

DRI-INSBADF MT

DRI Insurance Bad Faith MT

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DRI Insurance Bad Faith
A Compendium of State Law

MONTANA

2015

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Causes of Action

Is there a statutory basis for an insured to bring a bad faith claim?

Yes. The Montana Unfair Trade Practices Act, [Mont. Code Ann. § 33-18-101 et seq.](#) (“UTPA”), is the only basis for pursuing a bad faith claim. [Mont. Code Ann. §§ 33-18-242\(1\), 33-18-242\(3\)](#). However, third-party claimants have broader rights to sue insurers, and “[a]n insured may not bring an action for bad faith in connection with the handling of an insurance claim.” [Mont. Code Ann. § 33-18-242\(3\)](#).

Can a third party bring a statutory action for bad faith?

Yes. [Mont. Code Ann. § 33-18-242\(1\)](#).

Is there a common law cause of action for bad faith?

Yes. However, the common law causes of action available to insureds versus third parties are quite different.

An insured may bring a common law bad faith claim against an insurer for conduct that is unrelated to “the handling of an insurance claim.” [Thomas v. Northwestern Nat’l Ins. Co.](#), 1998 MT 343, 292 Mont. 357, 973 P.2d 804 (1998); [Williams v. Union Fid. Life Ins. Co.](#), 2005 MT 273, ¶58, 329 Mont. 158, ¶58, 123 P.3d 213, ¶58 (2005).

Third-party claimants may assert common law bad faith claims for claim handling practices (in addition to UTPA claims). [Brewington v. Employers Fire Ins. Co.](#), 1999 MT 312, 297 Mont. 243, 992 P.2d 237 (1999) (plain language of § 33-18-242(3) only limits the causes of action available to “insureds”).

What cause of action exists for an excess carrier to bring a claim against a primary carrier?

In order to determine insurers' rights under their respective policies, an excess insurance carrier may file a declaratory judgment action against the primary insurance carrier under Montana's Uniform Declaratory Judgments Act. [Mont. Code Ann. § 27-8-101, et seq.](#)

What causes of action for extracontractual liability have been recognized outside the claim handling context?

Insurers have been held liable for bad faith for failure to disclose changes in policy provisions upon renewal. *See, e.g., Thomas v. Northwestern Nat'l Ins. Co.*, 1998 MT 343, 292 Mont. 357, 973 P.2d 804 (1998).

Damages

Are punitive damages available?

Yes. The UTPA provides that “Exemplary damages may also be assessed in accordance with § 27-1-221.” [Mont. Code Ann. § 33-18-242\(4\)](#). A plaintiff can recover punitive damages by proving by a preponderance of the evidence that the insurer violated one or more specified subsections of [Mont. Code Ann. § 33-18-201](#), and by proving by clear and convincing evidence that the insurer acted with actual malice or actual fraud as defined in [Mont. Code Ann. § 27-1-221](#).

Punitive damages may be awarded in common law claims if the claimant can prove that the insurer acted with actual fraud or actual malice in breaching the covenant of good faith and fair dealing. *Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 861 P.2d 895, 901-02 (1993).

Are attorneys' fees recoverable?

Generally, no. Montana adheres to the American Rule that a party in a civil action is not entitled to attorneys' fees absent a specific contractual or statutory provision. *Mountain West Farm Bureau v. Hall*, 2001 MT 314, 308 Mont. 29, 38 P.3d 825 (2001).

Are consequential damages recoverable?

Yes. [Mont. Code Ann. § 33-18-242\(4\)](#) allows plaintiffs to recover “such damages as were proximately caused by the violation of subsection (1), (4), (5), (6), (9), or (13) of 33-18-201.” All special and general damages caused by the violation of the foregoing sections are included as damages.

Can a plaintiff recover damages for emotional distress?

Yes. [Mont. Code Ann. § 33-18-242\(4\)](#); *see also Stephens v. Safeco Ins. Co. of America*, 258 Mont. 142, 852 P.2d 565 (1993).

