

TABLE OF CONTENTS

Chapter 1	INSURANCE BAD FAITH CLAIMS IN COLORADO	1
	§ 1.1 INTRODUCTION	1
	EXHIBIT	
	Exhibit 1A—Bad Faith Case Outcomes	5
<hr/>		
Chapter 2	TORT VERSUS CONTRACT REMEDIES	27
	§ 2.1 INSURED’S REMEDIES LIMITED UNDER CONTRACT LAW	27
	§ 2.2 EXPANDED REMEDIES UNDER TORT LAW	29
	EXHIBIT	
	Exhibit 2A—Insured’s Remedies For Breach Of Contract And Bad Faith Breach Of Contract	31
<hr/>		
Chapter 3	FIRST-PARTY AND THIRD-PARTY CLAIMS	33
	§ 3.1 INTRODUCTION	33
	EXHIBIT	
	Exhibit 3A—Common First-Party And Third-Party Claims	35

Chapter 4	BASIS OF THE BAD FAITH CLAIM	37
§ 4.1	INSURANCE CONTRACT AS SOURCE OF THE DUTY OF GOOD FAITH	38
§ 4.2	DUTY OF GOOD FAITH OUTSIDE OF INSURANCE CONTRACT	41
§ 4.3	BAD FAITH CLAIMS WHEN NO BREACH OF CONTRACT OCCURRED	45
	§ 4.3.1—Breach Of Contract Not A Prerequisite	46
	§ 4.3.2—Breach Of Contract Is A Prerequisite	48
	§ 4.3.3—Where There Is No Breach Of Contract, There Is No Bad Faith	49
§ 4.4	CONCLUSION	52
<hr/>		
Chapter 5	STANDARD OF LIABILITY IN THIRD-PARTY CASES	55
§ 5.1	INITIAL ADOPTION OF NEGLIGENCE STANDARD	56
§ 5.2	COURT OF APPEALS DEFINES BAD FAITH AS INTENTIONAL TORT	56
§ 5.3	SUPREME COURT REAFFIRMS BASIC NEGLIGENCE STANDARD	57
§ 5.4	INSURER’S DUTY TO SETTLE DOES NOT INCLUDE DUTY TO PROTECT INSURED AGAINST PUNITIVE DAMAGES	58
§ 5.5	INSURED DOES NOT HAVE TO PROVE SETTLEMENT OFFER WAS BONA FIDE AS ELEMENT OF BAD FAITH	60

Table of Contents

§ 5.6	DUTY TO RECOMMEND THAT INSURED HIRE PERSONAL COUNSEL WHEN THERE IS A RISK OF AN EXCESS JUDGMENT	63
§ 5.7	SUMMARY OF STANDARDS IN THIRD-PARTY CASES	65
EXHIBIT		
	Exhibit 5A—Current Liability Law For Bad Faith In Third-Party Claims	67
<hr/>		
Chapter 6	STANDARD OF LIABILITY IN FIRST-PARTY CASES	69
§ 6.1	COURT OF APPEALS ATTEMPTS TO PROMULGATE STANDARD IN <i>SAVIO</i>	70
§ 6.2	SUPREME COURT ADOPTS TWO-PART TEST IN <i>SAVIO</i>	71
§ 6.3	TWO-PART STANDARD APPLIES TO BAD FAITH CASES OUTSIDE OF CLAIMS CONTEXT	73
§ 6.4	INSURER RELYING ON EXISTING LAW DOES NOT ACT IN BAD FAITH	74
§ 6.5	SUMMARY OF STANDARD IN FIRST-PARTY CASES	75
EXHIBIT		
	Exhibit 6A—Standards Of Liability In First-Party And Third-Party Claims	77

Chapter 7	REASONABLENESS OF THE INSURER’S CONDUCT — THE RISE AND FALL OF THE “FAIRLY DEBATABLE” STANDARD	79
------------------	---	----

§ 7.1	EMERGENCE OF THE “FAIRLY DEBATABLE” STANDARD IN COLORADO	80
§ 7.2	APPLICATION OF THE “FAIRLY DEBATABLE” STANDARD IN OTHER JURISDICTIONS	85
	§ 7.2.1—The “Fairly Debatable” Issue Can Be Decided As A Matter Of Law	85
	§ 7.2.2—Jury Must Decide Whether Insurer’s Decision To Deny A Claim Is “Fairly Debatable”	92
§ 7.3	BAD FAITH CLAIMS IN ARBITRATION PROCEEDINGS	96
§ 7.4	BAD FAITH CLAIMS IN DECLARATORY JUDGMENT ACTIONS	98
§ 7.5	THE “FAIRLY DEBATABLE” TEST HAS LIMITED UTILITY IN COLORADO	99
§ 7.6	CONCLUSION — THE MEANING OF THE “FAIRLY DEBATABLE” STANDARD	106

