

Insurance Bad Faith - Mississippi Summary

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I. Legal Framework For Handling Claims

- A. Good Faith Required - The relationship between the insurer and the insured is contractual. Implicit in all insurance contracts and relationships is the implied covenant of good faith and fair dealing. *Blue Diamond, Inc. v. Liberty Mut. Ins. Co.*, 21 F. Supp. 2d 631 (S.D. Miss. 1998).
- B. Elements of Bad Faith in Mississippi -
1. Denial of a legitimate claim;
 2. Lack of an arguable or legitimate basis for denial; and
 3. Conduct on the part of the insurance company that evinces malice, gross negligence, or reckless disregard of the insured's rights.

II. Creating Your Own Facts

- A. Prompt and Adequate Investigation Required – Insurance companies have a duty to promptly and adequately investigate all relevant facts underlying an insured's claim before denying it. Upon conclusion of the investigation, the company has a duty to disclose the facts discovered during the investigation, and if there is no valid reason for denying the claim, it should be paid promptly.²
1. *Adequate Investigation* – An insurance company should:
 - (1) check to see if the policy provision that it may rely upon to deny the claim has been held invalid and unenforceable by a state or federal court;³
 - (2) interview its employees and agents to ascertain if they possess any

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² *Murphree v. Fed. Ins. Co.*, 707 So. 2d 523, 530 (Miss. 1997).

³ *See Employers Mutual Casualty Co. v. Tompkins*, 490 So.2d 897 (Miss.1986); *see also Richards v. Allstate Insurance Co.*, 693 F.2d 502 (5th Cir.1982) (applying Mississippi law)

relevant knowledge regarding the claim in question;⁴ and
(3) make reasonable efforts to obtain all available information relevant to
the claim.⁵

2. An insurance carrier should consider whether it has fully and fairly developed the factual basis for the insured's claim, and has equally developed, through its investigation, the bases upon which it rests its denial decision.
 - a. Investigation of relevant facts through insured.⁶
 - i. Investigation of scene - complete documentation of entire scene, including photographic and/or reconstructive evidence.
 - ii. Authorization to obtain - get signed waivers from insured as soon as possible. Obtain information from potentially relevant sources, such as cell phone providers, bank statements, credit bureaus, black box data, all electronic media, including email and hard drives.
 - iii. Examination under oath and recorded statements - complete examinations of insureds, and obtain recorded and transcribed statements of all witnesses.

⁴ See *Merchants National Bank v. Southeastern Fire Insurance Co.*, 751 F.2d 771 (5th Cir.1985) (applying Mississippi law)

⁵ See *Life Insurance Co. of Mississippi v. Allen*, 518 So.2d 1189 (Miss.1987); *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254, 271-73 (Miss.1985); *Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833 (Miss.1984); *Reserve Life Insurance Co. v. McGee*, 444 So.2d 803 (Miss.1983).

⁶ *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989). See also *Gregory v. Continental Ins. Co.*, 575 So.2d 534 (Miss.,1990). "When suit was filed the plaintiff should have been informed by Continental, in a manner from which there could be no misunderstanding, that it recognized a sum in some amount was owed from business interruption caused by the damage to building number 1, and Continental was willing to pay whatever was due for this loss. Yet in order to do so, it was necessary that the plaintiff furnish it written documentation of this loss. Continental should either have done this by communication to Mrs. Gregory's counsel, or else specifically raised plaintiff's failure to comply with the policy in its pleading, and call the matter to the attention of the court for a ruling. There was no occasion to be coy on this policy provision. Because Continental did not insist upon this obvious right which it had under the policy to receive documentation of the loss as a condition precedent to paying anything, but-as the circuit judge ruled- waived it, the question arises why it did not pay the claim? Suit was filed April 7, 1986. No payment was tendered until September 12, 1987, two days before trial. We are left to wonder why the delay?"

- b. Investigation of relevant facts through agent.
 - i. Interview agent if appropriate, then determine whether written statement is appropriate.
- c. Consultation with appropriate experts.⁷
 - i. Medical experts
 - ii. Legal experts
 - iii. Forensic experts (engineers, arson investigators, accident reconstructionists)

2. *Prompt Investigation* – Mere delay in investigating a claim will not support an award of punitive damages under Mississippi law unless it is (a) so unreasonable as to constitute an independent tort or (b) amounts to a constructive denial of the claim, made without an arguable reason and in bad faith.⁸ Many carriers have enacted internal policy guidelines which give the insured a right to a prompt and objective investigation of his or her claim.

