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## Insurance Coverage & Bad Faith

Steptoe & Johnson LLP's Insurance Litigation practice includes the defense of coverage, bad faith, and employment-related claims, including class actions, in both state and federal trial and appellate courts, as well as coverage analysis and prosecution of declaratory judgment actions.

### Insurance Litigation and Counseling

We handle complex coverage and bad-faith litigation for many prominent property, casualty, commercial, and life insurance carriers. We have extensive experience in the following:

- defending class actions in jurisdictions across the country;
- coordinating the national defense of institutional claim-handling programs;
- litigating coverage, bad-faith, abuse-of-process, and other high-stakes claims against insurers; and
- providing other counseling services to help insurers avoid litigation and minimize bad-faith exposure while also running an efficient and fair claim-handling operation.

### Class Action Defense

Our practice group has extensive experience defending class actions in jurisdictions across the country. Within just the past two years, we have defended Allstate Insurance Company in eight class actions or putative class actions in Arizona, Arkansas, Illinois, Kentucky, Montana, New Mexico, Texas, and the District of Columbia.

### Counseling and Other Services

In addition to litigation defense, the firm provides coverage opinion services and legal auditing services. It also litigates declaratory judgment actions when an insurance company has decided to defend an insured under a reservation of rights.

One example of a victory in such matters is *Allstate Ins. Co. v. Donoher* (Ariz. Ct. App. 1999), in which Steptoe lawyers obtained summary judgment in the trial court and then affirmance on appeal, establishing that the "occurrence" requirement in a homeowner's policy's insuring clause barred coverage for negligent supervision claims arising out of criminal conduct by the insureds' child.

### Bad-Faith and Coverage Litigation Defense

We defend a broad array of individual coverage and bad-faith cases. We have achieved notable success obtaining summary judgments in cases challenging

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insurers' institutional claim-handling practices, and in defending our insurance clients at trial.

### Significant Published Dispositive Motion Victories

Our work has resulted in favorable published trial-court opinions (in addition to numerous published appellate opinions (see below) that have:

- Established that an insurer does not act in bad faith by implementing measures designed to avoid overpayment of claims or by utilizing computer programs as tools in the claim adjustment process. For example, in *Milhone v. Allstate Ins. Co.*, 289 F. Supp. 2d 1089 (D. Ariz. 2003), the firm persuaded the court that Allstate's utilization of Colossus, a computerized tool for estimating general damages in injury cases, was appropriate and did not result in bad faith.
- Established that an insurer is entitled to judgment as a matter of law with regard to claims of "institutional" bad faith when it demonstrates that institutional claim-handling programs constitute sound business and claim-handling practices. In *Young v. Allstate Ins. Co.*, 296 F. Supp. 2d 1111 (D. Ariz. 2003), for example, the court held that Allstate's nationwide "CCPR" claim-handling program, including the Minor Impact Soft Tissue (MIST) component of CCPR, is nothing other than a sound business and claim-handling program. After so finding, the court granted summary judgment in Allstate's favor on plaintiffs' "institutional" bad-faith claim.
- Established that an insurer can avoid bad faith as a matter of law by demonstrating that the plaintiff has no substantial evidence to rebut the fair debatability of the value of a claim. *Lopez v. Allstate Ins. Co.*, 282 F. Supp. 2d 1095 (D. Ariz. 2003), for example, represented a significant departure from the "collective wisdom" broadly held by attorneys in Arizona—that summary judgment could not be obtained on all aspects of an insurance bad-faith claim after the Arizona Supreme Court's decision in *Zilisch v. State Farm*, 995 P.2d 776 (2000). The *Lopez* court held that the manner in which Allstate investigated, evaluated, and processed the plaintiff's claim was objectively reasonable, and granted summary judgment in Allstate's favor on all claims.

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- Dismissed as a matter of law bad-faith cases involving sundry types of insurance policies. E.g., *Williamson v. Allstate Ins. Co.*, 204 F.R.D. 641 (D. Ariz. 2002) (granting judgment as a matter of law in case alleging bad-faith handling of uninsured motorist claim, including common-law bad-faith claim and claims under Arizona's Consumer Fraud Statute and Unfair Insurance Claim Settlement Practices Act).

