

# First Party Property Damage Claims in South Carolina



*A Bad Faith Primer and Case Study*

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# WHAT IS BAD FAITH?

Every insurance contract has an implied covenant of **good faith and fair dealing**. Bad faith insurance practices arise when this covenant is breached by an insurer. The following actions or conduct may constitute bad faith:

## 1. REFUSAL TO PAY BENEFITS WITHOUT REASONABLE BASIS

### ELEMENTS OF A BAD FAITH CLAIM

- 1 Existence of a mutually binding insurance contract
- 2 Insurers' refusal to pay benefits due under the contract
- 3 Refusal resulting from bad faith or unreasonable action in breach of the implied covenant of good faith and fair dealing
- 4 Damages caused to the insured as a result

See *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E. 2d 727, 730 (1996)(where trial court directed verdict for insured when insurer denied coverage for contents which were defined under multiple parts of the policy in a commercial fire loss claim)

South Carolina Code of Laws  
Ann. § 38-59-20

Improper claim practices.

Any of the following acts by an insurer...if committed without just cause and performed with such frequency as to indicate a general business practice, constitutes improper claim practices

(allows for recovery of attorney's fees and costs, only available in Breach of Contract actions)

# POLICY DEFINITIONS IN COCK-N-BULL

Covered Property, as used in this Coverage Part means the following types of property for which a Limit of insurance is shown in the Declarations: a. Building, meaning the building or structure described in the Declarations, including:

- (1) Completed additions;
- (2) Permanently installed:
  - (a) Fixtures;
  - (b) Machinery; and
  - (c) Equipment;
- (3) Outdoor fixtures;
- (4) Personal property owned by you that is used to maintain or service [\*\*\*4] the building or structure or its premises, including:
  - (a) Fire extinguishing equipment;
  - (b) Outdoor furniture;
  - (c) Floor coverings; and
  - (d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;

[Cock-N-Bull Steak House v. Generali Ins. Co., 321 S.C. 1, 5, 466 S.E.2d 727, 729 \(1996\)](#)

## 2. FAILURE TO INVESTIGATE CLAIMS IN GOOD FAITH

It is the insurer's responsibility to conduct a good faith investigation of claims, (i.e. to exercise honest and informed judgment), and the failure to do so may constitute bad faith.

Ex. an insurer denies coverage to a homeowner's claim of weather damage without gathering available evidence on-site.

*Flynn v. Nationwide Mutual Ins. Co.*, 281 S.C. 391, 315 S.E. 2d 817, 820 (S.C. Ct. App. 1984) (where carrier refused to pay a claim for a single car MVC, considering it an arson, where insured had accelerants on his clothing from working within his body shop and not from causing the fire) (cited in *Myrick v. Prime Ins. Syndicate, Inc.* 395 F.3d 485 (4th Cir. 2005))

## 3. UNREASONABLE DELAY IN PAYMENT

"[A]bsent the threat of tort liability, the insurer could arbitrarily delay paying undisputed amounts to coerce the often economically vulnerable insured into accepting a lower payment for those amounts that are disputed and, in so doing, face "no more penalty than interest on the amount owed."

*Snyder v. Auto-Owners Ins. Co.*, 634 F. Supp. 3d 252, 261 (D.S.C. 2022) ("In light of the undisputed evidence that the cause of the fire was unknown, the claim involved losses exceeding \$2 million, and the Snyders failed to submit a proof of loss, a three month delay in payment is insufficient to raise a genuine issue of material fact to support a finding of *bad faith*." (emphasis added)).

- S.C. Code Ann. § 38-59-20: (8) acknowledges "unreasonable delay in paying" as an improper claim practice

## 4. MISREPRESENTATION OR DECEPTIVE PRACTICES

Knowingly misrepresenting policy provisions or coverage information constitutes bad faith. This includes failing to acknowledge or respond promptly to communications regarding claims (S.C. Code Ann. § 38-59-20 (1))

## 5. COERCIVE SETTLEMENT PRACTICES

- Compelling policyholders to file lawsuits to recover amounts reasonably due
- Offering considerably less than amounts ultimately recovered
- Threatening to invoke policy defenses without reasonable expectation of prevailing

## 6. WILLFUL OR RECKLESS DISREGARD OF INSURED'S RIGHTS

Punitive damages may be awarded if the insurer's conduct is willful or in reckless disregard of the insured's rights, including for actions taken with malice or without a reasonable basis for contesting the claim.

Cases:

- *Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485 (4th Cir. 2005)
- *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992)

# 7. IMPROPER DENIAL OF COVERAGE



Denying coverage based on defenses that were not known or reasonably available at the time of denial may be bad faith. Evidence arising after the denial already occurred is irrelevant to this determination

Ex: an insurer denies coverage on the basis of speculation, and only afterwards cites evidence supporting their initial suspicions.

