

EXTRACONTRACTUAL DAMAGES ON INSURANCE POLICY CLAIMS -- TENNESSEE

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Tennessee's insurance statutes include one that authorizes a court to impose a penalty of up to twenty-five percent of an insurance company's liability for loss to the holder of an insurance policy or fidelity bond if payment has not been made within sixty days after demand, the refusal to pay was not in good faith, and the failure to pay inflicted additional expense or injury upon the holder, including attorneys fees.¹ This statute has been determined to be penal, and it must be strictly construed.² Thus, for a policyholder to recover, formal and strict compliance with the demand provisions are necessary,³ the policyholder must prevail on the insurance claim⁴ and must also prove that the refusal to pay was not in good faith.⁵ Tennessee's penalty statute has no application to workers' compensation claims⁶ or to liability policies,⁷ each of which is a third party claim. Tennessee's penalty statute has not been a bar to an insured's excess judgment claim for an insurance company's bad faith refusal to settle a liability claim within policy limits.⁸

Until 1998, Tennessee's bad faith refusal penalty statute had long been thought to be the exclusive remedy for bad faith denial of an insurance claim, either by itself or in conjunction with the Insurance Trade Practices Act.⁹ Tennessee's Supreme Court held in *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920 (Tenn. 1998) that Tennessee's bad faith refusal penalty statute and its Insurance Trade Practices Act were not exclusive, and that a policyholder could pursue an action against an insurance company for violation of Tennessee's Consumer Protection Act (or "TCPA").¹⁰ When applicable, the TCPA provides that when a court finds an insurance company used or employed unfair or deceptive acts or practices in willful or knowing violation of the TCPA, the court may design an award of up to 300 percent of the claimant's actual damages and also provides that the court may award such other relief as the court considers necessary and proper, most frequently attorneys' fees.¹¹ The statute calls for the trial judge to decide whether a violation is willful or knowing and to determine whether or not to grant treble damages, and courts have construed the statute as written.¹²

Tennessee has long permitted persons to insure against punitive damages and has determined that public policy does not prohibit such insurance.¹³ It does permit certain exclusions, such as intentional actions by the insured, that would constitute a basis for such an award. While the Tennessee Department of Commerce and Insurance routinely disapproves liability insurance policies containing punitive damage exclusions, it routinely approves liability insurance policies that exclude damages from various types of actions by an insured. While punitive damages may be insured, punitive damages are not allowed as a remedy on cases founded on breach of contract.¹⁴

It is important to note that in *Myint*, Tennessee's Supreme Court held that TCPA damages could be awarded if the policyholder prevailed on the claim, but did not hold that they must be awarded, and it specifically held on the record before it that the insurance company's action on the claims were reasonable. Thus, it found that TCPA damages could not be awarded on the record presented to it.¹⁵

Review of post-*Myint* reported cases involving insurance claims revealed that to date insurance company conduct on claims has generally stood up to scrutiny by courts and juries. The Tennessee Supreme Court held in 2003 that whether an insurance company's conduct was an unfair or deceptive act or practice was for the jury, as the bad faith refusal penalty has long been a jury question, so that a directed verdict is appropriate only if reasonable minds could reach only one conclusion after construing all evidence and inferences from the evidence in favor of the non-moving party, and disregarding all countervailing evidence.¹⁶ However, there must be material evidence to support any such jury verdict, and a verdict must be set aside if there is none.¹⁷

It is probably fair to predict that insurance companies will lose cases under the TCPA as they have from time to time under the bad faith refusal penalty statute. The standard under the TCPA is probably not materially higher than that of the bad faith refusal penalty statute, and the rewards under the TCPA can be materially greater.

Conclusion

Clearly, the TCPA poses additional risks and costs to insurance companies doing business in Tennessee. With exceptions, the Tennessee Department of Commerce and Insurance routinely disapproves policies for use in Tennessee that contain mandatory arbitration provisions (but routinely approves policies that contain permissive arbitration provisions), so changes in policy forms to move disputes into arbitration by unilateral insurance company decision provide no alternative to bearing the burden of those increased risks and costs. To date, insurance companies generally seem to be handling their claims fairly, or at least with every appearance of fairness, and to be presenting their cases well in litigations.

Endnotes

1. Tenn. Code Ann., Section 56-7-105. This statute was first enacted in 1901.
2. St. Paul Fire & Marine Ins. Co. v. Kilpatrick, 129 Tenn. 55, 164 S.W. 1186 (1913).
3. Ibid. If payment is refused, the pre-condition that sixty days must expire after demand does not have to be met, Thompson v. Interstate Life & Acc. Ins. Co., 128 Tenn. 526, 162 S.W. 39 (1913).
4. Thompson v. Fidelity Mut. Life Ins. Co., 116 Tenn. 557, 92 S.W. 1098 (1906).
5. Harowitz v. Concordia Fire Ins. Co., 129 Tenn. 691, 168 S.W. 163 (1914).
6. Wilkinson v. Johnson City Shale Brick Corp., 156 Tenn. 373, 299 S.W. 1056 (1928).
7. Medley v. Cimmaron Ins. Co., 514 S.W.2d 426 (Tenn. 1974).
8. Coppage v. Fireman's Fund Ins. Co., 379 F.2d 621 (6th Cir. 1967). See also 63 A.L.R.3d 627.
9. The Insurance Trade Practices Act is codified at Tenn. Code Ann., Secs. 56-8-101 – 306. It provides a regulatory cause of action but is generally thought not to provide a private cause of action and specifically provides that it does not provide a private cause of action on unfair claim settlement practices.
10. The TCPA is codified at Tenn. Code Ann. Secs. 47-18-101 – 125.
11. Tenn. Code Ann., Sec. 47-18-109(a)(3).
12. E.g., Buddy Lee Attractions, Inc. v. William Morris Agency, Inc., 13 S.W.3d 343 (Tn. Ct. App. 1999). The jury decides whether particular acts or practices occurred and, if so, whether they were unfair or deceptive.
13. Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1 (Tenn. 1964).
14. E.g., Bland v. Smith, 197 Tenn. 683, 277 S.W. 2d 377 (1955).
14. Myint, *supra*, at 928-929.
15. Gaston v. Tennessee Farmers Mutual Ins. Co., 120 S.W.3d 815 (Tenn., 2003).
16. Stooksbury v. American Natl. Prop. and Cas. Co., 126 S.W.3d 505 (Ct. App., 2003), Permission to Appeal Denied by Supreme Court January 26, 2004, reversing jury verdicts for plaintiff under bad faith refusal penalty statute and under TCPA.