3. *Early Retention of Counsel* - should be considered at the time the insurance carrier has a reasonable suspicion regarding the validity of the claim.⁹

B. Negligent Investigations – In order to justify the imposition of punitive damages, an insured must prove something more than merely a negligent investigation. Instead, the insured must prove that had the insurer conducted a proper investigation, it would have easily discovered evidence establishing its contractual defenses to be without merit. In other words, if a reasonable investigation would

⁷ *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989). The Mississippi Supreme Court has particularly found fault with insurance companies where they failed to fully and fairly utilize medical experts in reaching their claims decisions.

⁸ *Tutor v. Ranger Insurance Co.*, 804 F.2d 1395, 1398-99 (5th Cir.1986) (applying Miss. law); *Aetna Casualty and Surety Co. v. Day*, 487 So.2d 830, 833 (Miss.1986).

⁹ “Prudent parties anticipate litigation prior to the time suit is formally commenced. When the insurer has knowledge of specific and articulable facts which give it a reasonable suspicion about the validity of the claim, the insurer can assume litigation is imminent. . . . The insurer must demonstrate when this point in time was reached by showing when it was aware of specific and articulable facts which made it suspicious of the insured’s claim.” *Dunn v. State Farm*, 122 F.R.D. 507, 508-09 (N.D. Miss. 1988). 122 F.R.D. at 510 (citations omitted)(emphasis added).

have indicated coverage, then liability may exist for punitive damages.¹⁰

- C. Continuing Duty to Investigate – Insurance companies have a continuing duty to evaluate and review the basis for denying the claim as new information is discovered or provided. “An insurance company is under a continuing duty to reevaluate its position when it chooses to deny a claim. This is because an insurer may be subject to punitive damages for initially denying a claim without an arguable reason, even if it later decides to pay.” *Eichenseer v. Reserve Life Ins. Co.*, 682 F. Supp. 1355 (N.D. Miss. 1988).

Carriers should reevaluate the basis for the claim, and its denial, throughout the claims and litigation process – even after denial. Should facts be discovered that lead to the conclusion that the denial was in error, the carrier should immediately tender the undisputed benefits, although if there is a pocket book dispute, that issue of “amount” can continue to be contested.¹¹

- D. Carriers Must Rely On Facts Known and Reasons Given At The Time Of Denial – Mississippi courts have held that to the extent the issue of punitive damages is allowed to be considered by the jury, then the insurance carrier may only rely upon the coverage defenses that formed the basis for the denial of the claim. Additionally, the jury will only be permitted to consider the facts that the carrier knew at the time of the denial. In other words, the carrier’s knowledge is “frozen” at the time of the denial (with respect to the bad faith issue), and the carrier is not permitted to rely upon reasons not given to the insured as bases for the company’s denial.¹²

¹⁰ *Merchants Natl. Bank v. Southeastern Fire Ins. Co.*, 751 F.2d 771, 777 (5th Cir.1985); *Szumigala v. Nationwide Mut. Ins. Co.*, 853 F.2d 274, 280 (5th Cir.1988).

¹¹ *See Gregory v. Continental Ins. Co.*, 575 So.2d 534 (Miss.,1990). “When suit was filed the plaintiff should have been informed by Continental, in a manner from which there could be no misunderstanding, that it recognized a sum in some amount was owed from business interruption caused by the damage to building number 1, and Continental was willing to pay whatever was due for this loss. Yet in order to do so, it was necessary that the plaintiff furnish it written documentation of this loss. Continental should either have done this by communication to Mrs. Gregory's counsel, or else specifically raised plaintiff's failure to comply with the policy in its pleading, and call the matter to the attention of the court for a ruling. There was no occasion to be coy on this policy provision. Because Continental did not insist upon this obvious right which it had under the policy to receive documentation of the loss as a condition precedent to paying anything, but-as the circuit judge ruled- waived it, the question arises why it did not pay the claim? Suit was filed April 7, 1986. No payment was tendered until September 12, 1987, two days before trial. We are left to wonder why the delay?”