Elements of Proof

What is the legal standard required to prove bad faith in a first-party case?

The insured must prove by a preponderance of the evidence that the insurer breached its statutory obligations. *See Dees v. American Nat'l Fire Ins. Co.*, 260 Mont. 431, 451, 861 P.2d 141, 153 (1993) (Gray, J., concurring). The standard for first-party bad faith cases is whether the insured had a “reasonable basis for contesting the claim or the amount of the claim.” *Palmer by Diacon v. Farmers Ins. Exch.*, 861 P.2d 895 (Mont. 1992). An insurer is entitled to challenge a claim on the basis of debatable law or facts and will not be liable for bad faith or punitive damages for denying coverage if its position is not “wholly unreasonable.” *Id.* at 902.

What is the legal standard required to prove bad faith in a third-party failure to settle a claim?

The legal standard in a third-party UTPA claim is the same as a first-party claim. A third-party claimant must prove by a preponderance of the evidence that the insurer breached its statutory obligations. Proof of a common law bad faith claim requires proof that the insurer's conduct amounts to a general business practice. *Fode v. Farmers Ins. Exch.*, 221 Mont. 282, 286, 719 P.2d 414, 416 (1986). Insurers must give at least equal consideration to the interests of the insured. *Jessen v. O'Daniel*, 210 F. Supp. 317 (D. Mont. 1962). In *Jessen*, the court considered factors such as whether a verdict is likely to exceed policy limits; whether liability is doubtful; whether the insurer has considered trial counsel's recommendations; whether the insured is aware of all demands and offers; whether the insured has requested a settlement within policy limits; and whether the insurer has

considered any contributions by the insured. *Jessen v. O'Daniel*, 210 F. Supp. 317, 326-27 (D. Mont. 1962); see also *Redding v. Prosgit Specialty Mgmt. Co.*, No. 6:2012-cv-00098, 2015 U.S. Dist. Lexis 24281 (D. Mont. 2015).

Is there a separate legal standard that must be met to recover punitive damages?

Yes. For a jury to award punitive damages a plaintiff must prove by clear and convincing evidence that the insurer's conduct amounts to "actual fraud" or "actual malice." *Mont. Code Ann. § 27-1-221(1), (5)*.

In a UTPA claim, a plaintiff must establish by a preponderance of the evidence that the insurer violated one or more specified subsections of *Mont. Code Ann. § 33-18-201* and must establish by clear and convincing evidence that the insurer acted with actual malice or actual fraud as defined in *Mont. Code Ann. § 27-1-221*.

Punitive damages may be awarded in common law claims if the claimant can prove by clear and convincing evidence that the insurer acted with actual fraud or actual malice in breaching the covenant of good faith and fair dealing. See *Mont. Code Ann. § 33-18-201*; *Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 861 P.2d 895, 902 (1993).

Does a bad faith claim require evidence of a pattern or practice of unfair or deceptive conduct?

In a first- or third-party UTPA claim, "a plaintiff is not required to prove that the violations were of such frequency as to indicate a general business practice." *Mont. Code Ann. § 33-18-242(2)*. However, in a common law bad faith claim, the plaintiff must prove that the insurer's bad faith conduct amounts to a general business practice. *Fode v. Farmers Ins. Exch.*, 221 Mont. 282, 286, 719 P.2d 414, 416 (1986).

On what issues is expert evidence required to establish bad faith?

Expert evidence is not required to prove, or disprove, bad faith. Courts have discretion to allow expert evidence on issues of liability and damages in a bad faith case in accordance with Rules 702 and 703 of the Montana and Federal Rules of Evidence. See, e.g., *Federated Mut. Ins. Co. v. Anderson*, 1999 MT 288, 297 Mont. 33, 991 P.2d 915 (1999) (court excluded liability experts on the grounds that opinions were irrelevant and would cause confusion); *Dees v. American Nat'l Fire Ins. Co.*, 260 Mont. 431, 450, 861 P.2d 141, 152 (1993) (insurer may use expert testimony to show that investigation of claim was reasonable) (Gray, J. concurring).

