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Insurer Exposure to Extracontractual Liability: An Overview

An insurer's liability during a claim is usually tethered to the types of risks insured by a particular coverage and capped by the applicable limits of liability. For instance, where a personal automobile policy provides liability coverage with aggregate limits of $100,000, one would anticipate that $100,000 is the maximum amount of indemnity potentially payable by the insurer as the result of a claim under the coverage. Further, any indemnity payment would be related to the insured's liability or potential liability for the bodily injuries suffered by a third person. However, an insurer's potential exposure to liability is not always so neatly circumscribed. Rather, an insurer's exposure to liability during a claim may exceed the limits of liability for the applicable coverage and/or may expose the insurer to liability unrelated to the types of risks covered by the policy at issue. The following will cover some scenarios where this may occur, including exposure to liability stemming from a failure to settle where a demand is made within limits, a breach of the duty to defend, a violation of Section 155 of the Insurance Code, and additional non-insurance specific tort theories.

I. Failure to Settle Where Demand Made Within Limits — *Olympia Fields* Bad Faith

A. Overview of Failure to Settle Within Limits

Illinois law has long provided that an insurer that refuses to settle within its policy's limits is guilty of bad faith and, generally, will have to pay that portion of a judgment against its insured that exceeds the policy limit. For example, in *Olympia Fields Country Club v. Bankers Indemnity Ins. Co.,*[1] an insured was sued for a personal injury by an invitee at a country club.[2] A demand was made by the injured patron of $3,500 before the case was submitted to a jury.[3] After a verdict of $20,000 was returned, while the case was on appeal, the demand increased to $8,500, well within the insurer's policy limit of $10,000.[4] The insured sued its insurer following the appellate court's affirmance of the jury verdict, contending that the insurer committed bad faith by not settling the case within the policy's limit.[5] The appellate court observed that no Illinois case addressed this situation, but that the weight of authority from courts that had addressed this issue held that where there is bad faith by an insurer, it could be liable for judgments in excess of its policy's limits.[6]

Generally, an insured has the duty to settle once there is a demand for settlement within the policy limits and there exists both a reasonable probability of judgment in excess of those limits as well as a reasonable probability that there will be a finding of liability against the insured.[7] That duty to settle does not arise when suit is filed, but may exist prior to suit. In *Haddick v. Valor Insurance*, a policy limits demand was made by the executor of an estate of a man killed as a result of a single car accident prior to suit.[8] The auto policy limits were $20,000.[9] The estate advised the insurer that more than $80,000 in medical costs had been incurred.[10] The insurer had almost a year to investigate the accident to determine which of the two occupants was driving.[11] When the insurer failed to respond to the policy limits demand within 14 days (subsequently extended to a full 30 days), the estate of decedent filed suit and obtained a judgment in the amount of $150,924.80.[12]

The Illinois Supreme Court in *Haddick* refused to find that the duty (as argued by the insured and assignee) to settle commenced from the issuance of the insurance policy.[13] It also held that the duty to settle (as argued by the insurer) was not dependent upon, or triggered by, the filing of suit.[14] Illinois courts appeared to base the duty to settle upon the control asserted by the insurer in providing for the defense.[15] In *Haddick*, there was no suit pending and the insurer had not retained counsel.[16]

A good-faith settlement obligation arises if, and when, there is an indication to the insurer that the duty is triggered, coupled with the ability to settle. The United States District Court in *West Side Salvage, Inc. v. RSUI Indemnity Co.*, in denying summary judgment for insureds, pointed out that a successful plaintiff in a bad faith failure to settle case needs to establish the timeline that shows both the insurer's knowledge of its need to settle overlapping with the its opportunities to actually achieve settlement.[17]

Settlement must also encompass all claims against the insured.[18] In *Sanders v. Standard Mutual Ins. Co*., plaintiff Dodson sued the insurer and the insured, Moreland, following a one-car accident.[19] Dodson, who claimed to be the passenger, sued Moreland, to recover for his injuries. Moreland's estate counterclaimed for recovery on behalf of Moreland as the passenger.[20] Dodson obtained a judgment on jury verdict against the insured for $300,000, but there were limits of only $100,000.[21] The insured assigned his claims against the insurer to the prevailing plaintiff.[22] The trial court ruled that the insurer was not required to settle with the injured plaintiff when the insured was also contending he was the victim.[23] The appellate court, in affirming the trial court's grant for summary judgment to the insurer, held that the insured was estopped to assert the bad faith claim because his actions had induced the insurer to try the case.[24] Nor is there any liability to the insurer for a claim of bad faith failure to settle where the injured party refuses to settle the claim.[25]

Therefore, there generally can be no bad faith failure to settle where there is no demand made within the policy limits.[26] That does not mean the insurer can avoid a policy limits demand by refusing to provide the policy limit to the injured victim. In *Cernocky v. Indemnity Insurance Co.*, the insurer was held liable for an excess limits judgment because it had refused to make known to plaintiffs its policy limits of $25,000 per one person, $50,000 per occurrence.[27]

An insurer need not initiate negotiations with the adverse party. That would put the insurer at a negotiating disadvantage.[28] The perhaps larger exception to that rule is where likelihood of liability is great and damages are greater than the policy limits.[29] Absent the exception, however, the insurer has no obligation to start negotiations, although it has a duty to respond in good faith to any demands.[30]

The duty to settle within policy limits arises when a demand is made for settlement within policy limits. Where the insurer fails to respond within a pre-set time, the insurer may or may not be liable. The case of *Adduci v. Vigilant Insurance Co.* involved a demand for policy limits that was to remain open for 28 days.[31] When the insurer responded 72 days later, the plaintiff's attorney rejected the acceptance because it was untimely.[32] Following a verdict $52,500 in excess of available limits, the plaintiff took an assignment from the insured and filed suit for bad faith failure to settle. The trial court granted motions to dismiss as to the original and amended complaints in favor of the insurer, which result was affirmed on appeal. The appellate court held that the untimeliness in responding to the demand was not a breach of duty by the insurer.[33]

In comparison, the decision in *Phelan v. State Farm Automobile Mutual Insurance Co.* went against the insurer where it accepted the demand approximately thirty days after the deadline passed.[34] However, in *Phelan*, the insurer first countered with a number lower than policy limits on a quadriplegia case.[35] Additionally, the court noted the additional costs to the plaintiff in securing trial counsel and extra expenses in preparing for trial and the "welfare" of the plaintiff's family.[36]

With respect to whether duties are owed to excess insurers, in distinction to insureds, the answer appears to be in the affirmative, although the exact basis is not yet settled. The leading case in the area, *Schal Bovis, Inc. v. Casualty Insurance Co.*,[37] allows an excess insurer to assert a bad faith failure to settle on a primary insurer through common law subrogation to the insured's rights. However, the *Liberty Mutual Insurance Co. v. American Home Assurance Co.*[38] court predicted that there is a common law cause of direct action between excess insurers and primary insurers.[39]

B. Bad Faith Failure to Allow Insured Choice of Counsel in Excess Potential Case

Separate and apart from a cause of action for bad faith refusal to settle, which is based on a pre-judgment demand made within policy limits, the court in *R.C. Wegman Construction Co. v. Admiral Insurance Co.*[40] held that a conflict of interest was created when the insurer learns of a "non-trivial probability" of an excess judgment that will be presented at trial.[41] Thus, the insurer who fails to advise its insured of that probability of excess limits exposure is liable for payment of the damages caused to the insured, including covering the excess limits judgment. The facts in *Wegman* involve a construction injury claim with surgical intervention. The additional insured was not kept abreast of the case, and not informed of the exposure in excess of limits until a few days before trial when the primary insurer was aware two years before.[42] The jury returned a verdict of $2,000,000 against Wegman, after demanding in pre-suit negotiations a total of $6,000,000.[43] The case posture before the Seventh Circuit Court of Appeals was following dismissal of Wegman's complaint against Admiral, which included assertions that the primary insurer notified the insured too late for it to timely place the insured's excess insurer on notice.[44]

