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## ILLINOIS LAW MANUAL

### CHAPTER XIII

### **BAD FAITH AND EXTRA CONTRACTUAL LIABILITY**

#### **B. SECTION 155 OF THE ILLINOIS INSURANCE CODE – FIRST PARTY CLAIMS**

##### **1. Basic Law**

Under Section 155 of the Illinois Insurance Code, an insured or an assignee may recover damages from an insurer if the insurer disputes the amount of the loss payable on a claim, delays settling a claim, or refuses to provide coverage and the insurer's action or delay was unreasonable and vexatious. 215 ILCS 5/155.

##### **2. Analysis**

Only an insured party or an assignee has a cause of action against an insurer under Section 155 of the Illinois Insurance Code ("Section 155"). Yassin v. Certified Grocers of Illinois, Inc., 133 Ill. 2d 458 (1990). Furthermore, Section 155 preempts an insured's cause of action against an insurer for breach of the duty of good faith and fair dealing, Buais v. Safeway Ins. Co., 275 Ill. App. 3d 587 (1995); Mazur v. Hunt, 227 Ill. App. 3d 785, 788 (1992), for fraud where the allegations are framed as an insurer's breach of the duty of good faith and fair dealing, Id. at 788-793, and for intentional infliction of emotional distress where the allegations are framed as an insurer's breach of the duty of good faith and fair dealing. Combs v. Insurance Co. of Illinois, 146

Ill. App. 3d 957, 963-964 (1986). Moreover, there is a strong indication that Section 155 also preempts an action against an insurer's agent. Mazur, 227 Ill. App. 3d at 793-794. There are two elements which an insured or an assignee must prove before he or she can recover damages from the insurer for bad faith. First, the insured or the assignee must prove that either the insurer disputed the amount of the loss payable on a claim, delayed settling a claim, or refused to provide coverage when coverage was not debatable. Second, the insured or the assignee must prove that the insurer's action or delay was unreasonable and vexatious. 215 ILCS 5/155. Establishing one of the first elements is easily accomplished. Accordingly, courts focus on whether the insurer's action or delay was unreasonable and vexatious. Buckner v. Causey, 311 Ill. App. 3d 139 (1999).

In determining whether an insurer's action or delay is vexatious and unreasonable, no single factor is controlling. Rather, the totality of the circumstances will be considered. Morris v. Auto-Owners Ins. Co., 239 Ill. App. 3d 500, 503 (1993); Millers Mut. Ins. Ass'n. of Illinois v. House, 286 Ill. App. 3d 378 (1997). In particular, the insurer's attitude will be examined. Green v. International Ins. Co., 238 Ill. App. 3d 929, 935 (1992). Courts will also consider whether the insured was forced to file suit and was deprived of the use of his or her property. Mohr v. Dix Mut. County Fire Ins. Co., 143 Ill. App. 3d 989, 999 (1986). Moreover, payment of the full amount of a claim does not preclude an insured's cause of action against the insurer if the payment was vexatiously and unreasonably delayed. Calcagno v. Personalcare Health Management, Inc., 207 Ill. App. 3d 493, 504 (1991).

Courts have concluded that an insurer's delay or other action is not vexatious and unreasonable if a *bona fide* coverage dispute exists. Golden Rule Ins. Co. v. Schwartz, 203 Ill. 2d 456 (2003). Examples of *bona fide* coverage disputes include evidence of arson, including incendiarism, access and motive, Id. at 503-509, and evidence that the insured concealed material

facts about his health, including the fact that he had recently undergone tests and surgery.  
Massachusetts Mut. Life Ins. Co. v. O'Brien, 5 F.3d 1117, 1123 (1993).

On the other hand, examples of vexatious and unreasonable delay or action include:

Failure to adequately investigate a claim or denial of the claim without adequate supporting evidence; failure to evaluate a claim objectively; interpreting policy provisions in an unreasonable manner; making unreasonably low settlement offers; relying on misrepresentations in the insurance application which are very minor or where the insurer's agent knowingly filled out the application falsely; and abusive or coercive practices designed to compel compromise of a claim.

Emerson v. American Bankers Ins. Co., 223 Ill. App. 3d 929, 936 (1992).

Indeed, courts have concluded that an insurer's agent who delayed appraisal proceedings for approximately four years by repeatedly insisting on naming umpire candidates who had dealings with the insurer and canceling a series of meetings could be found guilty of engaging in vexatious and unreasonable delay or action. Green, 238 Ill. App. 3d at 935-936; see also Mohr, 143 Ill. App. 3d at 999 (insurer ignored attempts to discuss dispute).

If an insured establishes that the insurer's delay or action was vexatious and unreasonable, the insured is entitled to damages including attorneys fees and costs. 215 ILCS 5/155. "Costs" include any costs incurred which are found to be reasonably necessary in preparation of a case for trial. Watson v. State Farm Fire & Cas. Co., 122 Ill. App. 3d 559 (1984). Costs also can include pre-judgment interest. Millers Mut. Ins. Ass'n. v. House, 286 Ill. App. 3d 378 (1997). An insured cannot recover punitive damages from an insurer under Section 155 because the recovery of punitive damages is preempted. Combs, 146 Ill. App. 3d at 961-963. However, Section 155 does not preclude an award of consequential damages for breach of contract including an award of lost profits. Mohr, 143 Ill. App. 3d at 996-997.

In addition to costs and attorneys fees, a prevailing insured may also recover an amount not to exceed any one of the following:

- (a) 25% of the amount which the trier of fact finds the party is entitled to recover under the policy, exclusive of costs;
- (b) \$60,000; and
- (c) the excess of the amount which the trier of fact finds the insured is entitled to recover, exclusive of costs, over the amount, if any, which the insurer offered to pay in settlement of the claim before the action.

215 ILCS 5/155.

These three remedies are exclusive. The maximum penalty available is \$60,000. Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513 (1996); Nelles v. State Farm Fire & Casualty Co., 318 Ill. App. 3d 399 (2000).

Actions for bad faith and vexatious or unreasonable claims handling practices have been extended to include uninsured and underinsured motorist claims. Buais v. Safeway Ins. Co., 275 Ill. App. 3d 587 (1995); Marcheschi v. Illinois Farmers Ins. Co., 298 Ill. App. 3d 306 (1998). Furthermore, the statutory penalties are justified if an insurer fails to pay an uncontested amount while contesting the remainder of a claim. Millers Mut. Ins. Ass'n. v. House, 286 Ill. App. 3d 378 (1997).