plaintiff was not personally damaged by the allegedly inappropriate practices, Plaintiff cannot base his claim on such practices.⁶⁷

Thus, showing that any alleged bad-faith practices of the insurer, even if true, did not cause harm to plaintiff, can lead to summary adjudication of the institutional bad faith claim.

⁶³ *Id.* at 1123 n.21.

⁶⁴ 289 F. Supp. 2d 1089 (D. Ariz. 2003).

⁶⁵ *Id.* at 1102.

⁶⁶ *Id.*

⁶⁷ *Id.*

Courts are sensitive to plaintiffs' efforts to use general evidence of flawed institutional policies to morph any adverse claim decision into a bad faith claim. The Supreme Court articulated this concern in *Campbell*:

The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.⁶⁸

The causation element of all bad faith claims properly limits the potential liability arising from an insurer's actions to only those harms directly caused by the insurer's bad faith. The nexus requirement, a refinement of the causation element, helps ensure that a defendant will not be punished for institutional bad faith in every single case that arose during a period of allegedly flawed corporate policy.

B. Punitive Damages

Particularly where the plaintiff's evidence of bad faith barely clears its summary-judgment hurdle, or where there is affirmative evidence that the insurer acted in good faith in meaningful respects, a court that denies a summary judgment motion may nonetheless be inclined to grant partial summary judgment on the plaintiff's prayer for punitive damages. For example, in *Tritschler v. Allstate Insurance Co.*,⁶⁹ the Arizona Court of Appeals reversed the trial court's summary adjudication of the plaintiff's bad

⁶⁸ *Campbell*, 538 U.S. at 1524.

⁶⁹ 144 P.3d 519 (Ariz. Ct. App. 2006).

faith claim, but affirmed the grant of summary judgment on punitive damages.⁷⁰ The court reasoned that, although the plaintiff had produced evidence showing “disregard of the rights of the insured,” the plaintiff never produced evidence that could prove that the insurer “had exhibited the requisite evil mind and intent to harm his interests.”⁷¹

A court may view the propriety of summary judgment on punitive damages differently than summary judgment on the underlying bad faith claim for many reasons. In most jurisdictions, courts consider the evidentiary burden applicable to the claim at trial in determining whether summary judgment is appropriate.⁷² Typically, the burden of proof for the general bad faith claim is a preponderance of the evidence,⁷³ while the

⁷⁰ *Id.* at 535.

⁷¹ *Id.* at 531.

⁷² *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.”); *Cerberus Int’l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1148–49 (Del. 2002) (“[J]urisdictions have split on the question of whether to adopt the *Liberty Lobby* standard. Many states have adopted it, and it appears to be the majority rule. Some states have explicitly rejected it in favor of the traditional standard, which is that a trial court need only ask ‘whether the affidavits have created a genuine issue of material fact,’ not whether they do so ‘in light of the burden of proof’ We believe the common sense approach is consistent with *Liberty Lobby*. Accordingly, we hold that the trial court must determine whether the plaintiffs on the summary judgment record proffered evidence from which any rational trier of fact could infer that plaintiffs have proven the elements of a prima facie case by clear and convincing evidence.” (footnotes omitted)).

⁷³ *Burgess v. Mid-Century Ins. Co.*, 841 P.2d 325, 328 (Colo. Ct. App. 1992) (“An insured may recover for an insurer’s bad faith breach of an insurance contract if she proves by a preponderance of the evidence that the insurer’s conduct was unreasonable and that the insurer either knew that its conduct was unreasonable or recklessly disregarded the fact that its conduct was unreasonable.”); *Koppie v. Allied Mut. Ins. Co.*, 210 N.W.2d 844, 846 (Iowa 1973) (“Plaintiff’s burden is to show bad faith by a preponderance of the evidence.”). *But see, e.g.,*

burden for proving punitive damages is the more demanding clear-and-convincing-evidence standard.⁷⁴ This may be sufficient for a court to preclude punitive damages as a matter of law in a borderline bad faith case.

Likewise, in some jurisdictions, the substantive standard of proof for punitive damages is significantly more demanding than for bad faith.⁷⁵ The plaintiff usually must show that the insurer acted with a more culpable mental state, such as malice or an “evil mind.”⁷⁶ Otherwise, as one court has reasoned, “[i]f juries could award punitive damages

State Farm Mut. Auto. Ins. Co. v. Floyd, 366 S.E.2d 93, 98 (Va. 1988) (“We agree with [the insurer] that the trial court erred in requiring proof of ‘bad faith,’ however defined, only by a preponderance of the evidence. That standard would be appropriate if the insured were only required to prove negligence, but here, as we have seen, he must prove considerably more.”).