Wegman, for the first time provided an avenue for recovery of an excess limits verdict without there being an *Olympia Fields*-type demand within limits. The *Wegman* court held that the situation of inadequate coverage creates a conflict of interest, or at least potential conflict, allowing the insured its own choice of counsel to be paid for by the insurer and insured control over the defense.[45] The rationale for allowing insured-retained counsel is to allow that lawyer to attempt settlement of the case within policy limits because the insurer has no incentive to do so.[46] The factors observed by the Wegman court in concluding there was a conflict of interest and lack of good faith, were:

- Insurer's failure to warn insured of likelihood of excess judgment

- Insurer's discovery that the case was going to trial a few days before trial
- Nature and severity of plaintiff's injury
- Settlement demand in excess of policy limits
- Primary defense strategy to downplay involvement, not to contest liability
- Plaintiff securing at trial a judgment double the policy limit
- Failing to warn Wegman that its strategy placed insured in jeopardy of excess judgment[47]

There has not been a significant amount of litigation resulting in reported decisions arising from the *Wegman* decision. However, it does place substandard insurers who issue low-limit policies at significant exposure. In *Addus Healthcare v. Auto-Owners Insurance Company*,[48] a case that did not involve a substandard policy, the employer successfully asserted that it be allowed to retain its own defense counsel due to a conflict of interest where an employee was involved in an auto accident while driving his own car on company business.[49] The policy limits were $50,000 per person and $100,000 per occurrence.[50] The employee's passengers suffered significant injuries, valued by Addus' personal defense counsel at $3,000,000 and above.[51] The primary insurer attempted to tender its limits in settlement, but no settlement was achieved.[52] When the primary insurer refused to allow Addus to be defended by counsel of its choosing and at the insurer's cost, Addus sued. The result was that, pursuant to *Wegman*, the court found there was a potential conflict between the insured's interests in not being exposed to excess liability beyond the policy limits and the insurer's interests.[53]

The *Wegman* decision places insurers who write lower limits, including substandards that write minimum limit auto policies, in a quandary. As shown by *Addus Healthcare*, that insurer is trapped when a large loss occurs because *Wegman* requires the insurer to relinquish control of the defense and payment of defense counsel selected by the insured. This is likely to result in much higher costs for those insurers, which costs will likely be passed on to a segment of the citizens of Illinois who can ill afford to pay higher premiums.

II. The Expansion of Extracontractual Damages for Breach of the Duty to Defend

Awards of extracontractual damages against insurers of third party liability coverage in Illinois have typically been limited to situations where the insurer breaches the duty to settle. In recent years, however, courts in Illinois have increasingly awarded extracontractual damages to insureds when the insurer has breached the duty to defend.

An insurer that breaches the duty to settle can be liable for the full amount of any judgment against the insured, even if the judgment exceeds the insured's policy limit. Under Illinois law, an insurer has an obligation to act in good faith toward its insured when exercising its right to settle a liability claim against the insured.[54] The insurer is required to give at least equal weight to the insured's interests as to its own when deciding to settle.[55] To sustain a cause of action for bad faith failure to settle, the insured must show that there was a duty to settle, that the insurer breached the duty to settle, and that the breach caused injury to the insured.[56] To establish a duty to settle, it must be shown that: (1) there is a reasonable probability of an adverse verdict; (2) there is a reasonable probability that an adverse verdict will exceed the policy limit; and (3) that there has been a demand to settle within the policy limit.[57]

In contrast to the breach of the duty to settle, Illinois courts have not typically awarded extracontractual damages for breaching the duty to defend. Illinois courts have long held that an insurer that breaches its duty to defend will be estopped from denying a duty to indemnify in the event of an adverse finding against its insured.[58] However, while the insurer was liable to indemnify its insured for an adverse verdict rendered after the insurer failed to defend, the Illinois Supreme Court ruled, in *Conway v. Country Casualty Insurance Co.*, that the mere failure to defend, does not, "in the absence of bad faith, render the insurer liable for that amount of the judgment in excess of the policy limits."[59]

While *Conway* held that a breach of the duty to defend did not automatically render the insurer liable for the full verdict in the absence of bad faith, it also left the door open to the potential for recovery of an excess verdict, stating:

> Nevertheless, damages for a breach of the duty to defend are not inexorably imprisoned within the policy limits, but are measured by the consequences proximately caused by the breach.[60]

The court in *Conway*, however, found no evidence that the amount paid by the insured in excess of the policy limit was proximately caused by the insurer's failure to defend, and concluded that the insurer was not liable for the excess verdict.[61]

The rule that an insurer that breached the duty to defend would not be liable for an excess verdict in the absence of bad faith was repeated in *Guillen v. Potomac Insurance Co. of Illinois*:

> While the wrongful refusal of the insurer to conduct the defense of an action based upon a claim within the coverage of the policy makes it liable, the insurer is not exposed to a greater liability to the insured than the limit of the amount stated in the policy. The only exception to this rule is if an insurer breaches its duty to defend in bad faith.[62]

However, three recent cases illustrate the potential for extracontractual damages when an insurer fails to adequately defend the insured. The first case was *Delatorre v. Safeway Insurance Co.*,[63] in which the insured was involved in an accident that injured the driver of another car and that car's passenger.[64] The insured had an auto policy with Safeway Insurance with policy limits of $20,000 per person and $40,000 per accident.[65] The underlying plaintiff made a policy limit demand, but the insurer refused to pay it. However, after suit was brought, the insurer agreed to defend the insured under a reservation of rights and advised that it had retained an attorney to represent him. The insurer also advised the insured that it should consider retaining additional counsel at his own expense.[66] Defense counsel retained by the insurer filed an appearance in the personal injury suit, but defense counsel took no further action to defend the insured. The plaintiff moved for sanctions against the insured, and the court ultimately entered a default judgment against him due to failure to comply with outstanding discovery.[67] A prove-up was scheduled and the plaintiff was awarded $250,000 in damages.[68] Notably, the insurer's claims examiner had only one written communication with defense counsel when he was sent a copy of the default order.[69]

The insurer argued that it had not breached the duty to defend, since it did assign defense counsel to the plaintiff. The court, however concluded that the insurer still breached the duty to defend, since, other than retaining defense counsel who did nothing more than file an appearance, the insurer took no further steps to make sure the case was actually being defended.[70] The insurer next argued that it should not be liable for more than its policy limit, citing *Conway* for the proposition that the insurer which breaches the duty to defend is not liable for an amount in excess of its policy limit if it did not act in bad faith. The court rejected this argument, stating that under *Conway* an insurer can be held liable for an excess judgment based on the breach of the duty to defend in two ways: "(1) tort based, as a punitive measure, where the insurer has acted in bad faith, or (2) contract based, as a compensatory measure, where the insured's damages are proximately caused by the insurer's breach of duty."[71] As the entry of the excess judgment "directly flowed" from the insurer's breach of the duty to defend, and as the insurer could have averted this situation by simply ensuring that the defense counsel it retained did something to defend the insured, the insurer was liable for the excess judgment.[72] Notably, the court did not consider the question of whether the insured would have been held liable for a similar amount even if it had been defended adequately.