### Other Dispositive Motion Victories

Other notable dispositive-motion successes—in which courts either granted full summary judgment to our insurance-company clients or partial summary judgment dismissing the value-driving "institutional" aspects of bad-faith claims—have included the following:

- Persuading courts in Arizona, Hawaii, and Oklahoma that abuse-of-process allegations failed to state a claim as a matter of law. E.g., *Milroy v. Allstate Ins. Co.* (Oklahoma District Court (State), Tulsa, Oklahoma (March 2005)); *Young v. Allstate Ins. Co.* (Third Cir. Court, Hilo, Hawaii 2004); *Babbitt v. Allstate Ins. Co.* (Ariz. Ct. App. 2002). By obtaining dismissal of these cases on dispositive motions, successfully defending them on appeal, and defending other similar claims at trial (see below), the Phoenix bad-faith group beat back the efforts of high-profile plaintiffs' attorneys to establish an abuse-of-process surrogate for third-party bad-faith claims in jurisdictions that do not recognize third-party bad faith under the common law.
- Vindicating insurers' use of appropriate "bottom line" goals for claim employees and units. In *Ward v. Farmers Ins. Co. of Arizona* (Pima County, Arizona 2004), for example, we advocated that "combined ratio" and other financial-performance goals communicated in the performance reviews of Farmers claim adjusters were innocuous. The court agreed, holding that Farmers' goals were consistent with good business practice and that the plaintiff failed to show that the goals affected the handling of his workers' compensation insurance claim.

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- Establishing favorable, leading-edge judicial interpretations of coverage provisions in homeowners' insurance policies. In *Steed v. Farmers Ins. Co.* (Clark County, Nevada 2004), for example, the plaintiffs sought \$10 million for bad faith in handling a claim for mold damage under their homeowners' policy. The court held that Farmers' policy excludes mold claims, which was the first court ruling in Nevada interpreting Farmers' policy in that manner. See also *Ghiz v. Farmers Ins. Co.* (Maricopa County, Arizona 2003) (granting partial summary judgment after concluding that homeowners' policy excluded mold claims). Similarly, in *Tritschler v. Allstate Ins. Co.* (Pima County, Arizona 2005), in an issue of first impression in Arizona, the court held that Allstate's homeowners' policy does not require payment of overhead and profit to a homeowner who decides to perform repairs on his house rather than hire a contractor. The court was further persuaded to grant summary judgment to Allstate on all of the plaintiff's bad-faith and related claims. (*Id.* at 3.)
- Establishing that an insurer does not owe a duty of good faith and fair dealing to an insured in her capacity as a third-party claimant in an insured-versus-insured action. *Smith v. Allstate Ins. Co.*, 202 F. Supp. 2d 1061 (D. Ariz. 2002).
- Establishing in a putative class action that the insurer did not commit common-law or statutory misrepresentation in failing to disclose the scope of benefits for HMO enrollees under the medical payments coverage of an automobile insurance policy. See *Haisch v. Allstate Ins. Co.*, 5 P.3d 940 (Ariz. Ct. App. June 6, 2000), review denied (Ariz. Jan. 9, 2001).

### Recent Trial Victories

Three of our individual insurance cases have gone to jury trial in the last few years, each ending favorably for our clients. These trials' results included the following:

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- *Hager v. Allstate Insurance Company*, Commonwealth of Kentucky, Fayette Circuit Court, Eighth Division, Case No. 98-C1-2482. Plaintiff sought \$1.425 billion in damages (\$475 million in compensatory damages and \$950 million in punitive damages) on a third party bad faith claim against Allstate under Kentucky's Unfair Claim Settlement Practices Act. Plaintiff challenged Allstate's Claim Core Process Redesign casualty claim handling program, including the Minor Impact Soft Tissue and Colossus claim handling processes, and alleged that plaintiffs' claim against Allstate's insured was delayed for more than 2 1/2 years, before it was settled, in an effort to extort a more favorable settlement. On October 10, 2007, after a two-week trial, the jury rendered a unanimous verdict for Allstate.
- A unanimous defense verdict, after a two-and-a-half-week jury trial, in a case alleging that Allstate abused legal processes through its MIST, CCPR, and CCPR Litigation Management programs. In this case, *Leal v. Allstate Ins. Co.* (Maricopa County, Arizona 2005), Cal Thur, one of the deans of the plaintiffs' bad-faith bar in Arizona with a reputation for achieving multi-million-dollar judgments in bad-faith cases, sought between \$5-7 million in punitive damages. The jury rejected arguments that Allstate used its superior financial resources to discourage plaintiffs' attorneys from representing individuals with MIST claims against Allstate insureds, and that it sought to induce MIST claimants to accept less than they were entitled to by using "scorched earth litigation tactics."
- A defense verdict in the first third-party bad-faith case to proceed to trial in New Mexico after the state's supreme court recognized a claim for third-party bad faith under the state's Unfair Claim Practices Act. In this case, *King v. Allstate Ins. Co.* (Bernalillo County, New Mexico 2004), the jury rejected plaintiff's counsel's broad attack on Allstate's CCPR program and SIU practices.