On what issues is expert evidence precluded?

There is no specific rule regarding what expert testimony is either admissible or inadmissible. Generally, expert testimony will be admitted or excluded on any issue of liability or damages pursuant to the court's discretion and Rules 702 and 703 of the Montana and Federal rules of Evidence. *Federated Mut. Ins. Co. v. Anderson*, 1999 MT 288, 297 Mont. 33, 991 P.2d 915 (1999); *Dees v. American Nat'l Fire Ins. Co.*, 260 Mont. 431, 861 P.2d 141 (1993).

Is a bad faith claim viable if a coverage decision has been determined to be correct?

No. See *Truck Ins. Exch. v. Waller*, 252 Mont. 328, 334-35, 828 P.2d 1384, 1388 (1992) ("[b]ecause the policies excluded coverage, the Wallers' claims of bad faith on the part of Truck Insurance fail as a matter of law"); *EOTT Energy Operating Ltd. P'ship v. Certain Underwriters at Lloyd's of London*, 59 F. Supp. 2d 1072, 1076 (D. Mont. 1999) ("And where there is no coverage, there is no bad faith.").

Is a third-party bad faith claim viable if the plaintiff does not prevail in the underlying claim?

No, as long as judgment is entered against the claimant in the underlying action. Under the UTPA, "a third party claimant may not file an action under this section until after the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim." *Mont. Code Ann. 33-18-242(6)(b)*. This rule is the same for common law claims. See, e.g., *Fode v. Farmers Ins. Exch.*, 221 Mont. 282, 719 P.2d 414 (1986). If, however, judgment is entered against the claimant in the underlying action, but a settlement is reached on appeal, the claimant can still pursue a UTPA claim. *Graf v. Continental*

Western Ins. Co., 2004 MT 105, 321 Mont. 65, 89 P.3d 22; see also, *McCullough v. Minn. Lawyers Mut. Ins. Co.*, No. 1:2009-cv-00095, 2013 U.S. Dist. Lexis 30995 (D. Mont. 2013).

Practice and Procedure

Statute of limitations

For UTPA claims, two years after the date of violation of Mont. Code Ann. § 33-18-201. Mont. Code Ann. § 33-18-242(7)(a).

For third-party claimants, one year from the date of settlement or entry of judgment on the underlying claim against an insured tortfeasor. Mont. Code Ann. § 33-18-242(7)(b).

For common law bad faith claims, three years. Mont. Code Ann. § 27-2-204(1).

Under what circumstances will bad faith claims be dismissed or stayed pending the resolution of the underlying claims?

For third-party claims under the common law and the UTPA, courts will stay or dismiss bad faith claims until underlying claims against the insured tortfeasors are either reduced to judgment or settled. Mont. Code Ann. § 33-18-242(6)(b); *Fode v. Farmers Ins. Exch.*, 221 Mont. 282, 287, 719 P.2d 414, 417 (1986).

Under what circumstances will bad faith claims be severed for trial from the underlying claim?

In first-party claims, Mont. Code Ann. § 33-18-242(6) (a) authorizes bifurcation of actions for trial “where justice so requires.” In determining when justice so requires, courts look to Rule 42(b) of the Montana and Federal Rules of Civil Procedure, which allows a court to order a separate trial of any claim in the “furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. *Truck Ins. Exch. v. Waller*, 252 Mont. 328, 828 P.2d 1384 (1992). In addition, punitive damages are not recoverable in an action arising out of breach of contract. Mont. Code Ann. § 27-1-220 (2)(a) (ii). Therefore, in any action where breach of contract claims and bad faith claims are bifurcated as set forth above, the issues of compensatory damages and punitive damages will necessarily be bifurcated as well.

Under what circumstances will the compensatory and punitive damages claims be bifurcated?