If insurers were concerned about the expansion of extracontractual liability after *Delatorre*, they had more reason for concern after a decision from the United States District Court for the Central District of Illinois in *Hyland v. Liberty Mutual Fire Insurance Co.*[73] In *Hyland*, the court considered a situation in which a passenger in a car was seriously injured in a one-car accident. The car was insured by Liberty Mutual. The driver of the car was 16 years old and had a restricted driver's license. At the time of the accident, she was driving after curfew and had more under-aged passengers than was allowed. Liberty Mutual's investigation revealed that the daughter of the vehicle owner adamantly denied giving permission to the driver to use the vehicle, although the evidence on this point was conflicting. However, Liberty determined that the evidence indicating that the driver had permission to use the car was not credible, so it concluded that there was no coverage. Since the named insureds were not named in the lawsuit, Liberty did not defend and closed its file.[74]

The underlying plaintiff filed suit against the driver. The complaint was silent as to whether the driver had permission to use the car. Liberty notified counsel for the driver that it was denying coverage for the suit because it believed she had not been a permissive user. Subsequently, the court approved an uninsured motorist settlement with the plaintiff's insurer, and the plaintiff notified Liberty that it would proceed with a prove-up against the driver for the full value of the injuries she sustained. The plaintiff obtained a judgment against the driver of the car for $4,595,933.85, and the driver assigned the plaintiff any claims against Liberty for breach of the duty to defend.[75] The plaintiff then sued Liberty for breach of the duty to defend, but did not allege that Liberty had acted in bad faith.

Not surprisingly, the court found that Liberty had breached the duty to defend, since it had neither defended subject to a reservation of rights nor sought a declaratory judgment that it was not obligated to defend, and, based on the allegations of the complaint, there was a potential for coverage.[76] The court next turned to the issue of damages. The Liberty Mutual policy had a limit of $25,000 per person, meaning that there was an excess judgment of more than $4.5 million. Liberty argued that because there was no bad faith, the most it could be held liable for due to its breach of the duty to defend was its policy limit, $25,000.

The court rejected Liberty's argument. It noted that when an insurer breaches its duty to defend, "the insurer is estopped from asserting policy exclusions or defenses to coverage."[77] Notably, it went on to state, "[*t*]*he insurer is also estopped from limiting damages to its policy limits*."[78] In reaching this conclusion, the court cited to cases in which an insurer was estopped from denying coverage due to its breach of the duty to defend, including *Clemmons v. Travelers Insurance Co.*,[79] and *Chandler v. Doherty*.[80] The court found that these cases supported the conclusion that Liberty Mutual was estopped from raising its policy exclusion because it breached the duty to defend.[81] The court stated that "Liberty Mutual is attempting to enforce its exclusion, although it breached one of its duties under the contract."[82] Apparently, the court considered the insurer's policy limit to be the equivalent of a policy exclusion.

The court also discussed damages and concluded that Liberty Mutual's breach of the duty to defend had caused the judgment. The court reasoned that the underlying plaintiff would not have pursued a default judgment against the insured if Liberty Mutual had defended; as a result, there would have been no excess judgment against the insured if Liberty had defended.[83] The court did not consider whether any defense would have prevented the award of an excess judgment, in view of the clear negligence of the driver and the severe damages suffered by the underlying plaintiff.

Had the *Hyland* judgment stood, it would have marked a potential watershed in the expansion of extracontractual damages in the absence of bad faith. The court's reasoning that an insurer's policy limit was to be treated the same as a coverage exclusion under the estoppel doctrine seems to fly in the face of the statement in *Conway* that in the absence of bad faith, the breach of the duty to defend does *not* preclude an insurer from asserting its policy limit.

However, the Seventh Circuit reversed the trial court's decision in *Hyland*.[84] On appeal, Liberty argued that under *Conway*, in the absence of bad faith, damages for its breach of the duty to defend were limited to the policy limit, plus, potentially $60,000 if the plaintiff showed that the refusal to defend arose from vexatious conduct under § 155 of the Insurance Code,[85] while the plaintiff argued that all that is required to hold an insurer liable for the full verdict is proximate cause.

The Seventh Circuit declined to determine whether both bad faith and proximate cause were required to support extracontractual liability or whether proximate cause alone was sufficient. The court noted that it was "reluctant to get into this dispute about the meaning of Illinois insurance law, for we lack the remit to supply an authoritative answer."[86] More importantly, the court concluded that the plaintiff had not demonstrated that the insurer's breach of the duty to defend proximately caused the excess verdict. As the court explained, the best situation for the driver would have been for Liberty to provide a defense lawyer plus the tender of the policy limit toward a settlement or judgment. However, the provision of a defense lawyer would only have been valuable if "a vigorous defense might have defeated [the underlying plaintiff's] claim or at least held damages under $4.6 million."[87] The court noted that the plaintiff had not argued that such an outcome was likely, and given the clear liability faced by the driver, there was no hope that defense counsel could have defeated the claim.[88] As for damages, the state court judge awarded the plaintiff the amount she proved, and she "has not argued that she asked for too much and pulled the wool over the state judge's eyes. She's in no position to contend that Liberty Mutual must pay her $4.6 million precisely because that sum represents more money than her entitlement—and she does not say anything of the sort."[89] Nor did she offer any alternative—she wanted the whole judgment, "which is proper only if it is the *right* judgment—and thus not proximately caused by the absence of a lawyer dispatched by Liberty Mutual to defend Smith."[90]

The Seventh Circuit's decision in *Hyland*, if accepted by Illinois courts, could be a basis on which to challenge the decision in *Delatorre*, because it makes it hard to imagine any situation in which there is proximate cause between the breach of the duty to defend and damages exceeding the policy limit. As the Seventh Circuit noted in *Hyland*, the plaintiff which has been assigned the right to the insured's action for breach of the duty to defend can hardly argue that the judgment against the insured is unfair or more than it should have received. Thus, even in a situation such as the court faced in *Delatorre*, how could the insurer's breach of the duty to defend have proximately caused an excess judgment?

A recent case from the Illinois Appellate Court for the Fifth District suggests that the Seventh Circuit's analysis of proximate cause in *Hyland* may not be persuasive with Illinois state courts. In *Rogers Cartage Co. v. Travelers Indemnity Co.*,[91] the court considered a situation in which the insurer had defended the insured, but its conduct in the course of the defense allegedly led to an excess verdict. The insured, Rogers, was a commercial trucking company, and had been sued as both a third party defendant and a direct defendant in environmental claims.[92] Rogers sought a defense from the insurer and the insurer did defend it. However, the insurer also filed a declaratory judgment action in the Circuit Court of Cook County, seeking a declaration that it did not owe a defense. Shortly thereafter, Rogers settled the underlying claim for $7.5 million, without the insurer' consent, and the underlying plaintiffs filed a declaratory action against the insurer in the Circuit Court of St. Clair County.[93] Although the Cook County and St. Clair County actions proceeded simultaneously, the bulk of the Cook County action was transferred to St. Clair County, where the court entered partial summary judgment against the insurer and granted Rogers petition for fees, costs and penalties.[94]

Notably, when the insurer agreed to defend Rogers, it reserved rights, but also agreed that Rogers could retain its own defense counsel, at the insurer's expense, and that defense counsel could defend in any manner deemed appropriate to protect Rogers' interests.[95] Rogers later informed the insurer that it intended to participate in an informal settlement conference, and that the insurer would be advised when Rogers received a settlement demand. Eventually, the claimants sent a letter proposing to settle the claims for $4 million if the insurer would participate and resolve the claims for cash. If the insurer refused to settle, the claimants proposed settling for $7.5 million, with Rogers paying $50,000 and promising to pursue insurance coverage for the remainder, using the claimants' counsel.[96] Rogers' counsel then advised the insurer that it could settle for $4 million, but did not mention the $7.5 million alternative. Counsel also advised the insurer that he considered the $4 million demand to be reasonable as the damages could exceed $30 million. He believed that he could not win at trial, but believed that there was an 85% chance of prevailing on appeal.[97] He also advised the insurer that Rogers could not sustain and satisfy even a $1 million judgment, and that the company could not afford to go to trial or to lose.[98] In response, the insurer sent a letter to Rogers disputing coverage and stating that Rogers had less than $300,000 in coverage, and also requested a meeting with counsel for the claimants. During subsequent negotiations, the demand to Travelers was reduced slightly, but the case did not settle. The insurer later wrote to Rogers rejecting the settlement and also stating that if Rogers elected to settle on its own, it did so at its own peril, and that the insurer did not consent to the settlement.[99] The insurer also advised Rogers that if it negotiated such a settlement, it would consider that to be a breach of the cooperation clause.[100] Subsequently, Rogers did settle with the claimants for $7.5 million, out of which Rogers would pay $50,000 and plaintiff would seek the remainder from the insurer.[101]

