

## V. CONSUMER PROTECTION ISSUES

Victims of motor vehicle accidents who believe they have been mistreated by an insurance carrier have a variety of rights and remedies at their disposal, both statutory (such as those legislatively enacted or promulgated by the North Carolina Commissioner of Insurance) and common law (such as bad faith claims). Many of the rights created by statute and administrative regulation are designed to be enforced by the Commissioner of Insurance. For example, consumers can file with the Commissioner a complaint about a carrier's conduct and the Commissioner will then conduct an investigation of the matter on behalf of the consumer. The Commissioner is empowered to impose sanctions, including fines, on insurance companies who violate any one of myriad regulations controlling the insurance industry.

There are also statutory and common law remedies available to aggrieved consumers that can be pursued directly by the consumers themselves without the need for involvement by the Commissioner. These private causes of action will each be discussed separately below, but in practice they are often used in concert in order to complement each other and overcome limitations inherent to each. For example, North Carolina's unfair trade practices statute, N.C. Gen. Stat. § 75-1.1 (hereafter Chapter 75) creates a private cause of action for a broad array of unfair and deceptive trade practices, but is not specifically directed toward the insurance industry. North Carolina's unfair claims practices statute, N.C. Gen. Stat. §58-63-15(11) (formerly §58-54.4(11)) (hereafter Chapter 58), specifically outlines prohibited conduct in the insurance industry, but does not create a private right of action. Common law bad faith claims may be seen to have requirements that are less defined than either statutory claim and also provide for different remedies. Clearly, no one claim will fit all situations. As a result, one can perhaps see some effort by practitioners push the envelope of each claim, for example by attempting to graft onto a Chapter 75 claim the rights established in Chapter 58. In any event, the case law addressing Chapter 58, Chapter 75, and bad faith claims continues to evolve. As

it does, one can see increasing interdependence and interrelationship these types of claims.

#### **A. Deceptive Trade Practices Act (Chapter 75 Claims)**

Chapter 75, North Carolina's Deceptive Trade Practices Act, is a consumer protection act that creates a right and a remedy to combat deceptive trade practices. Chapter 75, creates rights for consumers by declaring as unlawful all "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. Section 75-1.1. Chapter 75 can be used to address conduct by insurance companies when it is used in conjunction with Chapter 58, particularly those subsections of Chapter 58 that create North Carolina's unfair claims settlement practices act and a prompt payment of claims act. See N.C. Gen. Stat. § 58-63-15(11)(a-n) and § 58-63-15(11)(b,c,d,e,f), respectively.

The remedies available under Chapter 75 can be pursued by either the Attorney General, who can bring suit against violators and pursue civil penalties of up to \$5,000, N.C. Gen. Stat. § 75-15.2, or by private citizens who can file civil actions and recover treble damages (three times the amount of any verdict rendered) and, in the discretion of the court, attorneys' fees, N.C. Gen. Stat. § 75-16. Chapter 75 is a powerful weapon in the hands of consumers litigants because it provides a double-barreled remedy for insurance company misconduct, allowing for both treble damages and attorneys fees.

#### *Chapter 75 Claims*

In order to establish a prima facie case for recovery under Chapter 75, a plaintiff must meet a three-pronged test. The Plaintiff must prove that the Defendant has engaged in (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, that (3) proximately causes actual injury to the plaintiff. A discussion of relevant aspects of each element follows.

The term "unfair" has been broadly interpreted to mean a practice that offends established public policy and can be characterized by one or more of the following terms: immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Miller v. Nationwide Mut. Ins. Co., 112 N.C. App. 295, 435 S.E.2d 537 (1993), *disc. rev. denied*, 335 N.C. 770, 442 S.E.2d 519 (1994). Conduct is also unfair if it is unethical or unscrupulous, and

deceptive if it has a tendency to deceive. See Polo Fashions, Inc. V. Craftex, Inc., 816 F.2d 145 (4<sup>th</sup> Cir. 1987).

