

Don't Pile on Causes of Action For Bad-Faith Insurance Suits

By Michael M. Pollak

Many plaintiffs' attorneys have trouble pleading causes of action in insurance bad-faith cases. In first-party insurance bad-faith cases, plaintiffs have viable causes of action for breach of contract and for breach of the implied covenant of good faith and fair dealing (bad faith). A plaintiff prevailing on a bad-faith cause of action may obtain tort damages and has the opportunity to seek punitive damages. Some plaintiffs' attorneys, in an effort to make it easier to prove liability or perhaps try to get the insurance carrier's attention, add additional purported causes of action, including



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breach of fiduciary duty, Business & Professions Code Section 17200, negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and declaratory relief. These causes of action generally are not available against an insurance carrier in a bad-faith lawsuit.

An insured has no cause of action against his or her insurance carrier for breach of fiduciary duty. Earlier California Supreme Court cases suggested that insurance carriers might be deemed fiduciaries. *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809 (1979) ("Insurers hold themselves out as fiduciaries"); *Frommoethelydo v. Fire Ins. Exch.*, 42 Cal.3d 208 (1986) (insurers are held to the "qualities of decency and humanity inherent in the responsibilities of a fiduciary"). Despite this language, the courts have not allowed causes of action for breach of fiduciary duty. *Love v. Fire Ins. Exch.*, 221 Cal.App.3d 1136 (Cal. App. 4th Dist. 1990); *Employers Ins. of Wausau v. Albert D. Senno Constr. Co.*, 945 F.2d 284 (9th Cir. 1991).

Any uncertainty in this area ended with the state Supreme Court's opinion in *Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal.4th 1142 (Cal. 2001). *Vu* stated that, while an insured has unequal bargaining power and must depend on the good faith of the insurance carrier, the insurance carrier is not a fiduciary and cannot be sued for breach of fiduciary duty.

Business & Professions Code Section 17200 causes of action have become fashionable in recent years. The statute covers a wide range of conduct, embracing anything that properly can be called a business practice. It prohibits, among other

things, any "unlawful," "unfair" or "fraudulent" business practice. Its broad and vague scope of potential liability has tempted plaintiffs' attorneys to include Section 17200 causes of action in bad-faith cases. However, Section 17200 does not create an independent right of action. Instead, a 17200 cause of action "borrows" violations of other laws and treats those violations as unlawful practices independently actionable. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (Cal. 2003). Section 17200 does not allow a plaintiff to recover compensatory or punitive damages. *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal.App.4th 1093 (Cal. App. 2nd Dist.). A Section 17200 cause of action allows only injunctive relief and restitution. *Korea Supply*. Before *Korea Supply*, plaintiffs' attorneys tried to obtain restitution of the defendant's profits from its conduct affecting a large group, not just from conduct affecting the individual plaintiff. However, in *Korea Supply*, the state Supreme Court held that the restitution remedy is limited to the return of money given to the defendant in which the plaintiff has an ownership interest. Because an insurance carrier's profits from any one plaintiff are small, after *Korea Supply* Section 17200 causes of action are of limited utility in insurance bad-faith causes.

In order to recover for bad faith, the plaintiff must show that the insurance carrier acted unreasonably, which requires more than ordinary negligence. *Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910 (Cal. 1978); *Chateau Chamberay Homeowners Assn. v. Associated Intl. Ins. Co.*, 90 Cal.App.4th 335 (Cal. App. 2nd Dist. 2001). Some plaintiffs' attorneys attempt to impose a negligence standard on the insurance carrier by pleading causes of action for negligence or negligent infliction of emotional distress. In a first-party bad-faith action, the relationship between the parties is based on the insurance contract. Conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. *Ertich v. Menezes*, 21 Cal.4th 543 (Cal. 1999). Negligence causes of action are not available against insurance carriers. *Sanchez v. Lindsey Morden Claims Services Inc.*, 72 Cal.App.4th 249 (Cal. App. 2nd Dist. 1999); *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160 (9th Cir. 1995).

Negligent infliction of emotional distress is not an independent tort but rather is based on the tort of negligence. *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965 (Cal. 1993). Just as negligence causes of action are not available against insurance

carriers, neither are purported causes of action for negligent infliction of emotional distress. *Soto v. Royal Globe Ins. Co.*, 184 Cal.App.3d 420 (Cal. App. 4th Dist. 1986).

The tort of intentional infliction of emotional distress requires proof of "extreme and outrageous conduct" by the defendant "especially calculated to cause ... mental distress of a very serious kind." *Christensen v. Superior Court*, 54 Cal.3d 868 (Cal. 1991). The conduct alleged must be "so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Schlauch v. Hartford Acc. and Indem. Co.*, 146 Cal.App.3d 926 (Cal. App. 3rd Dist. 1983). An insurance carrier's failure to pay a claim or its unreasonable investigation of a claim does not amount to the tort of intentional infliction of emotional distress. *Schlauch*; *Ricard v. Pacific Indemnity Co.*, 132 Cal.App.3d 886 (Cal. App. 1st Dist. 1982). In a bad-faith case, rarely can a plaintiff get by a demurrer or a Rule 12(b)(6) motion on a cause of action for intentional infliction of emotional distress, much less prevail on it at trial. But even if a plaintiff can plead an intentional infliction cause of action, it would not assist the plaintiff in a bad-faith case. It would not be any easier for a plaintiff to prevail on liability than it would be to prove bad faith, and the available damages are no greater than in a bad-faith cause of action.

Finally, plaintiffs sometimes allege causes of action for declaratory relief. In most instances, the bad-faith lawsuit is filed after the claim has been resolved: either denied or not handled to the plaintiff's satisfaction. Where there is no pending claim, there is no viable cause of action for declaratory relief. The fundamental basis of declaratory relief is the existence of an actual, present controversy. Witkin, "California Procedure," 4th Ed., Pleading, Section 817. Where no claim is pending, there is no present controversy on which the court can issue a declaratory judgment. Also, even where the plaintiff files suit while the plaintiff's claim is pending, a declaratory-relief cause of action is not appropriate. Declaratory-relief actions are filed when the plaintiff is uncertain of his or her rights or duties under a contract. Code of Civil Procedure Section 1060. But the plaintiff in a bad-faith action typically alleges that the insurance carrier has breached the contract, not that the plaintiff is unsure of his or her rights.

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