Following the settlement, Rogers filed the St. Clair County declaratory action, and sought to have the previously filed Cook Count declaratory action dismissed. The St. Clair County court entered judgment for Rogers, finding that the insurer had breached its duty to defend Rogers, was estopped from disclaiming indemnity coverage and must indemnify Rogers for the underlying settlement. It also awarded Rogers $2.6 million in attorneys' fees and costs plus a $60,000 penalty under § 155 of the Insurance Code.[102]

On appeal, the court first considered whether the insurer had breached the duty to defend. The insurer made the logical argument that it had not breached, since it both paid for independent counsel and later filed a declaratory action contesting coverage, both of which are what Illinois courts say an insurer is supposed to do when it contests the duty to defend. However, the court pointed to the insurer's conduct during settlement negotiations and concluded that the insurer's conduct was designed to intimidate Rogers and put a stop to negotiations. The court stated that while the insurer initially agreed to defend Rogers under a reservation of rights, it "attempted to take over the defense of the matter by refusing to allow Rogers to settle at a crucial time during negotiations."[103] It pointed to the fact that Rogers faced potential liability and damages in excess of the policy limits, that there was an offer to settle for $3.75 million, well within policy limits, and that this a was a "bet the company" case for Rogers. It also noted that Rogers' counsel believed the case could have been settled for less than $3.75 million. Nevertheless, the insurer refused to allow Rogers to settle and threatened that settling would negate coverage. The court stated that the insurer's actions were not innocuous and that "Travelers put its interest ahead of Rogers in refusing to settle, and the circuit courts of not one but two counties found Travelers' actions underhanded."[104] Thus, it found that Travelers had breached the duty to defend.[105]

The insurer then attempted to challenge the reasonableness of the settlement and argued that Rogers had colluded with the underlying claimants in reaching the settlement. The court rejected both arguments, finding the settlement reasonable. With respect to collusion, the court noted that the insurer had notice of the negotiations, and that it was not prejudiced by the fact that some details had not been disclosed. The court also found that the insurer had breached the duty to settle when it sent the threatening letter to Rogers and then failed to settle within its limits.[106] Thus, the insurer was liable for the full judgment, and because it acted in bad faith, was also liable under § 155 for attorneys' fees and statutory penalties.

The *Rogers* case is not a textbook case of the breach of the duty to defend, since the insurer did pay for the defense of the case. However, the court found that the insurer's tactics in asserting its coverage defenses effectively breached the duty to defend, pointing to the fact that the insurer filed its own declaratory judgment action in Cook County and the fact that during settlement negotiations the insurer pressured Rogers not to settle. The court gave little, if any consideration to what the insurer should have done in this situation. Presumably, the insurer had a good faith basis for its reservation of rights and its assertion that it did not owe coverage or that its coverage was limited. In that situation, why was it wrong for the insurer to advise the insured that if it settled, there may be no coverage? Probably the biggest problem was the fact that the insurer advised the insured that if it did settle, the settlement would be considered a breach of the cooperation clause. This would be accurate if the insurer was defending in the absence of a reservation of rights. However, previous Illinois cases have held that when an insurer reserves rights, the insured has the right to make a reasonable settlement without the insurer's consent.[107]

In any event, the decision in *Rogers* is important for a few reasons. First, it expands the conduct that constitutes a breach of the duty to defend, so that attempts to prevent the insured from settling may be a breach of the duty to defend. Second, it points to further circumstances in which the breach of the duty to defend will result in damages well in excess of policy limits. Given the decisions in *Delatorre* and *Rogers*, it is important for insurers to make sure that when they do defend an insured, they exercise care in doing so because the consequences of a mistake can be severe.

III. Insurer Liability Under Section 155 of the Illinois Insurance Code

Claims for relief pursuant to Section 155 of the Insurance Code may constitute the most common type of extracontractual relief sought by insureds against insurers. Section 155 is "intended to prevent [an] insurer from using its superior financial position to profit at the insured's expense"[108] and "provides an extracontractual remedy to" a policyholder bringing a breach of contract action against its insurer.[109] Unlike bad faith failure to settle and breaches of the duty to defend, Section 155 applies to coverage disputes involving both first party claims and third party liability claims where a policy holder has asserted that the insurer has breached the policy at issue.[110] The statute itself states:

> (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies or insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;

(b) $60,000;

(c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.

(2) Where there are several policies insuring the same insured against the same loss whether issued by the same or different companies, the court may fix the amount of the allowance so that the total attorney fees on account of one loss shall not be increased by reason of the fact that the insured brings separate suits on such policies.[111]

When evaluating a claim brought pursuant to Section 155 of the Insurance Code, it is important to understand the identity of the parties who have standing to bring a Section 155 claim, the situations where Section 155 possibly applies, the standards for a Section 155 claim, and the type of damages recoverable under Section 155.

A. Standing to Bring a Section 155 Claim Is Limited to Insureds and Assignees of Insureds

The Illinois Supreme Court has limited standing for Section 155 claims against insurers to insureds and their assignees. For instance, in *Yassin v. Certified Grocers of Illinois, Inc.*,[112] after obtaining a verdict against an insured, a personal injury plaintiff brought a garnishment action against the insured's liability carrier.[113] During the garnishment action, the personal injury plaintiff asserted that she was entitled to extracontractual relief pursuant to Section 155.[114] The trial court dismissed the Section 155 claim, and on appeal, the Supreme Court affirmed, reasoning:

> As a general rule, the remedy embodied in section 155 of the Insurance Code extends only to the party insured and policy assignees. [citation omitted] Therefore, the remedy embodied in section 155 of the Insurance Code does not extend to third parties.[115]

Since *Yassin,* Illinois courts (both state and federal) have consistently reaffirmed these limitations on standing to bring a Section 155 claim and have prohibited third parties with no contractual relationship with the insurer from seeking relief pursuant to the statute unless they have taken an assignment from the insured.[116]

B. Section 155 Applies Only to Certain Disputes Between an Insured and the Insurer and Requires Proof of "Unreasonable and Vexatious" Conduct

Section 155 applies in limited, defined circumstances and requires proof that the insurer acted vexatiously and unreasonably. An insured may seek relief pursuant to Section 155 only if one of three issues associated with the claim remains undecided: 1) the liability of the company on a policy, 2) the amount of loss to be paid under the policy, or 3) an unreasonable delay in settling a claim.[117] On the other hand, where the insured's problem with its insurer does not relate to the payment or provision of a benefit provided by the policy, the insured may not base a Section 155 claim on the insurer's alleged misconduct.

For instance, in *Ellis v. Allstate Insurance Company*,[118] an insured and his attorneys sued an insurer for damages pursuant to Section 155 maintaining that the insurer failed to recognize the common fund doctrine when it asserted its subrogation rights to recover medical payments benefits paid to the insured. The Federal District Court for the Northern District of Illinois dismissed the insured's Section 155 claim, reasoning that:

> Plaintiffs' allegations only concern Allstate's "subsequent refusal to comply with the Common Fund Doctrine with respect to its subrogation claim." (Id.) This is not actionable under section 155, which is a statutory remedy available to "an insured or his assignee 'who encounters unnecessary difficulties when an insurer withholds policy benefits.'" [citation omitted.] In light of the fact that Ellis' policy does not list compliance with the common fund doctrine as a "benefit," and Allstate never failed to pay medical benefits under the policy, plaintiffs have failed [to] state a claim under Section 155.[119]

Similarly, a successful Section 155 depends on the insured's ability to convince the court that the insurer acted "vexatiously" or "unreasonably."[120] When conducting its evaluation of the insured's Section 155 claim, the court must consider "the totality of the circumstances, taken in broad focus."[121] And the "totality of the circumstances" analysis can involve the consideration of a number of factors, including the insurer's attitude, whether the insured was forced to file suit to recover, whether the insured was deprived of the use of his or her property, whether the insurer "abandoned" its insured, and whether the insurer's coverage position had any merit in light of Illinois case law.[122]