The issuance of an insurance policy is an activity in or affecting commerce. See Golden Rule Ins. Co. V. Long, 113 N.C. App. 187, 439 S.E.2d 599 (1993). If an insurance company engages in conduct manifesting an unequitable assertion of power or position, that conduct constitutes an unfair trade practice. Johnson v. Beverly Hanks and Assoc., 328 N.C. 202, 208, 400 S.E.2d 38,42 (1991), cited in Murray v. Nationwide Mut. Ins. Co., 123 N.C. App. 1, 472 S.E.2d 358 (1996).

Fraud, bad faith, and intentional misrepresentation are not required; whether an act or practice is unfair or deceptive is determined by all the facts and circumstances surrounding the transaction. Myers v. Liberty Lincoln-Mercury, Inc., 89 N.C. App. 335, 365 S.E.2d 663 (1985). Evidence of negligence, ignorance, good faith, and lack of intent are not defenses to an action under this section. Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, S.E. 2d 643, *cert. denied*, 328 N.C. 89, 402 S.E.2d 824 (1990). Contributory negligence is also not a defense to a Chapter 75 violation. Winson Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Mere breach of contract, even if intentional, is not enough; there must be substantial aggravating circumstances attendant to the breach. Canady v. Crestar Mtg. Corp., 109 F.3d 969 (4<sup>th</sup> Cir. 1997). Unfair and deceptive trade practices claims are a creation of statute, and a violation of Section 75-1.1 is neither wholly tortious or wholly contractual in nature. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984).

The plaintiff must prove not only that defendant violated this section, but that plaintiff suffered actual injuries as a proximate cause of the violation. Bailey v. LeBeau, 79 N.C. App. 345, 339 S.E.2d 460, *modified and aff'd*, 318 N.C. 411, 348 S.E.2d 524 (1986).

The Statute of Limitations for a claim under Chapter 75 is generally 4 years. N.C. Gen. Stat. § 75-16.2. The cause of action arises when right to institute suit arises or when the violation occurs. Hinson v. United Financial Servs. Inc., 123 N.C. App. 469, 473 S.E.2d 382 (1996).

### *Relationship with Chapter 58 Claims*

The conduct proscribed in Article 13 of Chapter 58, which is discussed in the next section of this paper, also can be used as the basis for a Chapter 75 claim. Violations of Chapter 58 operate as a *per se* instance of unfair and deceptive trade practice. Murray v. Nationwide Mut. Ins. Co., 123 N.C. App. 1, 472 S.E.2d 358 (1996). Violations of section 58–63–15, which defines unfair or deceptive acts or practices in the business of insurance, are a violation of § 75–1.1 as a matter of law. North Carolina Chiropractic Ass’n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988). A party bringing a Chapter 75 claim may rely on violations of N.C. Gen. Stat. Chapter 58 in order to show a violation of Chapter 75, although it is not essential.

An insurance company that engages in acts or practices that violate subsection (f) of N.C.G.S. section 58-63-15(11) violates N.C.G.S. section 75-1.1, as a matter of law, without the necessity of an additional showing of frequency indicating a general business practice. Gray v. North Carolina Ins. Underwriting, 529 S.E.2d 676 (2000); *See also* United States Fire Ins. Co. v. Nationwide Mut. Ins. Co., 735 F. Supp. 1320 (E.D.N.C. 1990) (implying that a single violation may be sufficient and that the claimant need not meet the pattern or frequency requirements of Chapter 58).

Additionally, an insurer’s course of conduct may give rise to both a breach of contract claim and a Chapter 75 claim, and the aggrieved party may elect to recover under either. Garlock v. Henson, 112 N.C.App. 243, 435 S.E.2d 114 (1993). If the plaintiff elects to recover under N.C.G.S. section 75-1.1, the defendant can not prevent that recovery by stipulating to pay damages for the breach of contract claim. Vasquez v. Allstate Ins. Co., 529 S.E.2d 480 (2000).

### *Third-Party Claims*

A question that arises in some auto cases is whether an injured plaintiff can bring a Chapter 75 action against the tortfeasor’s liability carrier. The law is not settled on this matter. For now, despite some inconsistent decisions, the answer may often be no. See Wilson v. Wilson, 121 N.C. App. 662, 468 S.E.2d 495 (1996). (no action allowed because plaintiff not in privity with insurer); *see also* Horton v. NewSouth Insurance Company, 122 N.C.