¹² *See Soblely v. Southern Nat'l Gas Co.*, 210 F.3d 561 (5th Cir. 2000). *See also Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989). In *Eichenseer*, the Court held that since the arguable basis that the carrier relied upon in arguing against coverage did not exist at the time of the denial, it was improper for the carrier to contend the later-discovered defense should protect it from liability.

Since the Court “must look to the reason an insurance company gives to an insured for denying the claim; the issue is not the defense which the insurer settles on at trial to defend the suit, *Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985), the carrier has a tremendous vested interest in engaging in a complete investigation prior to making a coverage determination, and then making as honest and forthright a decision regarding the bases for the denial as possible.

- E. Declaratory Judgment – Insurance companies considering denying a claim should consider whether it wishes to file an action for declaratory judgment. On one hand, it guarantees that litigation will ensue. On the other hand, it does allow the company to choose a venue that it believes may be more favorable. Regardless, the filing of a declaratory action does not amount to bad faith.¹³

III. Wearing The White Hat

- A. Adjuster’s Key Role – The adjuster is the key contact with the insured during the early stages of the investigation of the claim. No one else with the company will have as much contact and interaction with the insured as the adjuster. Maintaining a civil and courteous relationship is crucial.

Nevertheless, the above arguable basis on which Reserve Life seeks to rely in justifying its denial of Eichenseer's claim and thereby avoid punitive damages did not exist at the time Reserve Life initially denied the claim of Eichenseer or at any time thereafter until the instant suit was commenced. . . . Implicit within the above acknowledgment by the district court that Reserve Life possessed an arguable reason to deny Eichenseer's claim at the time of trial, while at the same time concluding that Reserve Life did not possess an arguable reason to deny Eichenseer's claim sufficient to preclude the imposition of punitive damages, is the determination by the district court that the relevant window for the latter inquiry regarding punitive damages is necessarily a flexible one dependent upon the facts of a particular case. For instance, in seeking to avoid the imposition of punitive damages in a bad faith refusal case, an insurance company may not delay investigation of a claim for a significant period of time and then, after investigation, rely on the arguable basis for denying the claim ultimately discovered through the dilatory investigation. Thus, we are persuaded that the above approach by the district court is the proper one, particularly on the facts of the instant case where the arguable reason to deny the claim did not arise until after suit was commenced.

Id.

¹³ *Stratford Ins. Co. v. Cooley*, 985 F.Supp. 665 (S.D.Miss.,1996). “Under no circumstances could it reasonably be concluded that Stratford acted in bad faith by instituting this declaratory judgment action to determine a legitimate coverage dispute rather than contributing its policy limits to a pre-litigation settlement which may or may not have resulted in a complete release of Cooley.”

1. One claim versus one hundred claims – The insured only has one claim with the carrier, and to them, it is the most important claim.
 2. File Documentation – Facts only, please.
 3. Keep the insured informed of investigation status via timely written correspondence.
 4. Document all conversations with insured and witnesses, and include appropriate information, including contact information, etc.
 5. Comply with all insurance company claims policies.
 6. Honesty in all conduct with insured.
- B. Post-Claim Practices – The insurance company’s post-claim, post-litigation practices may be relevant and admissible with respect to bad faith issues. This includes post claim underwriting, as well as the company’s conduct generally.
1. *Post-Claim Underwriting* – This scenario typically occurs in the context of the insurance company denying a claim (and voiding the policy) based on underwriting issues that, the company typically contends, had they been disclosed, a different policy issuance decision would have been made by the company. The policyholder routinely claims that they disclosed the information in question to the agent, and/or that the information was available to the insurance company. The Mississippi Supreme Court has taken a dim view of post-claim underwriting.¹⁴
 2. *Post-Claim Conduct* – Insurance companies may also create potential punitive liability through its post-claim conduct. In *Sobley v. Southern Nat’l Gas*, 302 F.3d 325 (5th Cir. 2002), the Court observed that post-denial conduct was relevant with respect to the jury’s determination

