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Driving the Stake into the Comparative Bad Faith Defense and Reverse Bad Faith Claims

Greg Munro

University of Montana School of Law, greg.munro@umontana.edu

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INSURANCE CONSUMER COUNSEL'S COLUMN

DRIVING THE STAKE INTO THE COMPARATIVE BAD FAITH DEFENSE AND REVERSE BAD FAITH CLAIMS

BY PROFESSOR GREG MUNRO

There's a lot less there than meets the eye.
-anonymous-

The argument for allowing insurance companies accused of bad faith to have juries compare their conduct with that of their aggrieved insureds or third-party claimants sounds good enough to be the product of an insurance advertiser's focus group. The California court, in *Knight v. Jewett*,¹ said of comparative fault in general:

...the "comparative fault" doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable . . . apportionment or allocation of loss".

As a promoter of comparative fault for insurance, i.e., defense of comparative bad faith and reverse bad faith claims, has said, "Holding insurers wholly liable for damages for which they are only partly responsible, while allowing the insured to recover for self-inflicted harm, offends all notions of equity and fairness."²

The fact is, in insurance bad faith claims, comparative fault, and reverse bad faith are groundless concepts that should not survive plaintiff's motions to strike or dismiss. When the specter of comparative bad faith defense and/or reverse bad faith claims arise, counsel should be aware of some excel-

lent precedent from Montana and California which should put them to rest. Judge Molloy recently struck the comparative bad faith defense in *Burton v. Mountain West Farm Bureau Mutual Insurance Company*.³ In doing so, he relied in part on the Montana Supreme Court's 1993 decision in *Stephens v. Safeco Ins. Co.*,⁴ a case that has not received much attention in Montana but was a significant factor in the California Supreme Court's recent decision in *Kransco v. American Empire Surplus Lines Ins. Co.*⁵ in which that court dealt comparative bad faith a death blow in that state. It is worth reviewing each of these decisions to see the holes in the legal theory of comparative fault in insurance bad faith.

The unsung *Stephens v. Safeco* case

Stephens v. Safeco is a good starting point. Tom and Jodie Stephens owned Buster's Body Shop in Hamilton when it suffered an accidental fire in 1987. Disputes arose when they tried to settle their claims under their fire policy with Safeco, so they sued Safeco for violations of the duty of good faith and fair dealing and for violation of the Montana Unfair Claims Settlement Practices Act. Safeco was successful in injecting a comparative bad faith defense into the pleadings by taking the position that Stephens also owed Safeco a duty of good faith and fair dealing. The jury was asked on a special verdict form, "Did plaintiffs violate any duty of good faith and fair dealing owed to Safeco?" to which they responded "Yes" on an 11-1 vote. Having concluded that

both parties violated the duty of good faith and fair dealing and allocated causal conduct 53% to plaintiffs and 47 % to Safeco, the jury awarded \$38,333.33 to Tom Stephens for emotional distress. Consequently, plaintiff's recovery was barred by Montana's comparative negligence statute, MCA § 27-1-702.

On appeal, the Montana Supreme Court held that there could not be comparative bad faith where the first-party claimant alleged insurer bad faith tort. Justice McDonough's succinct and clear analysis noted first that, in 1983, the court, in *Lipinski v. Title Ins. Co.*,⁶ recognized that the insurance company's duty to act in good faith with their insureds existed independent of the insurance contract and independent of statute. He pointed out that, on the other hand, *Story v. City of Bozeman*⁷ had held that, absent a "special relationship," breach of a contract did not result in the tort of bad faith. He noted that *Story* set five criteria for determining a "special relationship" such as inherently unequal bargaining position of the parties, superior position of one party, and vulnerability of the other party. McDonough applied the *Story* criteria in *Stephens v. Safeco* and determined that the insurance company there was in a superior position and owed the insured a tort duty of good faith. For Justice McDonough, in *Stephens v. Safeco*, the clear import of *Story* was that the insurer was in the superior position to owe the duty, and the insured did not. As the court said in *Story*, "The tort of bad faith . . . serves to discourage oppression in contracts

which necessarily give one party a superior position."⁸ Consequently, while the insurer's conduct in the special relationship can lead to bad faith, the insured's conduct can only amount to breach of a contract and not to bad faith tort.