App. 265, 468 S.E.2d 856 (1966) (tort-like causes of action cannot be assigned because void as against public policy). *But cf.* United States Fire Ins. Co. v. Nationwide Mut. Ins. Co., 735 F. Supp. 1320 (E.D.N.C. 1990) (court's decision may support argument that Chapter 75 allows third-party claims for single or isolated acts of bad faith, as long as they meet the standards for an actionable "unfair practice" under Chapter 75.); *see also* Murray v. Nationwide Mut. Ins. Co., 123 N.C. App. 1, 472 S.E.2d 358 (1996) (claim by third party allowed but decision seems to rest on notion that post-judgment claims by claimant are permissible because they do not present the same public policy problems as pre-judgment claims.).

#### **B. Unfair Competition and Unfair Practices Act (Chapter 58 claims)**

The North Carolina Legislature enacted Chapter 75 to protect consumers from unfair methods of competition and unfair or deceptive acts in or affecting commerce. The Legislature enacted Article 63 of Chapter 58 to protect consumers from unfair and deceptive acts or practices by the insurance industry. Article 63 prohibits a broad array of unfair acts and practices in all aspects of the insurance business including the sales, issuance and marketing of insurance, as well as in how claims are handled. Unfair methods of competition and unfair or deceptive acts or practices are prohibited in subsection ten of Article 63:

No person shall engage in the State in any trade practice which is defined in this Article as or determined pursuant to this Article to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

N.C. Gen. Stat. § 58-63-10. Unfair methods of competition and unfair or deceptive acts or practices are then defined in subsection 15 of Article 63. N.C. Gen. Stat. § 58-63-15.

To establish a claim for relief under Article 63 of Chapter 58 a plaintiff must allege not only that defendant engaged in the prohibited acts under the statute but also that defendant engaged in the prohibited acts with such frequency as to indicate a general business practice. Von Hagel v. Blue Cross and Blue Shield, 91 N.C. App. 58, 60, 370 S.E.2d 698 (1988). Thus, one instance of "bad faith behavior" is not sufficient under a strict reading of the statute.

*But see Murray*, 123 N.C. App. 14 (repeated refusals of claimant's demand, involving only one breach of duty, sufficient to establish the frequency necessary to create a general business practice).

The Commissioner of Insurance is the only person empowered to enforce Article 63 of Chapter 58. There is no private cause of action for violations of Chapter 58. Recall that Chapter 75 claims do allow for a private right of action, however, and that a Chapter 58 violation may give rise to a Chapter 75 claim. Violations of conduct listed in Chapter 58 constitute Unfair and Deceptive Trade Practices under Chapter 75 as a matter of law. See *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986). Thus, a claimant may indirectly bring an action involving a violation of Chapter 58 by using it as a basis for a Chapter 75 claim. To do so, however, a claimant must meet the requirements of N.C. Gen. Stat. Section 58-65 and must also meet the requirements of the Unfair Trade Practices Act, N.C. Gen. Stat. 75-16.1.

Violations of this section may also be the basis for bad faith claims. Other related administrative regulations governing the conduct of adjusters may also be used for this purpose, and arguably as the basis of a Chapter 75 claim. Two Administrative Code provisions that could be used are Administrative Code Section 4.021, "Handling of Loss and Claim Payments," and Section 4.0423, entitled "Ethical Standards" which set forth the ethical standards an adjuster must abide by. These provisions require that the adjuster "conduct himself in such a manner as to inspire confidence by fair and honorable dealing." See Appendix B for a copy of these provisions.