Cases: *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 450 S.E.2d 582 (1994) (evidence received by carrier after denial in support of claim is irrelevant to determine whether it engaged in *bad faith*); *Harriman v. Associated Indus. Ins. Co.*, 91 F.4th 724 (4th Cir. 2024) (articulating the rule in finding an excess insurer did not commit bad faith in failing to provide a defense when it was not aware of a primary policy at the time the complaint was filed.)

# 8. FAILURE TO SETTLE WHEN LIABILITY IS CLEAR

Not attempting to effect a prompt, fair, and equitable settlement of claims where liability has become reasonably clear is bad faith conduct.

Ex. an insurer refuses to make a settlement offer in a MVC where the insured is proven at fault by police reports and medical records

In South Carolina, a **liability** insurer owes its insured a duty to settle a personal injury claim covered by the policy, if settlement is the reasonable thing to do. *Tyger River Pine Co. v. Maryland Casualty Co.*, 163 S.C. 229, 161 S.E. 491 (1931) (cited by *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 475, 377 S.E.2d 343, 349 (Ct. App. 1988))

# NICHOLS V. STATE FARM



Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983)

## EVENTS

Nichols' insured Corvette was stolen and heavily damaged, and State Farm refused to pay the full repair costs, allegedly delaying repairs for more than seven months.

A jury found for Nichols on both breach of contract and bad faith, awarding actual and punitive damages, and the South Carolina Supreme Court affirmed the bad faith tort recovery.

## FINDINGS SUMMARY

SC Supreme Court case; held that an insured may recover **in tort** for bad faith or unreasonable action by an insurer in processing a claim under a mutually binding insurance contract.

Consequential damages (including punitive) are recoverable if the insurer's actions were **willful or in reckless disregard** of the insured's rights

Emphasis on **implied covenant of good faith and fair dealing**

**Limitation:** In Kleckley v. Nw. Nat'l Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000), the court limited the application of bad faith claims to first-party insureds, explicitly holding that third parties who are not named insureds cannot bring such claims

# NICHOLS V. STATE FARM



Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983)

## ISSUES

- Whether South Carolina should recognize an action for bad faith in an insurer's handling of a claim for first party benefits, a cause of action first recognized in *Gruenberg v. Aetna Insurance Co.*, 9 Cal. (3d) 566, 108 Cal. Rptr. 480, 510 P. (2d) 1032 (1973):
    - Implied covenant of good faith and fair dealing that neither party will do anything to impair the other's rights to receive benefits under the contract.
    - Breach of this duty by an insurer's bad faith refusal to settle the claims of its insured renders the insurer liable in tort for all consequential damages
    - Actual damages are not limited by the contract
  - **Tyger River Doctrine**: According to court holdings in *Tyger River Pine Co. v. Md. Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933), an insurer's unreasonable refusal to settle within policy limits subjects the insurer to tort liability.
  - **Public interest**: one important reason for recognizing bad faith in tort law is that an insured ordinarily possesses no bargaining power and no means of protecting himself from insurer maltreatment;
    - The only reason for entering into the contract to begin with is to protect oneself from unexpected loss, not leverage any sort of power at the expense of the insurer.
    - Meanwhile, absent the threat of a tort action, an insurance company can, with complete impunity, deny any claim they wish, whether valid or not.
  - **Damages**: an insured may recover consequential damages in tort when an insurer acts in bad faith or unreasonably in processing a claim.
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# DIVE INTO *GRUENBERG*

Gruenberg v. Aetna Insurance Co., 9 Cal. (3d) 566, 108 Cal. Rptr. 480, 510 P. (2d) 1032 (1973)

## FACTS

- Plaintiff's business premises were insured against fire loss by three defendant insurers—*commercial case*
- After a fire, plaintiff was arrested and charged with arson and defrauding an insurer.
- Insurers demanded plaintiff appear for examination while criminal charges were pending.
- Plaintiff refused to appear until criminal charges were resolved, after which insurers denied liability.
- **Criminal charges were dismissed for lack of probable cause.**
- **Plaintiff then offered to submit to examination, but insurers maintained their denial.**

## RULING

- An insurer who unreasonably and in bad faith withholds payment of an insured's claim is subject to liability in tort.
- An insurer's duty of good faith and fair dealing is unconditional and independent of the insured's performance of contractual obligations.
- An insured may recover damages for mental distress without showing "extreme" or "outrageous" conduct by the insurer.
- Non-insurer defendants (agents, adjusters, attorneys) cannot be liable for breach of the duty of good faith.

## RELEVANCE

- Established that insurers owe an implied, independent duty of good faith and fair dealing to insureds.
- Breaching that duty (e.g., unreasonably withholding benefits) gives rise to a tort claim for bad faith and allows recovery of punitive damages.
- SC adopted and expanded Gruenberg's principles, recognizing bad faith claims through cases like Nichols, and reinforcing them through statutes that penalize improper claims practices and allow recovery of punitive damages.

# OTHER CASE LAW:



## MYRICK V. PRIME INS. SYNDICATE, INC., 395 F.3D 485 (4TH CIR. 2005)

US Court of Appeals case, an insurer can act in bad faith by failing to conduct a meaningful investigation before denying coverage.