⁷⁴ *E.g.*, *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 656 (Md. 1992) (“A growing majority of states requires that a plaintiff prove the defendant’s malicious conduct by clear and convincing evidence before punitive damages can be considered.”); *Walter v. Simmons*, 818 P.2d 214, 255 (Ariz. Ct. App. 1991) (“The burden of proof for punitive damages is by clear and convincing evidence.”). *But see, e.g.*, *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801, 809 (S.D. 1996) (“We ... find no error in the trial court’s instructing the jury that it could award punitive damages based on the preponderance of evidence standard.”).

⁷⁵ *Tritschler*, 144 P.3d at 531 (“A claim for punitive damages requires proof of facts beyond those required to prove bad faith.”); *cf.* *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 655 (Md. 1992) (“[T]he evidence necessary to support a punitive damages award goes far beyond that required to support a compensatory damages award based on the underlying strict liability claim.”).

⁷⁶ *Sloan v. State Farm Mut. Auto. Ins. Co.*, 360 F.3d 1220, 1228 (10th Cir. 2004) (“[P]unitive damages may only be awarded when the insurer’s conduct was in reckless disregard for the interests of the plaintiff, or was based on a dishonest judgment, or was otherwise malicious, willful, or wanton.”); *Tritschler*, 144 P.3d at 531 (“[T]o recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant’s conduct was undertaken with ‘an evil mind.’”); *Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 415 (Colo. 2004) (“To recover punitive damages, the insured must establish that the insurer’s breach was accompanied by circumstances of fraud, malice, or willful and wanton conduct.”).

without proof of anything more than bad faith, insurance companies may be overdeterred, and may pay legitimately questionable claims to avoid the risk of a punitive damages award.”⁷⁷

Thus, to warrant punitive damages, the plaintiff must at least show a conscious intent to injure the plaintiff or to create a substantial risk of significant harm.⁷⁸ In fact, courts have gone so far as to hold that “[a]ction justifying the award of punitive damages is conduct involving some element of outrage, aggravation, malice or fraudulent motive on the part of the defendant *similar to that usually found in crime.*”⁷⁹ And many courts hold that “negligent conduct, no matter how gross or wanton, cannot be equated with the conduct required for punitive damages.”⁸⁰ Such a high burden can be difficult to meet. Claims that the insurer “demonstrates a pattern of misconduct and disregard of the rights of the insured” or “knew that it was acting in such a way so as to impair the rights which

⁷⁷ *Gurule v. Ill. Mut. Life & Cas. Co.*, 734 P.2d 85, 86–87 (Ariz. 1987).

⁷⁸ *Id.* (stating that an evil mind requires that the defendant “intended to injure the plaintiff ... or consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others”).

⁷⁹ *Echanove v. Allstate Ins. Co.*, 752 F. Supp. 2d 1105, 1110 (D. Ariz. 2010) (emphasis added); *see also Ten Assocs. v. Brunson*, 492 So. 2d 1149, 1150 (Fla. Dist. Ct. App. 1986) (“To support an award of punitive damages, more than gross negligence must be found. The negligence required to sustain a recovery for punitive damages is the same as that required to sustain a conviction for manslaughter.”).

⁸⁰ *Volz v. Coleman Co.*, 748 P.2d 1191, 1194 (Ariz. 1987); *see also Samuel v. Home Run, Inc.*, 784 F. Supp. 548, 550 (S.D. Ind. 1992) (“Negligent conduct—and even grossly negligent conduct—is not sufficient to support punitive damages without the additional mental state of malice or wantonness.”).

[the plaintiff] was supposed to enjoy under th[e] policy” are generally insufficient alone to support a claim for punitive damages.⁸¹

Therefore, although many plaintiffs formulaically insert a punitive-damages claim into their complaints, the evidence uncovered during discovery may not ultimately support such a claim. In these situations, the insurer is presented with an opportunity to limit the scope of potential damages arising from the action prior to trial.

III. Utilizing the *Plaintiff's* Failures or Bad Faith

One basis for summary judgment that appears to be of recent interest to courts is that an insurer may not be liable for bad faith if the plaintiff acted improperly in some material respect such as by failing to notify the insurer of the insurer’s error or failing to follow the policy’s dispute-resolution mechanisms. This is based partially on equitable principles such as unclean hands (i.e., plaintiffs cannot benefit from their own lack of diligence) and estoppel (i.e., the plaintiff acted as if the insurer’s valuation was correct prior to suit). But materially improper conduct by the plaintiff also affects assessment of the three primary elements of the bad faith claim. As to subjective bad faith, the court may reason that the insurer could not have acted with bad-faith intent if it never knew that the insured took issue with its conduct or policy interpretation. The plaintiff’s failings may also establish objective reasonableness if, for example, the insured fails to provide reasonable support for a higher claim valuation, the insurer’s reliance on its own

⁸¹ *Tritschler*, 144 P.3d at 532.

valuation may be deemed reasonable in light of the absence of contemporary contradictory evidence. Finally, causation of damages may be difficult to show because the insurer may have corrected its error had it been timely presented with the insured's complaints. Thus, this hybrid defense can be useful in a number of respects.