### **C. The Unfair Claim Settlement Practices Act**

The legislature defined and prohibited unfair methods of competition and unfair and deceptive acts or practices in commerce in Chapter 75. The legislature then went on to define and prohibit such unfair trade practices in the insurance industry by enacting Article 63 of Chapter 58. The legislature has also specifically addressed unfair adjusting and settlement practices by insurance companies. The Unfair Claim Settlement Practices Act defines and prohibits fourteen types of conduct in N.C. Gen. Stat. § 58-63-15 (11). This conduct, if is

committed or performed with such frequency as to indicate a general business practice, amounts to a violation of Chapter 58. The Statute lists the following acts and practices:

- a) Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue;
- b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
- e) Failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed;
- f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear
- g) Compelling insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured
- h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;
- i) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured

- j) Making claims payments to insureds or beneficiaries not accompanied by statement setting forth the coverage under which the payments are being made
- k) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
- l) Delaying the investigation or payment of claims by requiring an insured claimant, or the physician of, or either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information;
- m) Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; and
- n) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

This subsection also states that no violation of this subsection shall create any cause of action in favor of any person other than the Commissioner. Once again, though, a violation of this subsection can be used as grounds to support a Chapter 75 claim or a bad faith claim.

#### **D. Prompt Payment of Claims Act**

Certain provisions of the Unfair Claims Settlement Practices Act establish a mechanism for ensuring the prompt, in addition to the fair, payment of claims. This can be seen as the Prompt Payment of Claims Act. In particular, subsections b, c, d, e, and f, each require the insurer to act reasonably promptly and conduct prompt investigations and settlements. Subsections l, m, and n prohibit delay in the investigation or payment of claims. They also prohibit the failure to promptly settle claims where liability becomes reasonably clear and the failure to provide a reasonable explanation for the basis for a denial.

#### **E. Common Law Duty of Good Faith and Fair Dealing**

The tort of bad faith is based upon an implied duty of good faith and fair dealing that the insurer will do nothing to deprive the insured from the benefits of the insurance policy. An insurer commits the tort of bad faith when it unreasonably fails to meet, and thus breaches, the implied contractual duty of good faith. 21 Wake Forest L. Rev. 957 (1986).

A variety of duties are imposed on insurance companies. They must honor contractual relationships with their policyholders, conform to the rules and regulations imposed by Statute (Chapters 75 and 58 are only two examples of the many regulations that apply to insurance companies), and they must conduct their activities with reasonable care and good faith. When insurance companies breach any of these duties, they may be sued. When the breach of duty is accompanied by aggravated conduct that could give rise to punitive damages, the insurance company is susceptible to a bad faith claim. For more information on this, see the excellent discussion in Von Hagel, 91 N.C. App. 58, 370 S.E.2d 695 (1988).

The most obvious duty an insurance company has in an automobile accident case is the contractual obligations that flow from the underlying insurance policy. A review of basic breach of contract principles may lead to a better understanding of the tort of bad faith.

The basis of any relationship between an insurer and an insured is the insurance contract. A breach of contract is any unjustified failure to perform a promise, expressed or implied, that is part of the contract. Non-performance of the contract is a breach. A breach may occur when a party, without legal excuse, fails to perform any promise which is all or part

of the contract. A violation or non-fulfillment of the obligations, agreements, or duties imposed by the contract is also a breach. McCurry v. Purgason, 170 N.C. 463 (1915). The commission or omission of some act which violates the express or implied undertakings contained in the contract, is a breach. A breach may also occur when a party knowingly prevents, hinders, or makes more costly the other party's performance, or when, in advance of the due date for performance, repudiates his duty to perform – that is, repudiates or denounces the contract. See North Carolina Pattern Jury Instructions, Civil 510.10.

The failure to pay or investigate a claim will give rise to a breach of contract action. The failure of a carrier to provide a defense will also give rise to a breach of contract action.

A bad faith claim requires that such a breach of contract be accompanied by aggravating conduct sufficient to justify an award of punitive damages. Robinson v. N.C. Farm Bureau, Ins. Co. 86 N.C. App. 44, 356 S.E.2d 392 (1997). Bad Faith consists of a tortious act plus some aggravation. Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976). Aggravation may be extrinsic to the tortious act (i.e., slander or willful and malicious behavior), or the aggravation may be a tort which by its nature encompasses elements of aggravation (fraud is a classic example of such a tort).

Bad Faith claims are always brought against insurance companies based on the bad faith conduct of the insurance company in handling a claim for benefits from an underlying insurance policy. They differ in the type of insurance policy involved, the relationship of the claimant to the policy, or the nature of the bad faith conduct of the insurance company.