Chapter 8	CONSENT JUDGMENTS AND ASSIGNMENTS OF BAD FAITH CLAIMS	109
------------------	--	-----

§ 8.1	BASHOR AGREEMENTS	111
§ 8.2	PREJUDGMENT BASHOR AGREEMENTS (CONSENT JUDGMENTS AND ASSIGNMENTS)	113
	§ 8.2.1—What Are Prejudgment Bashor Agreements?	113
	§ 8.2.2—Enforcing Consent Judgments Against Insurer Where Insurer Fails To Defend Or Withdraws Its Defense	115

Table of Contents

	§ 8.2.3—Enforcing A Consent Judgment Where Insurer Files Declaratory Judgment Action Or Defends Under Reservation Of Rights	118
	§ 8.2.4—Enforcing Consent Judgment Where Insurer Defends Without Reservation	123
§ 8.3	ARE CONSENT JUDGMENTS AND PREJUDGMENT ASSIGNMENTS VOID AS CONTRARY TO PUBLIC POLICY?	127
§ 8.4	COURTS’ ENFORCEMENT OF CONSENT JUDGMENTS AND PREJUDGMENT ASSIGNMENTS	133
	§ 8.4.1—Enforceability Of Stipulated Judgments If Insurer Acted In Bad Faith	133
	§ 8.4.2—Judgment In Excess Of Policy Limits Sufficient To Establish Actual Damages	138
§ 8.5	IS THE CONSENT JUDGMENT BINDING AGAINST THE INSURER?	141
§ 8.6	CONCLUSION	148
<hr/>		
Chapter 9	QUASI-BAD-FAITH CLAIMS — LITIGATION UNDER THE CCPA	151
<hr/>		
§ 9.1	THE <i>SHOWPIECE HOMES</i> CASE	152
§ 9.2	ELEMENTS OF A CLAIM FOR RELIEF UNDER THE CCPA — THE PUBLIC IMPACT REQUIREMENT	154
§ 9.3	THE PUBLIC IMPACT REQUIREMENT AS APPLIED TO INSURERS	157
§ 9.4	CURRENT STATUS OF THE LAW	163

Chapter 10	OTHER LIABILITY ISSUES	165
§ 10.1	INSURER CANNOT BE LIABLE FOR BOTH NEGLIGENCE AND BAD FAITH	166
§ 10.2	NO PRIVATE RIGHT OF ACTION EXISTS FOR VIOLATION OF THE UNFAIR CLAIMS SETTLEMENT PRACTICES ACT	168
§ 10.3	BAD FAITH ISSUES ARISING OUT OF WORKERS' COMPENSATION CLAIMS	170
§ 10.4	COMMERCIAL SURETIES MAY BE SUBJECT TO BAD FAITH CLAIMS	172
§ 10.5	RELATIONSHIP BETWEEN BAD FAITH AND OTHER TORTS	174
§ 10.6	BAD FAITH ISSUES ARISING FROM CLAIMS UNDER THE FORMER NO-FAULT ACT	175
	§ 10.6.1—Statutory Remedies Did Not Preempt Claims For Bad Faith	176
	§ 10.6.2—Bad Faith And Willful And Wanton Conduct Under The No-Fault Act Were Not Identical	178
	§ 10.6.3—PIP Claim Handling Practices That Led To Claims Of Bad Faith	183
	§ 10.6.4—Bad Faith Claims In Enhanced PIP Litigation	185
§ 10.7	BAD FAITH CLAIMS AGAINST A GOVERNMENTAL ENTITY ARE BARRED BY THE COLORADO GOVERNMENTAL IMMUNITY ACT (CGIA)	186
§ 10.8	INSURER'S DUTY OF GOOD FAITH TO SUPERVISE REPAIR CONTRACTORS AND COMMUNICATE WITH INSURED	188
§ 10.9	THE REASONABLENESS OF AN INSURER'S RELIANCE ON EXPERTS	190