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- The successful trial defense of another abuse-of-process action brought by Cal Thur. In *Crackel v. Allstate Ins. Co.* (Pima County, Arizona 2001), in a five-week jury trial, the plaintiffs sought \$500,000 in compensatory damages and \$100 million in punitive damages, alleging that Allstate's CCPR program induced Allstate's claim personnel to "lowball" claim payments and forced Allstate's in-house attorneys to abuse legal process once litigation began. We argued, on the other hand, that Allstate's CCPR program is a sound business and claim-handling program that reasonably attempts to eliminate the overpayment of claims. In a divided decision (6-2), the jury awarded nominal compensatory damages (\$7,500 per plaintiff); but in the second phase of the trial on punitive damages, the jury was out less than 10 minutes and unanimously rendered a defense verdict.

### Appellate Advocacy

We have an extensive appellate practice in the insurance field, which includes matters brought to the firm at the appeals stage as well as cases that the firm handled in the trial courts. In addition to the matters listed above, the firm has:

- Represented the Alliance of American Insurers, the American Insurance Association (AIA), the National Association of Independent Insurers (NAII), and the National Association of Mutual Insurance Companies as *amici curiae* in the US Supreme Court on the merits of State Farm's successful constitutional challenge to a \$145 million punitive damages award in a bad-faith action. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003).
- Obtained reversal of a \$5.7 million judgment against a St. Paul Travelers' entity, Northland Insurance Company. *State of Arizona v. Northland Ins. Co.* (Ariz. Ct. App. 2004). This dispute arose from a disagreement over an "additional insured" provision in a Northland policy covering certain operations in the State of Arizona's prison facilities. In a case of first impression in Arizona, the Court agreed with our interpretation of the policy and limited the scope of the "arising out of operations" language in the policy.
- Represented the Alliance, AIA, and NAII as *amici curiae* in successfully establishing that, in the tripartite relationship, appointed defense counsel may represent both the insured and the insurer as clients. *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Ariz. 2001).

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- Obtained sanctions against a plaintiff that led to the seminal decision on the scope of sanctions for failure to comply with Arizona's new disclosure rules, ultimately resulting in the grant and affirmance on appeal of summary judgment in favor of the insurer on former agent's wrongful termination and breach-of-contract claims. *Allstate Ins. Co. v. Superior Court (Korman)*, 875 P.2d 845 (Ariz. Ct. App. 1994), *vacated*; *Allstate Ins. Co. v. O'Toole*, 896 P.2d 254 (Ariz. 1995), *on remand after grant of summary judgment*; *Korman v. Allstate Ins. Co.* (Ariz. Ct. App.), *review denied* (Ariz. 2000).
- Defended an insurer against breach-of-contract and wrongful-termination claims by a former agent, establishing that cause for termination is evaluated based on the employer's good-faith belief rather than the employee's actual guilt. *Almada v. Allstate Ins. Co.*, 153 F. Supp. 2d 1108 (D. Ariz. 2000), *aff'd*, 285 F.3d 798 (9th Cir. 2002).
- Represented an insurer as *amicus curiae* in a coverage dispute over mold-related losses. *Liristis v. American Family Mut. Ins. Co.*, 61 P.3d 22 (Ariz. Ct. App. 2002).
- Defended an insurer on the theory that an insured's healthcare expenses were not covered under the automobile policy's Med Pay coverage because they were covered by the insured's HMO and therefore were not "actually incurred" expenses. *Samsel v. Allstate Ins. Co.*, 59 P.3d 281 (Ariz. 2002).
- Established that a third-party claimant may not sue an insurer for bad faith based on any duty of good faith implied by law in the mandatory automobile insurance statute, or any duty assumed by the insurer in a pledge to provide third-party claimants with "quality customer service." *Leal v. Allstate Ins. Co.*, 17 P.3d 95 (Ariz. Ct. App. 2000), *review denied* (Ariz. May 23, 2001).
- Obtained a unanimous reversal by the Arizona Supreme Court of a unanimous Court of Appeals' decision as to the circumstances in which injuries arise out of the use of an automobile for purposes of an exclusion in a homeowner's policy. *Allstate Ins. Co. v. Johnston*, 194 P.3d 10 (Ariz. 1999).

### Representative Matters

#### Class Action Litigation Victories

Our practice group's notable litigation achievements in class-action cases include the following, among others:

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- In 1999, Floyd Bienstock represented Arthur Anderson as trial counsel in a 66-day trial in *ISCO v. Arthur Anderson, L.L.P.*, a securities fraud class action, which resulted in a defense verdict.
- Steptoe is currently representing Allstate in the nationwide class action, *Hensley v. Computer Sciences Corp., et al.*, filed in Miller County, Arkansas, challenging insurers' use of claim evaluation software such as Colossus.