Safeco argued in *Stephens* that *Martel v. Montana Power Company*⁹ authorized comparison of different levels of conduct so as to allow comparison of the insured's conduct with that of the insurer. Recall that *Derenberger v. Lutey*,¹⁰ had forbidden comparison of different degrees of tort conduct, so that, for instance, an insurer accused of willful or wanton misconduct could not seek comparison of the insured's ordinary negligence. In *Martel*, the court overturned *Derenberger* saying:¹¹

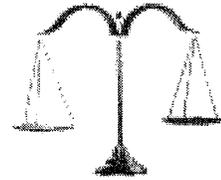
We hold, therefore, that all forms of conduct amounting to negligence in any form including but not limited to ordinary negligence, gross negligence, willful negligence, wanton misconduct, reckless conduct, and heedless conduct, are to be compared with any conduct that falls short of conduct intended to cause injury or damage.

However, the *Stephens* court noted that in *Martel* they compared tort conduct to tort conduct.¹² In *Stephens*, they refused to allow comparison of the insured's breach of contract with the insurance company's tort conduct, describing those "two distinctive legal concepts as to liability and damages" as "apples and oranges."¹³

California's *Kransco* case

Many lawyers today recall a time when we relied almost entirely on California cases when arguing insurance matters before Montana's

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Supreme Court. In June 2000, the California Supreme Court relied on Montana's *Stephens v. Safeco* in deciding *Kransco v. American Empire Surplus Lines Ins. Co.*,¹⁴ a landmark case in that state. *Kransco* began when a Wisconsin jury shocked California toy maker, *Kransco*, and its insurers, American Empire Surplus Lines (AES) and International Insurance Company, by awarding a partially

quadriplegic plaintiff \$2.3 million in compensatory damages and \$10 million in punitive damages. *Kransco* and its insurers had rejected plaintiff's offer to settle for \$750,000, offering instead \$450,000. The plaintiff, Michael Hubert, was an adult who broke his neck when he jumped head first onto a backyard water slide toy known as a Slip-and-Slide. Of importance is the fact that, during discovery in the underlying case, *Kransco* had answered interrogatories wrongly denying knowledge of any adult cervical injuries on the Slip-and-Slide when, in fact, a product vice president knew of one case involving death and another of quadriplegia. Plaintiff's counsel alluded to those discovery lapses during the trial which ended in the \$12.3 million jury verdict.

Kransco sued AES alleging breach of the covenant of good faith and fair dealing for rejecting plaintiff's offer to settle within limits when there was a substantial risk of a verdict greatly in excess of the limits. AES alleged that *Kransco* failed to take ordinary care for its own safety and that its negligence was the cause of the loss and damage at trial. The basis for AES's contention was that *Kransco* had wrongly answered the

discovery and that the jury punished that conduct. However, *Kransco* corrected the information many months before trial, and AES knew, during negotiations before trial, of the lapse, its correction, and presumably its potential import at trial.

At the bad faith trial in California, the court instructed the jury in "comparative bad faith" assert-

...the court confirmed that the duty of good faith and fair dealing "is a two-way street" that also runs from insured to insurer.

ing that the covenant of good faith and fair dealing applied to both the insurer and the insured, and that, if *Kransco* did anything that would injure AES's right to receive the benefits of the insurance agreement, *Kransco*'s recovery would be proportionately reduced by comparative fault attributable to it. The court also instructed in comparative negligence to the effect that any negligence of *Kransco* in preparing for trial, which negligence was a cause of the damage verdict in *Hubert v. Kransco*, would reduce *Kransco*'s recovery against AES in proportion to the amount of fault attributable to *Kransco*. The jury in the bad faith trial assessed compensatory damages at \$13.6 million and found *Kransco* 90% at fault for its own damages. However, on post-trial motions, the trial court concluded it had erred in instructing on either theory of comparative fault: comparative bad faith or comparative negligence. The Court of Appeal affirmed the trial court in this, and the issues of comparative bad faith and comparative negligence went to the California Supreme Court.

There, the court confirmed

that the duty of good faith and fair dealing "is a two-way street" that also runs from insured to insurer. However, the court noted that, based on the "special relationship," the insurer's breach is a tort, while the insured's is contractual only. Citing the Montana Supreme Court "apples and oranges" quote from *Stephens v. Safeco*, the California Supreme Court refused to allow comparative bad faith to be used as an affirmative defense in an insured's action against its insurer for bad faith. In doing so, the court over-

ruled *California Casualty Gen. Ins. Co. v. Superior Court*¹⁵ which had been the seminal California case recognizing "comparative bad faith" as a form of comparative fault in an insurance bad faith case. The court reasoned that the *California Casualty* case would not withstand the scrutiny of cases distinguishing an insurer's tortious breach of the covenant of good faith from an insured's breach of contract. As the court said, "the California Casualty court's holding is grounded on the faulty premise that the obligations of insurer and insured—and thus their bad faith—are comparable. They are not."¹⁶

The court noted that insurers have adequate remedies for the insured's breaches. For example, the insured's misconduct may be used to avoid insurer liability for bad faith by showing that the insurer acted reasonably under the circumstances. Or, the insured's breach may be actionable as a breach of contract, and the insurer may simply avoid coverage on the basis of material misrepresentation or breach of warranty.