Bad faith claims can be categorized first by the status of the person bringing the underlying claim, that is whether, they are a first party to or third party beneficiary of the policy, and then, within those two broad categories, by the type of insurance policy or claim being made. Common first-party claims involve policies providing coverage against fire or casualty loss, medical payments, and underinsured motorist coverage. The most common bases for first-party bad faith claims are for failing to pay claims or investigate them promptly.

Third-party claims involve claims against the carrier brought by someone who was not a

party to the original contract of insurance. Third-party claims may give rise to bad faith lawsuits brought by the insured. Common examples of bad faith suits brought by an insured are those in which a carrier fails to provide a defense to the insured when he is being sued by a third party, or those in which the carrier fails to reasonably settle within policy limits with the third party and the insured is exposed to an excess judgment after the case is tried. Third-party claims may also be brought by the third party themselves. For example, in an auto case, the injured person may attempt to claim he has been the victim of a bad faith failure to pay by the tortfeasor's carrier. In some jurisdictions the tortfeasor who becomes exposed to an excess judgment because of a carrier's unreasonable failure to settle can assign his bad faith claim to the third party in exchange for a release.

A brief review of some representative cases may illustrate the concepts involved. However, detailed legal analysis of bad faith case law is beyond the scope of this paper. For an excellent analysis of the law, *see*, "Bad Faith Litigation in North Carolina", by Michael T. Medford and William E. Moore, Jr., (NBI, Inc. 1998).

### **First-Party Claims**

#### *1. Failure to Pay the Insured*

In Smith v. Nationwide, 96 N.C. App. 215, 385 S.E.2d 152 (1989), the insured sued the carrier for failure to settle a claim for damages to his mobile home. The Court of Appeals held that the claim was sufficient to state a claim for punitive damages, and that the carrier failed to attempt in good faith to achieve an "effective, prompt, fair and equitable settlement."

In Olive v. Great American Ins. Co. 76 N.C. App. 180, 333 S.E.2d 41 (1985), *disc. rev. denied*, 314 N.C. 668, 336 S.E.2d 400 (1985), the Court of Appeals found no tortious conduct by the carrier and rejected the insured's claim that the carrier acted in bad faith by refusing to pay a homeowners policy claim. The court said a bad faith claim must be based on more than an incorrect interpretation of policy. (Note, however, the result may be different where duty to defend is at issue and the pleadings filed in the case bring it within policy's coverage. The duty to defend is absolute when allegations in complaint bring claim within coverage of the policy. Wilson, *supra*.)

In Lovell v. Nationwide Mutual Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181 (1993), the carrier failed to pay their insured's obvious medical payments claim after agreeing to do so. The aggravated conduct of the adjuster was sufficient to support the insured's bad faith claim. The adjuster's plea that he "just plumb forgot" was not persuasive to the jury that awarded the insured punitive damages of over two hundred thousand dollars.

In Miller v. Nationwide Mutual Ins. Co., 112 N.C. App. 295, 435 S.E.2d 537 (1993), *disc. rev. denied*, 335 N.C. 770, 442 S.E.2d 519 (1994), the Court of Appeals reversed dismissal of a bad faith claim. The Miller claimant alleged multiple instances of conduct amounting to a bad faith refusal to pay UIM policies. The court held that "These allegations of plaintiff's complaint, if proven, are sufficient to support an award of damages, including punitive damages, based upon a bad faith refusal to pay the plaintiff's claim." 112 N.C. App. at 306.

### 2. *Bad Faith Payment of a Claim.*

In an unusual case, the plaintiff brought a bad faith claim against their carrier for wrongfully settling a claim filed against them, thereby causing plaintiff to pay his or her deductible. In Nationwide v. Public Service Company of N.C. Inc. 112 N.C. App. 345, 435 S.E.2d 561 (1993) the plaintiff did not prevail, even though he or she were not notified of settlement, in part because consent of the insured was not required under the policy.