However, "[n]o single factor alone is controlling in determining whether an insurer is guilty of" vexatious and unreasonable conduct.[123] Likewise, even where the court ultimately decides that the insurer's coverage position was erroneous, the insurer's conduct is not vexatious or unreasonable as long as (1) there was a *bona fide* dispute concerning the scope and application of the insurance coverage, (2) the insurer asserted a legitimate policy defense, or (3) the claim presented genuine legal or factual issues regarding coverage.[124] Additionally, where a court ultimately determines that the insurer's coverage position was correct, the court cannot find that the insurer acted vexatiously or unreasonably for taking that coverage position.[125]

The Illinois Appellate Court's decision in *Marcheschi v. Illinois Farmers Ins. Co.*[126] is an example of a situation where an insured met his burden to prove vexatious and unreasonable conduct in the first party context. In *Marcheschi*, after an insured made an uninsured motor vehicle claim and was paid $25,000, he demanded $75,000 from his insurer—which was the balance of the limits left of his uninsured motor vehicle coverage under his personal auto policy.[127] While the uninsured motor vehicle claim was pending, the insurer made an offer of $40,000 and then $50,000, but never offered the requested $75,000 prior to the arbitration of the uninsured motor vehicle claim.[128] However, the evidence established that the insurer eventually assigned $75,000 in authority to settle the case in advance of the arbitration.[129] The arbitration went forward, and the panel of UM arbitrators "assessed plaintiff's damages in the amount of $215,000 and found [the insurer] liable for the $75,000 policy limit."[130]

Following the arbitration, the insured filed a complaint against his insurer, seeking damages pursuant to Section 155 of the Insurance Code.[131] The trial court found that the insurer's delay in settling the uninsured motor vehicle claim was unreasonable and awarded Section 155 damages.[132] In doing so, the trial court noted that there was no *bona fide* dispute as to the value of the insured's claim after the insurer "assessed the liability at the remaining policy limits of $75,000 and increased settlement authority to that amount."[133] According to the trial court, "[a]fter that time, the issue was resolved in favor of plaintiff and any further delay in settling the claim became vexatious and unreasonable."[134] Likewise, the trial court "noted that because of this delay, plaintiff was 'forced to go through all the pre-trial discovery preparation, the arbitration preparation and the arbitration itself.'"[135] On appeal, the Illinois Appellate Court affirmed, finding that the trial court did not abuse its discretion in awarding Section 155 damages as the award was supported by the evidence.[136]

On the other hand, *Shell Oil Co. v. AC&S*[137] illustrates a scenario where a court may find that an insurer acted in vexatious or unreasonable manner in a case involving third party coverage. In *Shell Oil Co.*, an oil company filed a declaratory judgment action against an insurer asserting that the insurer had a duty to defend the oil company in a suit seeking the recovery of injuries to an employee of a contractor who was injured on the oil company's premises.[138] During the suit, the oil company maintained that it was an additional insured under the contractor's CGL policy, and the contractor's CGL carrier had a duty to defend the oil company against the employee's personal injury lawsuit.[139] When the oil company tendered the defense to the CGL carrier, the CGL carrier did not even respond, forcing the oil company to file a declaratory judgment action.[140]

The trial court found that the CGL carrier had a duty to defend, and the carrier appealed.[141] On appeal, the Illinois Appellate Court affirmed the trial court's ruling, reasoning, in part, that the carrier was estopped from raising its coverage defenses because it failed to file a declaratory judgment action or defend under a reservation of rights when the oil company tendered its defense to it.[142]

During the appeal after resolving the coverage issues, the appellate court turned to the question of the award of attorneys' fees under Section 155. In finding that the CGL carrier engaged in vexatious and unreasonable conduct, the court noted that the CGL carrier "failed to tender a defense to [the] plaintiff upon notification of the underlying lawsuit," and "[i]nstead of taking the appropriate legal action to determine its rights and obligations, [it] chose to wait until plaintiff instituted the present declaratory judgment action."[143] Furthermore, "[e]ven after the trial court found that [the CGL carrier] owed plaintiff a defense …, [the CGL carrier] steadfastly refused to tender a defense to plaintiff."[144] According to the appellate court, these actions constituted vexatious and unreasonable conduct because "'it would defeat the purpose of the statute [section 155] to allow an insurer to escape any penalty when it fails to provide one of the most important benefits of a liability policy—a defense.'"[145]

C. Measure of Damages for a Section 155 Claim

Section 155 provides a limited extracontractual remedy to an insured which allows the insured to potentially recover, "as part of taxable costs," attorneys' fees, costs, and a statutorily restricted penalty.[146] The limited penalty must be one of three options: 1) "60% of the amount" recovered against the insurance company exclusive of costs, 2) $60,000, or 3) "the excess of the amount which the court or jury finds [that the plaintiff] is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action."[147]

It is largely undisputed that the maximum penalty allowable under Section 155 is $60,000.[148] And even where the court finds that the insurer acted vexatiously and unreasonably, the plain language of the statute suggests that the court must calculate each of the three potential Section 155 penalties and choose the smallest penalty.[149] However, there is at least one Illinois appellate court decision suggesting that the trial court always has discretion to award the current $60,000 maximum award under the statute.[150]

IV. Tort-Based Extra-Contractual Liability

While Section 155 of the Illinois Insurance Code is the sole remedy for an insured alleging a "bad faith" claim against an insurer based upon a vexatious and unreasonable delay or refusal to pay an insurance claim, Section 155 will not preclude an insured from bringing a claim against an insurer for a "separate and independent tort action" relating to the handling of an insurance claim.[151] Such torts can include consumer fraud, fraud, and intentional infliction of emotional distress. For an insured to successfully bring a tort claim against its insurer, the insured must allege more than a breach of the duty of good faith and fair dealing, a tort which is preempted by Section 155.[152] As one court noted, "[w]hen a purported tort claim boils down to an insurer's failure to pay, the remedies provided in § 155 and for breach of contract cover the claim and are sufficient and the tort claim must be dismissed."[153]

A. Intentional Infliction of Emotional Distress and Common Law Fraud

There are few Illinois cases in which a court found an insurer liable for common law fraud or intentional infliction of emotional distress, likely because such conduct is very infrequent in the claim adjusting process. To prevail on a claim for intentional infliction of emotional distress, the insured must prove: (1) that the conduct involved was "truly extreme and outrageous"; (2) "the actor must either intend that his conduct inflict *severe* emotional distress, or know that there is at least a high probability that his conduct will cause *severe* emotional distress"; and (3) that the conduct actually caused "severe emotional distress."[154] In one case, an Illinois appellate court found that an insured properly alleged a claim for intentional infliction of emotional distress when an adjuster sent a letter to the insured rejecting the claim "despite the insurance company having knowledge of [the] information contradicting the reasoning behind the rejection . . . ."[155] The insured alleged that in sending the letter, the adjuster "intended to induce and to coerce the insureds into accepting a settlement in an amount substantially less than the actual cash value."[156]

A party alleging common law fraud against an insurer must prove a: "(1) false statement of material fact; (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement, and (5) damages."[157] Such claims are not limited to claims brought by an insured. For example, an insurance adjuster that attempts to induce an underlying tort claimant to accept a low settlement offer based upon false material misrepresentations may be liable for fraud.[158]

B. Claims under the Illinois Consumer Fraud and Deceptive Practices Act

Courts applying Illinois law have recognized that an insurer may be liable to its insured under the Illinois Consumer Fraud and Deceptive Practices Act[159] (ICFDPA) for deception in the adjustment of an insurance claim if the insurer "engaged in deceptive acts or practices distinct from any underlying breach of contract."[160] To state a claim under the ICFDPA, a plaintiff must allege: "(1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during a course of conduct involving trade or commerce."[161] The plaintiff must also allege actual damage resulting from the deceptive act or practice.[162] Because the sale of insurance is "trade or commerce," the sale of insurance and handling of insurance claims are subject to the protections of the ICFDPA.[163] An ICFDPA claim against an insurer may be brought by an individual insured or a corporate insured.[164]