Furthermore, an insurer may not deny a claim first and investigate later - a thorough investigation is a meaningful step in determining coverage or denial.

## CROSSLEY V. STATE FARM MUT. AUTO. INS. CO., 307 S.C. 354, 415 S.E.2D 393, 1992

Reiterates the elements of bad faith - if an insurer has a reasonable basis for contesting a claim, there is no bad faith.

Punitive damages may only be awarded in cases of willful or reckless disregard for the insured's rights according to the contract.

An insurer's conduct must be judged based on the evidence available at the time of the claim denial.

## HARRIMAN V. ASSOCIATED INDUS. INS. CO., 91 F.4TH 724 (4TH CIR. 2024)

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# CASE STUDY

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## EVENTS

A residential community underwent a historically significant hail event. After conducting inspections and internally concluding roof damage consistent with damage caused by the hail event, the community alerted its insurer of a hail damage claim.

The insurer meets with an expert who conducts a multi-day inspection, concluding with a recommendation of at least partial replacement of the roofs and a statement that the damage most likely is attributable to the hail storm.

The insurer never discloses the outcome of the inspection to its insured. Instead, their representatives attest that further documentation is needed before they can complete their investigation, proceeding to request an overly burdensome quantity of material irrelevant to the claim.

The insured supplied ample evidence of the initial damage, opened its corporate books to the insurer, and continuously requested payment of the claim.

Over a year and a half after its insured first reported the damage, the insurance company declined the claim, without ever citing the inspection report; instead, they cited a subsequent inspection falsely claiming that the damage was caused by hail from over a decade ago.

# CASE STUDY

## LEGAL ANALYSIS

INSURER'S DUTY

The insurer had the opportunity and duty to fairly adjust and pay the claim; instead, it refused to follow its own expert's findings, failed to disclose the findings to its insured, hid the findings from the insured, and fraudulently claimed that it did not have enough information to accept coverage.

South Carolina recognizes a claim for bad faith in this insurer's handling of a claim for first party benefits because the "insured does not contract to obtain any kind of commercial advantage or leverage but only to protect himself against the specter of accidental [or unavoidable] loss." Nichols v. State Farm Mutual Automobile Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983).

NICHOLS APPLIED

WILLFUL AND WANTON  
DISREGARD

The insurer's conduct was **willful and in wanton disregard of the rights of its insured** by intentionally withholding material from its insured that furthered the insured's claim and intentionally misrepresented facts regarding damage to the insured.

DAMAGES

The insurer was also sued for under SCUPTA—showed that it had engaged in similar conduct with other claimants.

# CASE STUDY

## EVENTS

Insured offered to settle the claim for the agreed upon price reached by the initial, in house insurance adjuster and the property manager.

Carrier refused to pay that undisputed amount, claimed the adjuster did not have authority to bind the carrier and disputed the context of the agreement.

After its first reversal, carrier claimed damage was caused by a subsequent storm.

Nearly two years later, carrier changed its denial, claiming that the damage was caused by a decade old storm

Carrier's initial expert report was eventually produced in discovery, showing that damage was from hail, most likely from the storm claimed by the insured, and identifying damage to 1/2 of the roof systems.

Carrier eventually settled claim confidentially.

# REAL WORLD ISSUE SPOTTING

## COMMERCIAL CLAIMS—MAJORITY OF MAJOR CLAIMS

Business income loss

Reasonable and fair adjustment of property and content value

Loss runs—application to which policy

Insurers applying a loss to an insured policy when damage is attributable to the insurer's negligence

## INDIVIDUAL CLAIMS

Fire damage

Hail/Windstorm damage

Named Storm Damage

# PRACTICE POINTERS

## EXPERTS?

*ASSUME YOU ARE GOING TO NEED ONE - FACTOR IT INTO LITIGATION COST FOR CLIENT*

## PRIVATE ADJUSTERS?

Expert adjuster

Client should produce their own inventory

## ACCOUNTING EXPERT

Carrier will hire expert to determine business income loss

Very important to at least engage a consulting expert to assist in examining carrier's projections for rebutting numbers, pre-suit negotiations, and cross-examination.

ongoing expense vs. a saved expense relative to the loss

"Buckets": Pay attention to which "bucket" the carrier is attributing damages.

# PRACTICE POINTERS

## ADDITIONAL DEFENDANTS?

- Adjuster? - Forget it
- Insurance Agent – Often, possibly . . . .
  - Additional Analysis (rescission case? business income loss case?)
  - fact specific
  - standard of care is a moving target, dependent upon facts
  - Often injects countervailing arguments

# CLOSING

- YOU WILL ENCOUNTER FIRST PARTY PROPERTY DAMAGE CLAIMS
  - OFTEN ARE WORTH PURSUING—EVEN FROM A CLAIMS HANDLING BASIS
  - TEDIOUS, COMPLEX, TIME-CONSUMING
  - RESULTS CAN BE VERY REWARDING AS AN ADVOCATE

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