An award of punitive damages must be determined in a separate hearing, and only after the judge or jury finds that the insurer is guilty of actual fraud or actual malice. Mont. Code Ann. § 27-1-221(7)(a). If the judge or jury in its initial consideration determines that the insurer acted with actual fraud or malice, then a separate hearing is held to determine the amount of punitive damages to award, during which evidence may be presented regarding the insurer's net worth, financial affairs, and financial condition may be considered. Mont. Code Ann. § 27-1-221(7)(a).

How does a bankruptcy petition (by either the insured or the insurer) affect the prosecution and defense of bad faith and extracontractual claims?

No reported cases. However, upon the filing of a bankruptcy petition by an insurer, the automatic stay provisions of 11 U.S.C. § 362 would apply to any bad faith proceedings. Upon the filing of a bankruptcy petition by the insured, any claim for bad faith against an insurer would become an asset of the bankruptcy estate and could be pursued by the bankruptcy trustee. See, e.g., *In re Bergeson*, 112 F.R.D. 692 (D. Mont. 1986) (bankruptcy trustee brought action against insurer for breach of obligations under business interruption clause of policy and bad-faith refusal to tender full amount of coverage to insureds in bankruptcy).

How does insolvency or the intervention of a state guaranty fund affect the prosecution and defense of bad faith and extracontractual claims?

When an insurer becomes insolvent, the provisions of Montana's Insurers Supervision, Rehabilitation, and Liquidation Act, codified at Mont. Code Ann. § 33-2-1301 *et seq.*, apply to any pending claims against the insurer. Once an insurer has been declared insolvent under the Act, all pending claims against that insurer are automatically stayed for at least 90 days. Mont.

[Code Ann. § 33-2-1334](#). Upon issuance of an order appointing a liquidator for an insurer, no action at law or equity may be brought or maintained against the insurer. [Mont. Code Ann. § 33-2-1348](#).

The Montana Insurance Guaranty Association (MIGA) was established under [Mont. Code Ann. § 33-10-101, et seq.](#), for the purpose of paying the “covered claims” of insolvent insurers up to the lesser amount of \$300,000 or the applicable policy limits. A “covered claim” is defined in relevant part as “an unpaid claim, including one for unearned premiums, that arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this part applies” [Mont. Code Ann. § 33-10-102\(2\)\(a\)](#). A covered claim does not include any claim for extracontractual or punitive damages. [Mont. Code Ann. § 33-10-102\(2\)\(a\)](#).

Defenses and Counterclaims

Is evidence regarding the reasonableness of the conduct of the insured or third-party claimant admissible?

If an insured breached obligations under the contract of insurance, such as the duty to cooperate with the investigation of a claim, such conduct is relevant to the issue of whether the insurer had a reasonable basis in law or fact for denying the claim. [Tynes v. Bankers Life Co.](#), 224 Mont. 350, 364, 730 P.2d 1115, 1124 (1986). However, the insured's conduct will not permit an apportionment of fault between the insurer and insured. [Stephens v. Safeco Ins. Co. of America](#), 258 Mont. 142, 852 P.2d 565 (1993). In [Stephens](#), the jury found that both the insured and insurer breached the covenant of good faith and fair dealing. However, where the insurer's breach constituted a tort, the court held that the insured's breach amounted only to a breach of contract. *Id.* at 565. The court concluded that the insured's tort damages could not be reduced in proportion to their own liability for breaching the insurance contract.

In [Spadaro v. Midland Claims Serv.](#), 227 Mont. 445, 740 P.2d 1105 (1987), a third-party case, the court held that the claimant's delay in settling a claim constitutes an affirmative defense to bad faith. However, an insurer cannot refuse to settle with a third-party claimant who refuses to release claims against the insured. [Shilhanek v. D-2 Trucking, Inc.](#), 2003 MT 122, 315 Mont. 519, 70 P.3d 721 (2003). [Shilhanek](#) expressly held that nothing in the UTPA requires a general release from the insured or insurer as a condition of settlement pursuant to [MCA § 33-18-201](#). *Id.*

Is “advice of counsel” a recognized defense?