In one such case, the court held that an insurer could be liable under the ICFDPA for relying solely on the results of polygraph tests, which are inadmissible in court, to deny insurance claims because existing Illinois case law evinced a public policy against the use of polygraphs.[165] The court found that the insurer potentially violated the ICFDPA in selling the insured an insurance policy without disclosing its policy of denying automobile-theft claims on the basis of polygraph examinations.[166] In so ruling, the court found that the insurer's failure to disclose its policy of using polygraphs as part of the claim adjustment process was a deceptive act and that the insurer was "considered to have intended that the [insured] purchase its automobile-theft insurance under the belief that [the insurer] would not refuse to pay otherwise facially valid claims simply on the basis of polygraph test results."[167]

An insurer's conduct in knowing disregard of insurance statutes or regulations that do not permit a private cause of action can form a basis for an ICFDPA claim. Outside of the insurance context, courts applying Illinois law have held that "a plaintiff may predicate an [ICFDPA] unfairness claim on violations of other statutes or regulations . . . that themselves do not allow for private enforcement."[168] As one court explained, under the standard "adopted by the Illinois state courts … [a] plaintiff may prove an [ICFDPA] unfairness claim by showing that the challenged practice offends public policy . . . [a]nd a practice can offend public policy if it violates a standard of conduct contained in an existing statute or common law doctrine that typically applies to such a situation."[169] Applying this rule, the court in *Ornelas v. Safeway Insurance Co.,*[170] denied an insurer's motion to dismiss its insured's ICFDPA claim alleging that the insurer's conduct violated Illinois insurance regulations even though the regulations did not provide a private cause of action.[171] In so ruling, the court distinguished between attempting to recover due to violations of Illinois insurance regulations, which is improper, and including references to Illinois insurance regulations in an ICFDPA claim to show that the insurer "knew of th[e] regulation and disregarded it in an effort to defraud its insureds."[172]

Conclusion

Insurer exposure to extracontractual liability is an inherent part of Illinois insurance law. It can arise from common law theories, such as bad faith failure to settle. It also finds roots in Illinois statutes, such as Section 155 of the Illinois Insurance Code. However, irrespective of its source, it is critical that an insurance law practitioner—whether he or she represents insurers or policyholders—has a firm grasp on the nuances of these legal theories because they can significantly alter an insurer's exposure to liability and the scope of a policyholder's recovery. To that end, this article gives an introductory overview of this area of the law and introduces the reader to some of the fundamental concepts associated with extracontractual liability for insurers.

Endnotes

1 *Olympia Fields Country Club v. Bankers Indemnity Ins. Co.* 325 Ill. App. 649 (1st Dist. 1945).

2 *Olympia Fields*, 325 Ill. App. at 651.

[3] *Id*. at 652.

[4] *Id*. at 654.

[5] *Id*. at 652.

[6] *Id.* at 673-74.

[7] *Haddick v. Valor Insurance*, 198 Ill. 2d 409, 419 (2001).

[8] *Haddick*, 198 Ill. 2d at 411.

[9] *Id*.

[10] *Id.* at 417.

[11] *Id*.

[12] *Id.* at 412.

[13] *Id*. at 415.

[14] *Id*.

[15] *See, e.g., Cernocky v. Indemnity Ins. Co.*, 69 Ill. App. 2d 196, 207 (2d Dist. 1966). The decision in *Fox v. American Alternative Ins. Group*, 757 F.3d 680 (7th Cir. 2014), is based on the duty to defend triggering the duty of good faith settlement. The case involves a coverage dispute between a man arrested and jailed for the murder of his three-year-old daughter. The underlying case was for civil rights and malicious prosecution claims against three detectives, against whom a jury ultimately awarded $15.5 million in damages, including $6.2 million in punitive damages. *Fox,* 757 F.3d at 682. The *Fox* court rejected Fox's claims because:

> First, based on Fox's factual allegations, AAIC never acquired, and therefore never violated, a good faith duty to settle the claims against the detectives. That duty could not arise unless Fox made a settlement demand within AAIC's policy limits. . . . And although it is true. . . that Fox made such demands at least twice, he did not do so at any point after the duty to defend passed from St. Paul to AAIC.

Id. at 685 (citations omitted).

[16] *Haddick*, 198 Ill. 2d at 419.

[17] *West Side Salvage, Inc. v. RSUI Indemnity Co.*, 215 F. Supp. 3d 728, 741 (S.D. Ill. 2016).

[18] *Sanders v. Standard Mutual Ins. Co.*, 142 Ill. App. 3d 1082 (4th Dist. 1986).

[19] *Sanders*, 142 Ill. App. 3d at 1083.

[20] *Id.*

[21] *Id*.

[22] *Id.*

[23] *Id.* at 1084.

[24] *Id.* at 1085.

[25] *Brocato v. Prairie State Farmers Ins. Assoc.*, 166 Ill. App. 3d 986, 988 (4th Dist. 1988). Plaintiff in that case obtained a verdict of $375,000, where the policy limit was $50,000. The insurer investigated and offered policy limits, which the plaintiff refused. Therefore, there was no cause of action for bad faith failure to settle.

[26] *Van Vleck v. Ohio Casualty Ins. Co.*, 128 Ill. App. 3d 959, 961 (3d Dist. 1984) (*citing Rotunda v. Royal Globe Ins. Co.*, 87 Ill. App. 3d 446, 454 (1st Dist. 1980)).

[27] *Cernocky*, 69 Ill. App. 2d at 203. The other factors supporting the bad faith failure to settle against the insurer were that the insured's personal counsel and insured requested that the insurer settle the case prior to trial; that when approached by personal counsel discussing settlement, the trial attorney retained by the insurer responded that "he was there to try a lawsuit, not to settle a case, and that he was running the case."

[28] *Oda v. Highway Ins. Co.*, 44 Ill. App. 2d 235, 253 (1st Dist. 1963).

[29] *Kavanaugh v. Interstate Fire & Casualty Co.*, 35 Ill. App. 3d 350, 356 (1st Dist. 1975).

[30] *Krutsinger v. Illinois Casualty Co.*, 10 Ill. 2d 518, 527 (1957).

[31] *Adduci v. Vigilant Ins. Co.*, 98 Ill. App. 3d 472, 474-75 (1st Dist. 1981).

[32] *Adduci*, 98 Ill. App. 3d at 476-77.

[33] *Id.* at 477.

[34] *Phelan v. State Farm Mutual Auto. Ins. Co.*, 114 Ill. App. 3d 96 (1st Dist. 1983).

[35] For an in-depth analysis of the arguably differing approaches of *Phelan* with that of *Adduci*, *see* Seth M. Hemming, *Insurer's Wrongful Refusal to Settle: A Note on Excess*, 15 Loy. U. Chi.L.J. 513 (1984).

[36] *Phelan*, 114 Ill. App. 3d at 104.

[37] *Schal Bovis, Inc. v. Casualty Ins. Co.*, 314 Ill. App. 3d 562 (1st Dist. 1999).

[38] *Liberty Mutual Ins. Co. v. American Home Assurance Co.*, 348 F.Supp.2d 940 (N.D. Ill. 2004).

[39] *Liberty Mutual*, 348 F. Supp. 2d at 954-55.

[40] *R.C. Wegman Const. Co. v. Admiral Ins. Co.*, 629 F.3d 724 (7th Cir. 2010).

[41] *Wegman*, 629 F.3d at 730.

[42] *Id*. at 726-27.

[43] *Id.* at 725, 727.