¹⁴ *Lewis v. Equity Nat. Life Ins. Co.*, 637 So.2d 183 (Miss. 1994). “The insurer can continue to “play the odds” through usage of risky practices which motivates agents to make misrepresentations; they can then deny a claim; flippantly “absolve” itself of any responsibility for such misrepresentations; and it can lose. In this case, the insurer “played the odds and lost.” An insurer has an obligation to its insureds to do its underwriting at the time a policy application is made, not after a claim is filed. It is patently unfair for a claimant to obtain a policy, pay his premiums and operate under the assumption that he is insured against a specified risk, only to learn after he submits a claim that he is not insured, and, therefore, cannot obtain any other policy to cover the loss. The insurer controls when the underwriting occurs. It therefore should be estopped from determining whether to accept an insured six months or more after a policy is issued. If the insured is not an acceptable risk, the application should be denied up front, not after a policy is issued. This allows the proposed insured to seek other coverage with another company since no company will insure an individual who has suffered serious illness or injury.”

whether the insurance company had acted in good faith.

3. *Giving The Insured The Benefit Of The Doubt* – The carrier’s duty to the insured does not end once the coverage decision is made. Instead, the carrier has a continuing duty to evaluate - and re-evaluate - the claim.
 - a. Pursue discovery of facts beneficial to insured – The carrier should make certain that it seeks the insured’s involvement in discovering any facts that might change the coverage decision. Follow up the initial denial with additional requests for information or assistance in discovering facts beneficial to providing coverage.
 - b. Provide all required forms (proof of loss, authorization to obtain, etc.) as soon as possible after the loss.
4. Document all requests for required information, and provide multiple written requests for any documentation not timely submitted by insured.¹⁵
 - a. Proof of loss;
 - b. Authorization to obtain information / evidence;
 - c. Signed and verified examination under oath

C. Payment Of Undisputed Claims

- A. An insurance carrier's duty to promptly pay a legitimate claim does not end because a lawsuit has been filed against it for nonpayment. Put more bluntly, if you owe a debt, the duty to pay does not end when you are sued for nonpayment of it.¹⁶

¹⁵ See *Gregory v. Continental Ins. Co.*, 575 So.2d 534 (Miss.,1990). “No proof of loss was filed. No written documentation was ever filed; no written demand was ever made on Continental before suit was filed. Counsel's explanation of this in oral argument was that they were not required to do so, since Continental had denied the claim. That simply will not wash. . . . under the terms of the policy, unless or until Mrs. Gregory filed some written documentation of loss of income caused by the pro shop and restaurant being closed down, Continental was not obligated to do anything. We can hardly attribute the Gregorys' failure to an inability to do so. Mr. Gregory was a businessman and had been president of two different banks, and St. Andrews had a bookkeeper who should have been able to furnish Continental some information from its business records. This Court shares the view of the circuit judge that there was a callous disregard of the written notice requirement by Mrs. Gregory's counsel. It would have to be under much more unusual circumstances than this case for this Court to entertain a punitive damage claim for the insurance carrier's failure to pay when the insured never even bothered to file any proof of loss, or make a written demand upon the insurance carrier before filing suit.”

¹⁶ *Broussard v. State Farm Fire and Cas. Co.*, 523 F.3d 618 (5th Cir. 2008). “Although it is a much closer question, we also hold that State Farm is not liable for punitive damages for continuing to withhold payment under the policy after its expert opined that some covered wind damage likely occurred prior to the arrival of the

B. Payment should be made - without conditions – Many times, during the investigation of the insured’s claim, it becomes apparent that some, or all, of the insured’s claim is covered. At that point, the carrier should pay the undisputed portion of the claim immediately and without conditions.¹⁷ A release should not be required for claims that are due and owing, compared to claims that are doubtful (either with respect to liability or damages) and are resolved through the negotiation process.

1. Pocket-Book Dispute - Where pocket-book disputes exist over the extent of the money owed to the insured, it is a better practice to forward the undisputed portion without conditions, and then to negotiate any further settlement. The Mississippi Supreme Court has been extremely reluctant to allow punitive damages in cases where the insurer did not deny coverage, but only disputed the amount of the claim or delayed payment.¹⁸

storm surge. State Farm had a duty to re-evaluate the Broussards' claim which continued even after the claim was refused and the Broussards filed suit. *See Gregory v. Cont'l Ins. Co.*, 575 So.2d 534, 541 (Miss.1990). State Farm's expert Gurley stated that there was a 75% likelihood that between none and 35% of the shingles on the Broussards' roof were damaged by wind prior to the arrival of the storm surge. State Farm was liable to the Broussards for this damage, however minor. *See Dixie Ins. Co. v. Mooneyhan*, 684 So.2d 574, 584 (Miss.1996). “