Yes. See [Palmer by Diacon v. Farmers Ins. Exch.](#), 261 Mont. 91, 861 P.2d 895, 907 (1993). If an insurer directly relies on an advice of counsel defense, attorney client privilege regarding any such communication is waived. *Id.* In a UTPA action, advice of counsel is included within the “reasonable basis” defense. [Mont. Code Ann. § 33-18-242\(5\)](#).

What other defenses are available?

An insurer may not be held liable if it had a reasonable basis in law or fact for contesting the claim or the amount of the claim. [Mont. Code Ann. § 33-18-242\(5\)](#); [State Farm Mut. Auto. Ins. Co. v. Freyer](#), 372 Mont. 191, 312 P.3d 403 (2013) (insurer's failure to settle did not breach covenant of good faith and fair dealing where insurer had reasonable basis for contesting the insured driver's child's claim). Evidence that is relevant to either the issue of liability or damages in the underlying claim will generally be admitted in support of the insurer's defense.

Is there a cause of action for reverse bad faith?

No. When the insured breaches the covenant of good faith and fair dealing, such breach is deemed a breach of the insurance contract, and not a tort. [Stephens v. Safeco Ins. Co. of America](#), 258 Mont. 142, 852 P.2d 565 (1993). Moreover, any fault apportioned to an insured for breaching an insurance contract may not offset damages awarded as a result of the insurer's bad faith. *Id.*

Other Significant Cases Involving Bad Faith and Extracontractual Claims

Montana law authorizes a declaratory judgment action in which a third-party claimant may seek advance payment of medical bills or other special damages from a tortfeasor's insurer where liability for the loss and causation of damages are reasonably clear. *Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1998) (it is an unfair trade practice per se for insurer to demand release for its insured while withholding payment of third party's medical expenses, where both insured's liability for underlying accident and causally related damages, are reasonably clear). Neither the UTPA nor any Montana Supreme Court decision specifically defines "reasonably clear." However, liability is not reasonably clear, and there is no duty to advance pay, when there are genuine issues of material fact regarding negligence or liability. *Giambra v. Travelers Indem. Co.*, 2003 MT 289, 318 Mont. 73, 76, 78 P.3d 880, 882 (2003).

The insurer's duty to "advance pay" such damages prior to obtaining a release has been extended to include payment of lost wages and other special damages. See *Dubray v. Farmers Ins. Exch.*, 2001 MT 251, 307 Mont. 134, 36 P.3d 897. Advance payments must be made up to policy limits, and without demanding a release for the insured. *Shilhanek v. D-2 Trucking, Inc.*, 2003 MT 122, 315 Mont. 519, 70 P.3d 721 (2003).

In a declaratory judgment action, only the "advance payments" may be recovered, not UTPA damages. *Safeco Ins. Co. of Ill. v. Montana Eighth Jud. Dist. Court*, 2000 MT 153, 300 Mont. 123, 2 P.3d 834 (2000). In *Safeco*, the Court explained that because claims for advance payment do not seek "bad faith damages," a declaratory judgment action seeking advance payment may be brought before any final resolution of the underlying claim. *Id.* at 34.

Under *Ridley v. Guaranty National Insurance Co.*, 286 Mont. 325, 951 P.2d 987 (1998) and its progeny, an insurer must pay medical expenses and other special damages, such as lost wages, to a third-party claimant where both the liability of its insured and causation of damages is reasonably clear. An insurer must do so up to the limits of liability coverage, and may not demand a release from the third party in exchange for such advance payment. Thus, before the merits of an underlying claim are settled or adjudicated, an insurer may be forced to relinquish all available insurance proceeds while it is simultaneously prohibited from demanding a release for its insured. In this area, it is believed that Montana is a minority jurisdiction of one. Currently, tort defendants and insurers alike are raising constitutional defenses to this line of cases.

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