Table of Contents

§ 10.10	BAD FAITH CLAIM NOT NECESSARILY BARRED BY INSURED’S FAILURE TO COMPLY WITH “NO ACTION” CLAUSE	198
§ 10.11	AN INSURER’S POTENTIAL LIABILITY FOR SPOILIATION OF EVIDENCE	199
<hr/>		
Chapter 11	LIABILITY OF INSURER’S AGENTS AND EMPLOYEES — LIABILITY OF INSURER TO NON-PARTIES	203
<hr/>		
§ 11.1	CASES HOLDING NO BAD FAITH CLAIM LIES AGAINST A NON-PARTY TO THE CONTRACT	203
§ 11.2	CASES EXPANDING LIABILITY BEYOND THE SCOPE OF THE CONTRACT	206
§ 11.3	CONCLUSION	212
<hr/>		
Chapter 12	EVIDENTIARY ISSUES	215
<hr/>		
§ 12.1	ADMISSIBILITY OF EVIDENCE OBTAINED AFTER COMMENCEMENT OF LITIGATION	216
§ 12.2	ADMISSIBILITY OF EVIDENCE OF INSURER’S CONDUCT AFTER COMMENCEMENT OF LITIGATION	217
§ 12.2.1	—Admissibility Of Evidence Of Insurer’s Actions After Litigation Begins	217
§ 12.2.2	—Admissibility Of Evidence Of An Insurer’s Litigation Tactics To Prove Bad Faith	219
§ 12.3	DISCOVERABILITY OF INSURER’S LIABILITY ASSESSMENTS, FAULT EVALUATONS, EVIDENCE OF RESERVES, AND SETTLEMENT AUTHORITY	222

Chapter 13	USE OF EXPERTS	225
§ 13.1	PROOF OF INSURANCE INDUSTRY’S STANDARDS OF CONDUCT IS REQUIRED	226
§ 13.2	EXPERT TESTIMONY IS NOT ESSENTIAL IN ALL CASES TO PROVE BAD FAITH	227
§ 13.3	QUALIFICATIONS OF EXPERTS	232
§ 13.4	SCOPE OF EXPERT TESTIMONY	234
§ 13.5	ILLUSTRATIONS OF HOW EXPERT TESTIMONY CAN BE USED	241
§ 13.6	EVIDENTIARY ISSUES RELATED TO DAMAGES	243
§ 13.7	CONCLUSION	245

Chapter 14	INSURER’S FIDUCIARY AND QUASI-FIDUCIARY DUTIES	247
§ 14.1	ORIGIN OF THE CONCEPT OF A QUASI-FIDUCIARY DUTY	247
§ 14.2	INSURER DOES NOT OWE INSURED A FIDUCIARY DUTY IN FIRST-PARTY INSURANCE CLAIMS	248
§ 14.3	INSURER DOES NOT OWE INSURED A QUASI-FIDUCIARY DUTY IN FIRST-PARTY CLAIMS	249
§ 14.4	CONCLUSION	252

Table of Contents

Chapter 15	WILLFUL AND WANTON BREACH OF CONTRACT	253
-------------------	--	-----

§ 15.1	CONFIRMATION OF THE AVAILABILITY OF NON-ECONOMIC DAMAGES IN <i>GIAMPAPA</i> . . .	253
§ 15.2	STATUTORY LIMITATION ON RECOVERY OF NON-ECONOMIC DAMAGES	255

Chapter 16	DAMAGES AND ATTORNEY FEES IN COMMON LAW BAD FAITH CLAIMS	257
-------------------	---	-----

§ 16.1	BACKGROUND: THE RULE OF <i>TRIMBLE III</i>	258
§ 16.2	THE <i>GOODSON</i> COURT OVERRULES <i>TRIMBLE III</i>	259
§ 16.3	ATTORNEY FEES AS AN ELEMENT OF DAMAGES	262
§ 16.4	PREJUDGMENT INTEREST	266
§ 16.5	SUMMARY OF DAMAGES RECOVERABLE	267
EXHIBIT		
	Exhibit 16A—Types Of Damages In Insurance Bad Faith Cases	269

Chapter 17	PUNITIVE DAMAGES	271
-------------------	-----------------------------------	-----

§ 17.1	AMOUNT OF PUNITIVE DAMAGES GENERALLY MAY NOT EXCEED THE ACTUAL DAMAGES AWARDED	271
§ 17.2	CIRCUMSTANCES JUSTIFYING INCREASE IN THE AMOUNT OF PUNITIVE DAMAGES BEYOND THE ACTUAL DAMAGES AWARDED	272