¹⁷ *See Standard Life Ins. Co. v. Veal*, 354 So. 2d 239 (Miss. 1977). “This case demonstrates the necessity of awarding punitive damages when an insurance company refuses to pay a legitimate claim, and bases its refusal to honor the claim on a reason clearly contrary to the express provisions of its own policy. If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely. We are of the opinion that the refusal to pay the legitimate claim in this case was an intentional wrong and constituted an independent tort.” *See also Travelers Idemn. Co. v. Weatherbee*, 368 So. 2d 829 (Miss. 1979). “While it is true that Claxton, supra, and its progenitors, cited therein, do not address punitive damages, they do unequivocally establish the divisibility of policy coverages so they may be considered as separate contracts even though the premiums are paid in the entirety, not presently true as separate premiums were paid for the coverages. There are, inescapably, three distinct contracts in this one policy, each subject to separate consideration so that an insurer may be liable for punitive damages on one contract even though other contractual payments are delayed because of legitimate dispute.”

¹⁸ *See, e.g., Aetna Casualty & Sur. Co. v. Day*, 487 So.2d 830, 832-34 (Miss.1986) (no punitive damages in case of dispute in coverage and delay in payment); *State Farm Mut. Auto. Ins. Co. v. Roberts*, 379 So.2d 321, 322 (Miss.1980) (award of punitive damages improper when insurer legitimately disputes the amount due under the policy); *Bellefonte Ins. Co. v. Griffin*, 358 So.2d 387, 391 (Miss.1978) (dispute over method of determining amount due under the policy did not entitle insured to punitive damages), *Tutor v. Ranger Ins. Co.*, 804 F.2d 1395 (5th Cir. 1986).

IV. Keeping Your Eye On The Ball

A. The Real Goal In Bad Faith Litigation – Avoiding Punitive Damages

1. *Contractual Damages* – Insurance companies typically assign a reserve upon receiving notice of a potential loss, and while the insurance company may not wish to pay damages related to coverage which it believes does not exist, or in an amount that it believes is not justified, those sorts of losses are typically anticipated.
2. *Punitive Damages* – Mississippi permits the imposition of punitive damages in cases where the insurance company intentionally and unreasonably refuses to pay a legitimate claim. In order for punitive damages to be appropriate, the insurance carrier must have acted with actual malice, gross negligence, reckless disregard, or engaged in actual fraud. Miss. Code Ann. § 11-1-65 (2008).
3. *Limits on Punitive Damages* – In *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), the United States Supreme Court provided guidance regarding the allowable limits of punitive damage awards. Generally speaking, the Court held that single digit multipliers would be acceptable with respect to punitive damage awards, while awards exceeding those multipliers would be constitutionally suspect.
 - a. Mississippi Statutory Limits – The Mississippi Legislature has provided statutory guidance regarding the allowable limits of punitive damages.¹⁹ The same statute provides guidelines for the Court to use in determining whether punitive damages are

¹⁹ In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following:

(i) Twenty Million Dollars (\$20,000,000.00) for a defendant with a net worth of more than One Billion Dollars (\$1,000,000,000.00); (ii) Fifteen Million Dollars (\$15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars (\$750,000,000.00) but not more than One Billion Dollars (\$1,000,000,000.00);(iii) Five Million Dollars (\$5,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars (\$500,000,000.00) but not more than Seven Hundred Fifty Million Dollars (\$750,000,000.00);(iv) Three Million Seven Hundred Fifty Thousand Dollars (\$3,750,000.00) for a defendant with a net worth of more than One Hundred Million Dollars (\$100,000,000.00) but not more than Five Hundred Million Dollars (\$500,000,000.00);(v) Two Million Five Hundred Thousand Dollars (\$2,500,000.00) for a defendant with a net worth of more than Fifty Million Dollars (\$50,000,000.00) but not more than One Hundred Million Dollars (\$100,000,000.00); or (vi) Two percent (2%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars (\$50,000,000.00) or less.

appropriate, and the actual amount of the award.²⁰

²⁰ Factors the Court is entitled to consider include the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.