[44] Following the dismissal of its complaint against the primary insurer, Wegman sued its excess insurer for wrongful denial of coverage. That parallel suit resulted in the federal case of *Wegman v. Admiral Indemnity* to be stayed pending the outcome of the state court lawsuit against the excess insurer. *R.C. Wegman Const. Co. v. Admiral Ins. Co.*, 687 F.3d 362 (7th Cir. 2012).

[45] *Wegman*, 629 F.3d at 729.

[46] *Id*.

[47] *R.C. Wegman Constr. Co. v. Admiral Ins. Co.*, 634 F.3d 371 (7th Cir. 2011—Wegman II) (denial of request for rehearing).

[48] *Addus Healthcare v. Auto-Owners Ins. Co.*, No. 11 C 3788, 2012 U.S. Dist. LEXIS 190432 (N.D. Ill. Dec. 12, 2012).

[49] *Addus Healthcare*, 2012 U.S. Dist. LEXIS 190432, at **2-3.

[50] *Id*. at *3.

[51] *Id.* at **4-5.

[52] *Id.* at *5.

[53] *Id.* at **12-13.

[54] *Haddick*, 198 Ill. 2d 409; *Cramer v. Ins. Exchange Agency*, 174 Ill. 2d 513 (1996).

[55] *O'Neill v. Gallant Ins. Co.*, 329 Ill. App. 3d 1166, 1172 (5th Dist. 2002).

[56] *Haddick*, 198 Ill. 2d at 416; *Powell v. American Service Ins. Co.*, 2014 IL App (1st) 123643, ¶ 18.

[57] *Haddick*, 198 Ill. 2d at 417; *Powell*, 2014 IL App (1st) 123643, ¶ 18.

[58] *E.g.*, *Employers Ins. of Wausau v. EHLCO Liquidating Trust*, 186 Ill. 2d 127, 150-51 (1999); *Murphy v. Urso*, 88 Ill. 2d 444, 451 (1981); *Maryland Cas. Co. v. Peppers*, 64 Ill. 2d 187, 193 (1976).

[59] *Conway v. Country Cas. Ins. Co.*, 92 Ill. 2d 388, 397 (1982).

[60] *Conway*, 92 Ill. 2d at 397-98, *quoting Reis v. Aetna Cas. & Surety Co.*, 69 Ill. App. 3d 777, 790 (1st Dist. 1978).

[61] *Conway*, 92 Ill. 2d at 398.

[62] *Guillen v. Potomac Ins. Co.*, 323 Ill. App. 3d 121, 137 (1st Dist. 2001) (internal quotations and citations omitted).

[63] *Delatorre v. Safeway Ins. Co.*, 2013 IL App (1st) 120852.

[64] *Delatorre*, 2013 IL App (1st) 120 852, ¶ 4.

[65] *Id.* ¶ 5.

[66] *Id.* ¶ 6.

[67] *Id.* ¶ 7.

[68] *Id.*

[69] *Id.*

[70] *Id.* ¶ 25.

[71] *Id.* ¶ 33.

[72] *Id.* ¶ 35.

[73] *Hyland v. Liberty Mutual Fire Ins. Co.*, No. 1:15-cv-01264-JES-JEH, 2017 WL 3388161 (C.D. Ill. Aug. 7, 2017).

[74] *Hyland*, 2017 WL 3388161, at *2.

[75] *Id.* at *3.

[76] *Id.* at *5-6.

[77] *Id.* at *7.

[78] *Id.* (emphasis added).

[79] *Clemmons v. Travelers Ins. Co.*, 88 Ill. 2d 469 (1981).

[80] *Chandler v. Doherty*, 299 Ill. App. 3d 797 (4th Dist. 1998).

[81] *Hyland*, 2017 WL 3388161, at *9.

[82] *Id.* at *8.

[83] *Id.* at *11.

[84] *Hyland v. Liberty Mutual Fire Ins. Co.*, 885 F.3d 482 (7th Cir. 2018).

[85] 215 ILCS 5/155.

[86] *Hyland*, 855 F.3d at 486.

[87] *Id.*

[88] *Id.* at 487.

[89] *Id.*

[90] *Id.* (emphasis in original).

[91] *Rogers Cartage Co. v. Travelers Indemnity Co.*, 2018 IL App (5th) 160098.

[92] *Rogers*, 2018 IL App (5th) 160098, ¶ 2.

[93] *Id.* ¶ 4.

[94] *Id.* ¶ 5.

[95] *Id.* ¶ 15.

[96] *Id.* ¶ 22.

[97] *Id.* ¶ 25.

[98] *Id.*

[99] *Id.* ¶¶ 26, 28.

[100] *Id.*

[101] *Id.* ¶ 29.

[102] *Id.* ¶ 32.

[103] *Id.* ¶ 53.

[104] *Id.* ¶ 54.

[105] *Id.* ¶ 55.

[106] *Id.* ¶¶ 90, 91.

[107] *E.g.*, *Commonwealth Edison Co. v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 323 Ill. App. 3d 970, 984-85 (1st Dist. 2001).

[108] *Estate of Price v. Universal Casualty Co.*, 322 Ill. App. 3d 514, 517-18 (1st Dist. 2001).

[109] *Cramer*, 174 Ill. 2d at 524.

[110] *See, for example, Buais v. Safeway Ins. Co.*, 275 Ill. App. 3d 587 (1st Dist. 1995) (Section 155 applied in a case seeking first party benefits under uninsured motor vehicle claim); *Richardson v. Illinois Power Co.*, 217 Ill. App. 3d 708 (5th Dist. 1991) (Section 155 damages warranted where a liability insurance carrier breached its duty to defend).

[111] 215 ILCS 5/155 (2018).

[112] *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458 (1990).

[113] *Yassin*, 133 Ill. 2d at 460.

[114] *Id*. at 461.

[115] *Id*. at 466.

[116] *See, for example, Premier Electrical Constr. Co. v. American Nat'l Bank of Chicago*, 276 Ill. App. 3d 816, 833 (1st Dist. 1995); *Sieron v. Hanover Fire & Cas. Ins. Co.*, 485 F. Supp. 2d 954, 960 (S.D. Ill. 2007) ("Section 155 only provides relief to the party insured; it does not extend to third parties."); *Piasa Commercial Interiors, Inc. v. J.P. Murray Co., Inc.*, No. 07-617-DRH, 2008 U.S. Dist. LEXIS 76295, at **4-5 (S.D. Ill. Sept. 30, 2008) ("The Illinois Supreme Court has held that remedies embodied in Section 155 extend only to the party insured or policy assignees, not to third parties."); *Yachting Experience, LLC v. Doe*, No. 03 C 0259, 2003

U.S. Dist. LEXIS 14750, at *8 (N.D. Ill. Aug. 21, 2003) ("To obtain relief under Section 5/155(1), a plaintiff must be an insured party or 'an assignee who succeeds to the same position of the insured' … The rights afforded by Section 5/155(1) are 'not intended for "true" third parties.'")

[117] *See Pryor v. United Equitable Ins. Co.*, 2011 IL App (1st) 110544, ¶ 9; *Neiman v. Economy Preferred Ins. Co.*, 357 Ill. App. 3d 786, 794 (1st Dist. 2005).

[118] *Ellis v. Allstate Ins. Co.*, 479 F. Supp. 2d 782 (N.D. Ill. 2006).

[119] *Ellis*, 479 F. Supp. 2d at 789.

[120] 215 ILCS 5/1551.

[121] *Millers Mutual Ins. Ass'n v. House*, 286 Ill. App. 3d 378, 387 (5th Dist. 1997).

[122] *See Price v. Universal Cas. Co.*, 322 Ill. App. 3d 514, 517-18 (1st Dist. 2001) (insurer's attitude, whether insured forced to file suit, and whether insured was deprived of use of property factors to consider in Section 155 analysis); *Korte Constr. Co. v. American States Ins.*, 322 Ill. App. 3d 451, 458 (5th Dist. 2000) (insurer unreasonable where it breached its duty to defend and "abandoned" its insured); *Verbaere v. Life Investors Ins. Co. of America*, 226 Ill. App. 3d 289, 298 (1st Dist. 1992) (company found to be unreasonable and vexatious where it took an unreasonable interpretation to its credit disability policy in contravention to similar precedent).