### 3. *Failure to Investigate*

In Newton v. Standard Fire Ins. Co., 291 N.C. 105,115, 229 S.E.2d 277 (1976), the court noted in dicta that it would be bad faith for a carrier to not make any investigation at all in a claim.

Failure to investigate was then successfully raised in Von Hagel v. Blue Cross & Blue Shield, 91 N.C. App. 58, 370 S.E.2d 695 (1988). In Von Hagel, a case that involved denial of a payment for skilled nursing care, the court found the carrier acted in bad faith in not investigating the need for the nursing care under the circumstances. The court noted that the carrier failed to make any investigation whatsoever about the need for the nursing care but simply denied payment, even though the carrier had previously agreed to pay for the care and even though two of the claimant's doctors had written letters supporting the need for such

care. The court found such conduct was done with the intent to cause further damage to plaintiff, willful, wanton, and in conscious disregard of defendant's duty of good faith.

An insured was not successful with this argument in McMillan v. State Farm Fire and Cas. Co., 93 N.C. App. 748, 379 S.E.2d 88 (1989). In McMillan, the court did not find the carrier engaged in bad faith even though no investigation was done by the carrier before an appraisal was requested and even though Plaintiff was without a house for two months. Despite a claim by the Plaintiff that there was an unreasonably low offer, the court found no aggravated conduct.

### **Third-Party Claims (Brought by Insureds)**

#### *1. For Failure to Settle*

In Thomas v. Nationwide, 277 N.C. 329 177 S.E.2d 286 (1970), an insured alleged negligence and bad faith where the carrier failed to settle a case prior to a trial and the insured ended up exposed to an excess verdict. The court found no bad faith and stated that the outcome was based on a reasonable difference of opinion and the insured's failure to purchase enough insurance.

#### *2. For Failure to Settle and Failure to Defend*

The insured in Wilson v. State Farm Mut. Auto Ins. Co., 92 N. C. App. 320, 374 S.E.2d 446 (1988) was successful in a claim against the carrier for failure to settle and failure to defend a claim brought against the insured by a third party. The insurer was ordered to pay the amount of an excess consent judgment, even though the amount exceeded policy limits. The court found the carrier's refusal to pay unjustified and in bad faith, despite any mistaken belief that the claim was outside policy limits. The court found that the carrier breached an implied covenant of good faith and fair dealing by failing to defend insured or negotiate a claim, and that the duty to defend an insured is absolute when allegations in the complaint bring the claim within the coverage of the policy. The court also said an honest but mistaken belief is no defense.

### **Third-Party Claims (Brought by the Third Party)**

1. *For Failure to Settle or Pay*

Generally, claims by third parties (parties not in privity with the carrier) are not allowed and may not be assigned to them by the insured that is in privity with the carrier. The following two cases are representative of the rule. The third case, Murray, provides the exception.

Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856 (1996): Only insured has contractual duty, not third party to the contract. Tort-like causes of action can not be assigned; void as against public policy.

Wilson v. Wilson and Nationwide, 121 N.C. App. 662, 468 S.E.2d 495 (1996): No similar action allowed under Chapter 58 or Chapter 75 because Plaintiff not an insured nor in privity with insured.

Murray v. Nationwide Mut. Ins. Co., 123 N.C. App. 1, 472 S.E.2d 358 (1996): Third party permitted to assert post-judgment bad faith claim. The fact that the claim was for a post-judgment failure to pay seems to be the key to explaining this decision.

### **Other Claims**

In an unusual twist of events, a carrier brought a bad faith claim against its own insured. The claim by the carrier was based on an assertion that the insured acted in bad faith by failing to timely and adequately notify the carrier about the claim. The insured prevailed.

Great American Ins. Co. v. C.G. Tate Constr. Co., 315 N.C. 714, 340 S.E.2d 743 (1986). The court set out a two-part test to determine when insurers may be relieved of the duty to defend due to an insured's failure to delay in giving notice of claim to the insurer. The test is: (1) Did the insurer act in good faith (i.e. lack actual knowledge of claim against them) or did the insured purposefully and knowingly fail to notify insurer, and (2) Was the insurer materially prejudiced by the late notice in its ability to investigate or defend the claim? Affirmative answers to both questions will relieve the insurer of its duty.