In one recent Louisiana case arising out of damage to a home resulting from Hurricane Katrina, the defendant insurer limited coverage under a homeowners policy to exclude amounts that the adjuster determined to be caused by flood, an excluded peril.⁸² The plaintiffs never requested additional payments for the property or advised the insurer that they felt the amounts they received were insufficient. It was not until the plaintiffs filed suit that they requested additional coverage, claiming that the damage was caused by wind, a covered peril, rather than flood.⁸³ The court held that “[i]n the absence of evidence that plaintiffs had informed [the insurer] that it owed additional payment for wind-caused dwelling damage, plaintiffs cannot establish that [the insurer] arbitrarily and capriciously failed to tender timely and sufficient payment.”⁸⁴

Similar arguments can also be made when plaintiffs fail to follow the mechanisms provided in the policy for dispute resolution. In *Bond v. American Family Mutual*

⁸² *Tardo v. State Farm Fire & Cas. Co.*, No. 08-1165, 2009 WL 1804762, at *1 (E.D. La. June 19, 2009).

⁸³ *Id.*

⁸⁴ *Id.* at *4.

Insurance Co.,⁸⁵ the plaintiffs disagreed with the insurer’s valuation, but failed to avail themselves of their insurance policy’s appraisal clause.⁸⁶ The court held that “[p]laintiffs cannot now obtain additional funds by contending that the actual cash value payment was too low.”⁸⁷ It reasoned that permitting the claim

would allow an insured to game the system by accepting an actual cash value payment, repairing the property for less than the payment, and then seeking to recover more money by challenging the reasonableness of the actual cash value payment in court without ever having invoked the policy provisions designed to address inadequate actual cash value payments—the appraisal and supplemental payment provisions.⁸⁸

Similarly, a plaintiff’s questionable conduct can support partial summary judgment of a punitive-damages claim. In one Arizona case, the court emphasized that “[i]n deciding whether punitive damages are appropriate ... we also think it proper to consider the insured’s conduct.”⁸⁹ The court went on to note the bad-faith conduct of the insured’s attorney throughout the claim process. The attorney was well-skilled in insurance and bad-faith law and knew that certain information would be relevant to the insurer’s determination of coverage. Yet the attorney obfuscated and delayed in

⁸⁵ No. CV-06-1249-PHX-DGC, 2008 WL 477873, at *3 (D. Ariz. Feb. 19, 2008).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*; see also *Echanove v. Allstate Ins. Co.*, 752 F. Supp. 2d 1105, 1108 (D. Ariz. 2010) (quoting and applying *Bond*).

⁸⁹ *Borland v. Safeco Ins. Co.*, 709 P.2d 552, 558 (Ariz. Ct. App. 1985).

providing the insurer with the relevant information.⁹⁰ This conduct precluded the plaintiffs from being awarded punitive damages.⁹¹

Thus, evidence of the plaintiff's bad faith during the claim process, particularly conduct that stokes worries about the possibility of "gaming the system" to set up or exacerbate a bad faith claim, may provide fertile grounds for the insurer to be granted full or partial summary judgment.⁹²

CONCLUSION

Obtaining summary judgment in an insurance bad faith case is a difficult, but not impossible, task. Fact-heavy claims still contain dispositive legal issues. To prevail, the defense must carve out the legal issues and material undisputed facts and distill them from the extraneous disputed factual claims. Emphasizing areas where causal or logical links between facts and legal claims are unsupported or speculative can be particularly effective. The bad-faith plaintiff still has the burden to prove the individual elements of the claim, and each element may be subject to a material deficiency in a particular case. By focusing on the elements of proof, or on discrete, weak aspects of the plaintiff's

⁹⁰ *Id.*

⁹¹ *See also Olbrich v. Shelby Mut. Ins. Co.*, 469 N.E.2d 892, 895 (Ohio Ct. App. 1983) (holding that insured's bad faith conduct precluded punitive damages award).

⁹² *But cf. Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1040 (Cal. 1973) ("While it might be argued that defendants would be excused from their contractual duties (e.g., obligation to indemnify) if plaintiff breached his obligations under the policies, we do not think that plaintiff's alleged breach excuses defendants from their duty, implied by law, of good faith and fair dealing. In other words, the insurer's duty is unconditional and independent of the performance of plaintiff's contractual obligations.").

theories of recovery and prayers for relief, it is possible to transform the most fact-heavy of claims into something that can be summarily adjudicated before trial.