[123] *House*, 286 Ill. App. 3d at 387.

[124] *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 200 F.3d 1102, 1110 (7th Cir. 2000).

[125] *See DeVore v. American Family Mut. Ins. Co.*, 383 Ill. App. 3d 266, 270 (2d Dist. 2008) (court did not need to address the insured's Section 155 arguments where it determined that a policy's mold exclusion precluded coverage).

[126] *Marcheschi v. Illinois Farmers Ins. Co.*, 298 Ill. App. 3d 306 (1st Dist. 1998).

[127] *Marcheschi*, 298 Ill. App. 3d at 308-09.

[128] *Id*. at 309.

[129] *Id*.

[130] *Id*.

[131] *Id*.

[132] *Id*. at 308.

[133] *Id*. at 313.

[134] *Id*.

[135] *Id*.

[136] *Id*. (applicable standard of review for a Section 155 award is abuse of discretion). For other cases involving the award of Section 155 damages in first party uninsured motor vehicle or underinsured motor vehicle claims, see *House*, 286 Ill. App. 3d 378 (refusal to

arbitrate UM claim constituted vexatious and unreasonable conduct); *Bauis*, 275 Ill. App. 3d 587 (insurer acted vexatiously and unreasonably when it did not engage in pre-arbitration settlement negotiations with insured although it had all pertinent information related to insured's uninsured motor vehicle claim); *Price*, 322 Ill. App. 3d 514 (an insurer acted vexatiously and unreasonably when it refused to pay arbitration award).

137 *Shell Oil Co. v. AC&S, Inc.*, 271 Ill. App. 3d 898 (5th Dist. 1995).

138 *Shell*, 271 Ill. App. 3d. at 900.

139 *Id*. at 901.

140 *Id*.

141 *Id*. at 900.

142 *Id*. at 903.

143 *Id*. at 909.

144 *Id*.

145 *Id*., *quoting Richardson v. Illinois Power Co.*, 217 Ill. App. 3d 708, 711 (5th Dist. 1991). For other cases finding that an insurer was liable for Section 155 penalties in the third-party liability context, see *Rogers Cartage Co. v. Travelers Indem. Co.*, 2018 IL App (5th) 160098, ¶¶ 96-98 (insurer liable for Section 155 penalties where the court found that the insurer egregiously mishandled settlement negotiations to resolve the underlying case and inappropriately threatened the insured); *Richardson*, 217 Ill. App. 3d at 710-12 (appellate court affirmed section 155 damages where the trial court found that the insurer unreasonably refused a defense to the insured).

146 215 ILCS 5/155(1); *Cramer*, 174 Ill. 2d at 521 (discussing the nature of the limited relief potentially recoverable under Section 155).

147 215 ILCS 5/155(1).

148 *See Cramer*, 174 Ill. 2d 521 (noting that $25,000 was the "maximum allowable penalty under the statute," a figure that was later raised to $60,000 by statutory amendment).

149 *See* 215 ILCS 5/155(1) (…"the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus *an amount not to exceed any one of the following amounts …")* (emphasis added); *Nelles v. State Farm Fire & Cas. Co.*, 318 Ill. App. 3d 399, 402-403 (1st Dist. 2000) (discussing the appropriate plain language interpretation of Section 155 when calculating the penalty recoverable under the statute).

150 *See House*, 286 Ill. App. 3d at 387-88 (affirming the trial court's award of $25,000 as the Section 155 penalty (which was then the maximum penalty under the statute) even though the other possible penalties under the statute were lower).

151 *Burress-Taylor v. American Security Ins. Co.*, 2012 IL App (1st) 110554, ¶ 28 (quoting *Young v. Allstate Ins. Co.*, 351 Ill. App. 3d 151, 169 (1st Dist. 2004) and *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 528 (1996)).

[152] *See Mazur v. Hunt*, 227 Ill. App. 3d 785, 789 (1st Dist. 1992) (dismissing putative common law fraud count because the "allegations of the Defendants' refusal to pay the entire amount of Plaintiff's claim . . . would fall within the statute as an action in which the amount of loss payable under a policy is in issue, and would be preempted.")

[153] *Western Howard Corp. v. Indian Harbor Ins. Co.*, No. 1:10-CV-7857, 2011 U.S. Dist. LEXIS 70069, at *14 (N.D. Ill. June 29, 2011) (citations and internal punctuation omitted).

[154] *Emerson v. American Bankers Ins. Co.*, 223 Ill. App. 3d 929, 940 (5th Dist. 1992).

[155] *Emerson*, 223 Ill. App. 3d at 937.

[156] *Id*.

[157] *McCarter v. State Farm Mut. Auto. Ins. Co.*, 130 Ill. App. 3d 97, 101 (3d Dist. 1985).

[158] *See McCarter*, 130 Ill. App. 3d at 102.

[159] 815 ILCS 505/1.

[160] *See Greenberger v. GEICO Gen. Ins. Co.*, 631 F.3d 392, 399 (7th Cir. 2011).

[161] *Burress-Taylor*, 2012 IL App (1st) 110554, ¶ 29 (quoting *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417 (2002)).

[162] *Burress-Taylor*, 2012 IL App (1st) 110554, ¶ 29.

[163] *See Elder v. Coronet Ins. Co.*, 201 Ill. App. 3d 733, 749-50 (1st Dist. 1990) (sale of insurance is "trade or commerce" under the ICFA, and insured could assert a consumer fraud claim based on insurer's unfair practices in adjusting insured's claim); *see also P.I.A. Michigan City, Inc. v. Nat'l Porges Radiator Corp.*, 789 F. Supp. 1421, 1426-27 (N.D. Ill. 1992) (noting that *Elder* "specifically holds that an insured may bring a claim against his or her insurer based on deception in the adjustment of a claim"); *Fox v. Industrial Cas. Ins. Co.*, 98 Ill. App. 3d 543, 546 (1st Dist. 1981) ("The sale of insurance is clearly a service and insureds are thus consumers and within the protection of the [ICFA])."

[164] *See Labella Winnetka, Inc. v. Gen. Cas. Ins. Co.*, 259 F.R.D. 143, 150 (N.D. Ill. 2009) (denying insurer's motion to dismiss corporate insured's claim under the ICFA and holding that "[b]ecause the sale of insurance qualifies as merchandise, insureds are considered consumers within the Act"); *Commonwealth Ins. Co. v. Stone Container Corp.*, No. 99 C 8471, 2001 U.S. Dist. LEXIS 11100, at **16-17 (N.D. Ill. May 3, 2001) (insured corporation treated as individual consumer for purposes of ICFA claim against its insurer); *W.E. O'Neil Constr. Co. v. Nat. Union Fire Ins. Co.*, 721 F. Supp. 984, 1001 (N.D. Ill. 1989) (corporate purchaser of insurance is a "consumer" under prior version of ICFA).

[165] *See Elder*, 201 Ill. App. 3d at 744.

[166] *See id.* at 750-53.

[167] *Id*. at 752.

[168] *Boyd v. U.S. Bank, N.A.*, 787 F. Supp. 2d 747, 752 (N.D. Ill. 2011) (denying motion to dismiss ICFA claim alleging violations of the Illinois Homeowner Protection Act and Illinois Mortgage Foreclosure Act).

[169] *Boyd*, 787 F. Supp. 2d at 752 (internal citations and punctuation omitted) (citing cases).

[170] *Ornelas v. Safeway Ins. Co.,* No. 88 C 3583, 1988 U.S. Dist. LEXIS 10970 (N.D. Ill. Sept. 26, 1988).

[171] *Ornelas*, 1988 U.S. Dist. LEXIS 10970, at **2-3.

[172] *Id*. at *3.

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