In another odd case, an insured unsuccessfully alleged bad faith by his carrier for paying claims the insured deemed fraudulent and raising the insured's premium. Cash v. State Farm Mut. Auto. Ins. Co., 528 S.E.2d 372 (2000).

An injured worker was unsuccessful in bringing an action against his employer and workers' compensation carrier, alleging bad faith and intentional infliction of emotional distress caused by a videotape that failed to show all aspects of the workers' job, because the exclusivity provision barred an employees claims against the employer and insurer; thus, the Industrial Commission had exclusive jurisdiction of such issues. See Groves v. Travelers Ins.Co., 535 S.E.2d 105 (2000).

#### **F. Negligent Failure to Settle.**

When an insurance company breaches its duty to settle, it will, in most jurisdictions, be deemed to have acted in bad faith, and will be liable to the insured for a judgment or settlement beyond its policy limits. See WINDT, INSURANCE CLAIMS AND DISPUTES (3d ed. 1995) at § 5.13, p. 325, and at § 5.21, p. 340. Of course, the company will also be responsible for contract damages as well as damages that were reasonably foreseeable as a consequence of the breach at the time of the breach. Moreover, in many states, an action for a breach of the duty to settle sounds in tort, rather than, in or in addition to contract. See id. at § 5.12, p. 323 and § 5.21, p. 341. Where such action gives rise to a tort recovery, the defendant will be responsible for all damages proximately caused by its negligence including, perhaps, emotional distress. Id.

In North Carolina the insurance company's duty to reasonably settle a case was first addressed in Wynnewood Lumber Co. v. Travelers Ins. Co., 173 N.C. 269, 91 S.E. 946 (1917). In Wynnewood, the Plaintiff alleged that the Defendant negligently refused to settle the victim's on-the-job injury claim. The court, in finding for the insurance company, recognized that an insurer is liable where it assumes the duty of defending a suit and negligently fails to discharge such duty, and is also liable if it exercises the exclusive power of settlement in bad faith, or for purposes of fraud, to the injury of the insured. In Wynnewood, however, the court

ultimately found the Plaintiff failed to state a cause of action for such a claim. The Supreme Court said that while settlement would have been better for everyone involved, it was simply a case where hindsight turned out to be better than foresight. Id. at 271.

The court finally reached a decision on this issue many years later in Thomas v. Insurance Company, 277 N.C. 329 177 S.E.2d 286 (1970). There, the court recognized the existence of a claim for a negligent failure to settle but held that the Plaintiff's evidence was insufficient to make out a case. The court concluded that the Plaintiff simply had not bought enough insurance. Id. at 333.

A summary of the law concerning the obligation of an insurer to settle a case can be found in Allford v. Insurance Company, 248 N.C. 224, 103 S.E.2d 8 (1958).

The law imposes on the insurer the duty of carrying out in good faith its contract of insurance. The policy provision giving the insurer the right to effectuate settlement was put in for the protection of the insured, as well as the insurer. It is a matter of common knowledge that fair and reasonable settlements can generally be made at much less than the financial burden imposed in litigating claims. It is for this reason that courts have consistently held that an insurer owes a duty to its insured to act diligently and in good faith in effecting settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy. The liability has been repeatedly imposed upon insurance companies because of their failure to act diligently and in good faith effectuating settlements with claimants.

Id. at 229.

## **G. Breach of Contract**

Under common law, damages for breach of contract were limited to the value of the contract, unless the parties could have expected greater damages at the time of entering into the contract. Damages were limited to consequences that were probable as a result of the breach. Emotional distress and punitive damages were generally not recoverable (exceptions included mistakes by funeral homes) unless the breach involved a matter so unusual that damages were highly foreseeable. Accordingly, a breach of contract will generally result in a less attractive recovery from the perspective of the injured party than the tort recovery, which allows for additional damages, including punitive damages. Beginning with Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976), North Carolina courts have opened the door to punitive damages in cases where a defendant insurer has failed to pay a claim, as long as there is an identifiable tort (even if the tort also constitutes or accompanies a breach of contract), and as long as the tortious conduct also includes aggravation.