The *Kransco* court also held it error to instruct in comparative

negligence. The court said that a third-party insurer is not shielded from "full responsibility for its bad faith failure to settle a case even if the insured's litigation misconduct or mishandling of the claim inflated the size of the verdict, although as noted, evidence of such misconduct may support contract defenses, cross claims or separate causes of action for breach of the terms of the insurance contract otherwise available."¹⁷

Judge Mosk, in his concurring opinion, succinctly stated the reason for saddling only the insurer with the risk of bad faith tort in the breach of insurance contracts:¹⁸

We have done so in order to extend to individual insureds in individual cases against individual insurers the remedies of the law of torts, which are broader and deeper than those of the law of contracts. And we have done that in order to attempt to true the balance in the relationship between insurers and insureds generally in the world at large — a balance that we have found to be skewed in favor of insurers and against insureds — by providing further deterrents against nonperformance on the part of insurers to the detriment of insureds.

As a result of the *Kransco* case, the defenses of comparative bad faith and comparative negligence in bad faith actions are dead in California.

Federal Judge Molloy's *Burton v. Mountain West* case

Judge Molloy confronted the comparative fault insurance defenses in *Burton v. Mountain West Farm Bureau Mutual Ins. Co.* which he decided on November 15, 2000. Michael Burton was a passenger

injured in an auto driven by Bonnie Truscott and insured by Mountain West. Burton settled his third-party claims against Truscott and then brought first- and third-party claims against Mountain West. As a first-party "insured," he alleged that Mountain West failed to inform him that the \$5,000 limits of Medical Pay coverage available on three other cars owned by their insured, Truscott, were potentially available to him under "stacking." By way of third-party claim, Burton alleged the carrier ultimately required him to agree that any stacked medical pay coverages would be an advance against his recovery as a third-party claimant and also failed to promptly and fairly investigate and settle his claim. Mountain West answered the common law insurance bad faith claim with an affirmative defense of comparative bad faith.

At this point, it is necessary to recall a bit of history of insurance bad faith law in Montana: Remember that the legislature, in 1987, codified first-party and third-party causes of action against insurers in an attempt to do away with common law bad faith.¹⁹ However, the Montana Supreme Court, in *Brewington v. Employers Fire Ins. Co.*,²⁰ subsequently held that the statute's prohibition on "any other theory or cause of action" (referring to common law bad faith) did not preempt common law claims for third-party bad faith but did for first-party. Accordingly, Mountain West contended that, since passenger Burton was a first-party "insured" under the Medical Pay coverage, he could not bring a common law bad faith claim in any event. However, Mountain West also contended that both the first-party and third-party claims sounded in tort so as to invoke their affirmative defense seeking to compare some conduct of Bur-

ton. Burton moved to strike the defense.

From the start, Judge Molloy seemed bothered by the fuzzy catch-all nature of the comparative bad faith defense being raised. He said:²¹

Mountain West's second affirmative defense blends the doctrine of contributory or comparative negligence, the concept of an affirmative defense, and the reciprocal nature of the duty of good faith and fair dealing. The mixture of these three things does not sit well with the court.

Judge Molloy pointed out that the essence of the doctrine of comparative negligence is that plaintiff caused his own injuries and not that plaintiff breached a duty owed defendant. Mountain West argued not that Burton caused his injuries, but that his misconduct influenced Mountain West so as to give it the "reasonable basis in law or fact" which provides an insurer a statutory defense to an "independent action" allowable under MCA §33-18-242. Accordingly, Judge Molloy struck Mountain West's comparative bad faith defense, on the ground that the statutory "reasonable basis in law or fact" defense was adequate, and the comparative bad faith defense inappropriate. The judge further asserted that, if Mountain West contended Burton's misconduct injured it, it could file a counterclaim which would necessarily entail a showing that Burton owed the insurer a duty the breach of which was the proximate cause of damages to the insurer and which damages it would have to prove.

Was *Juedeman v. National Farmers Union* a comparative fault case?