§ 17.3	THE <i>CAMPBELL</i> DECISION AND STATUTORY LIMITATIONS ON PUNITIVE DAMAGES	274
<hr/>		
Chapter 18	CLASS ACTION CLAIMS	277
<hr/>		
§ 18.1	THE “TYPICALITY” REQUIREMENT	277
§ 18.2	DECEPTIVE PRACTICES AND BAD FAITH BY INSURERS IN SELLING UM/UIM COVERAGE	280
<hr/>		
Chapter 19	JURY INSTRUCTIONS	289
<hr/>		
Chapter 20	STATUTORY REMEDIES FOR DELAY OR DENIAL OF FIRST-PARTY BENEFITS	291
<hr/>		
§ 20.1	PRIVATE RIGHT OF ACTION IN C.R.S. §§ 10-3-1115 AND -1116 ADDS TO AND DIFFERS FROM COMMON LAW BAD FAITH	294
§ 20.2	APPLICATION OF “FAIRLY DEBATABLE” STANDARD TO STATUTORY BAD FAITH CLAIMS	297
§ 20.2.1	Common Law Legal Standards, Including “Fairly Debatable” Standard, Do Not Necessarily Govern C.R.S. §§ 10-3-1115 And -1116 Claims	297
§ 20.2.2	Insurer May Be Obligated To Pay UM/UIM Benefits Piecemeal; Liability Not Relieved If Claim “Fairly Debatable”	300
§ 20.3	REPAIR VENDOR INCLUDED AS “FIRST-PARTY CLAIMANT”	304

Table of Contents

§ 20.4	INSURED ENTITLED TO RECOVER ATTORNEY FEES ON CLAIM FOR RECOVERY OF ATTORNEY FEES	305
§ 20.5	ATTORNEY FEES AS DAMAGES MUST BE DETERMINED BEFORE ENTRY OF FINAL JUDGMENT	310
§ 20.6	“PERSONS ENGAGED IN THE BUSINESS OF INSURANCE” ARE THOSE AGAINST WHOM COMMON LAW BAD FAITH OR BREACH OF CONTRACT CLAIMS MAY LIE	311
§ 20.7	PLAINTIFF ENTITLED TO DOUBLE BENEFIT AS PENALTY AGAINST INSURER	314
§ 20.8	ERISA PREEMPTION OF STATUTORY BAD FAITH CLAIMS	323
§ 20.9	UNREASONABLE DENIAL OF BENEFITS WHERE INSURER CONCEDES COVERAGE BUT DISPUTES AMOUNT OWED	329
<hr/>		
Chapter 21	STATUTE OF LIMITATIONS	333
<hr/>		
§ 21.1	TWO-YEAR STATUTE OF LIMITATIONS APPLIES	333
§ 21.2	ONE-YEAR STATUTE OF LIMITATIONS MAY APPLY TO C.R.S. § 10-3-1116(1) CLAIMS	335
§ 21.3	APPLICATION TO CLAIMS ARISING FROM BREACH OF DUTY TO DEFEND AND DUTY TO INDEMNIFY	337
§ 21.4	ACCRUAL OF ACTION ARISING OUT OF WORKERS’ COMPENSATION CLAIM	352

§ 21.5	INSURER HAS NO DUTY TO ADVISE INSURED WHEN STATUTE OF LIMITATIONS WILL EXPIRE	355
§ 21.6	ACCRUAL OF CLAIM FOR FAILURE TO OFFER ENHANCED PIP BENEFITS	357
§ 21.7	EACH ACT OF BAD FAITH IS A SEPARATE TORTIOUS ACT ON WHICH THE STATUTE OF LIMITATIONS RUNS ANEW	359
<hr/>		
Chapter 22	ERISA PREEMPTION OF BAD FAITH CLAIMS	361
<hr/>		
§ 22.1	NO ISSUE OF PREEMPTION UNLESS AN ERISA PLAN EXISTS	362
§ 22.2	NO ERISA PREEMPTION UNLESS CLAIMANTS ARE “EMPLOYEES”	363
§ 22.3	APPLICATION OF THE “SAVING CLAUSE” TO COLORADO’S LAW OF BAD FAITH	368
§ 22.4	ERISA PREEMPTION UNDER COLORADO STATUTES	375
§ 22.5	VIABILITY OF POLICY-IMPOSED STATUTES OF LIMITATION	376
<hr/>		
Chapter 23	EVOLUTION OF THE LAW OF INSURANCE BAD FAITH	381
<hr/>		
SUBJECT INDEX		383
<hr/>		