Interestingly, *Juedeman v. National Farmers Union Property & Casualty Co.*,²² is cited as an example of a case in which the Montana Supreme Court "effectively recognized comparative fault when it was not so described."²³ In *Juedeman*, a child passenger in a vehicle driven by Bennyhoff was injured so severely as to merit payment of the liability policy limits in settlement of his claim. His mother made the demand but refused to release the insured defendant from a potential claim for loss of consortium. Consequently, the insurer refused to tender payment. In the resulting bad faith claim brought by the claimants, the trial court granted summary judgment for the insurer. The Montana Supreme Court upheld the judgment, reasoning that claimant's conduct in refusing to agree to a release in return for payment of the limits of the policy "prevented Farmers Union from effectuating a prompt, fair and equitable settlement."²⁴

Juedeman was subsequently overruled on its core holding regarding plaintiff's refusal to sign a release. In *Watters v. Guaranty National Ins. Co.*,²⁵ the court held it to be bad faith for an insurer in a clear liability "limits" case to condition settlement on execution of a full and final release. The *Juedeman* case contains no discussion of any concept of comparative fault, has not been recognized in Montana as authority for any comparative fault defense, and would be weak authority given that the *Watters* decision overruled its holding on the propriety of making the claimant sign a full release where liability is clear and the limits inadequate.

Juedeman aside, reflection on the Montana Supreme Court's decision in *Stephens v. Safeco* and Judge Molloy's decision in *Burton v. Mountain West* indicates that

the proverbial stake has been driven through the heart of "comparative bad faith" in both first and third-party actions against insurers in Montana. For the "independent cause of action" under MCA §33-18-242, the insurer is given the "reasonable basis in law or fact" defense for denying the claim, and comparative fault concepts of comparative bad faith or comparative negligence are not provided in the statute. The courts have simply found such comparative fault concepts inappropriate for cases involving insurer bad faith.

The fate of "reverse bad faith" claims

A good horror show often ends with a hint that the monster might still be alive providing the possibility of a sequel. Ever creative insurers, when reading Judge Molloy's reference to their recourse of counterclaiming against the insured, if they can prove his duty, breach, cause and damage, might be expected to assert that "reverse bad faith" is alive. In the insurance context, "reverse bad faith" is defined as tortious breach of the covenant of good faith and fair dealing by the insured such as to provide a claim for relief to the insurer.²⁶ The California Appellate Court recently treated this specter to wolfbane in *Agricultural Ins. Co. v. Superior Court*.²⁷ The reasoning, quoted in *Kransco*, will sound familiar:²⁸

An insurer has no claim against its insured in tort for breach of the covenant of good faith and fair dealing. A breach of this covenant is, at base, a breach of contract. A relationship including specialized circumstances of reliance and dependence is

necessary to transmute such a contractual breach into a tort. Such circumstances do not exist in the context of an insured's responsibilities toward its insurer, or in the reciprocal context of an insurer's legitimate expectations from its insured . . . Hence an insured does not bear a risk of affirmative tort liability for failing to perform the panoply of indefinite but fiduciary-like obligations contained within the concept of "insurance bad faith."

In fact, reverse bad faith has received a poor reception in most appellate courts. Douglas Richmond, a proponent of reverse bad faith, after reviewing the reported decisions in a law review article in 1996, reported that "no appellate court has published a decision recognizing reverse bad faith as a cause of action absent a statute conferring the right to bring such a claim."²⁹ (Referring to court recognition of a claim based on a Tennessee statute.) While juries have been instructed in reverse bad faith and even returned verdicts, the appellate courts reject the cause of action. Nevertheless, the insurer is not without recourse and has such claims for relief as fraud and breach of contract to remedy the insured's misconduct. In the *Agricultural Ins. Co. v. Superior Court* case, even though the appellate court sustained the demurrer to the reverse bad faith claim, it set aside the trial court's order sustaining the demurrer to the fraud claim. The court said:³⁰

...an insured must not defraud in making a claim under the policy. When an insured makes a claim to its

insurer, the insurer's duty to investigate is triggered. If, because of the insured's false factual assertions, the insurer incurs expenses that would otherwise not have been necessary, justifiable detrimental reliance can be pleaded by the insurer. Although a mere inflated opinion of a claim's value is not fraud, deliberately false factual assertions can be fraud. There is a significant distinction between a mere aggressive claims position and an outright factual fraud.

Conclusion

Under Montana case law and the Unfair Claims Settlement Practices Act³¹, it is the insurance company that, because of its special relationship, must meet certain duties in the handling of claims. The first-party claimant need only meet the notice and claim requirements of the insurance policy, and both first- and third-parties must not defraud in making the claim. If the insured or third-party claimant brings a bad faith claim against the insurer, comparative fault concepts such as comparative bad faith and comparative negligence have no legal basis in Montana. Consequently, an affirmative defense of comparative bad faith should be the subject of a successful motion to strike.

In Montana, a reverse bad faith tort claim should fall in the face of a motion to dismiss for failure to state a claim upon which relief can be granted. Insofar as Montana courts recognize any covenant on the part of an insured for good faith and fair dealing, it is entirely a creature of the insurance contract, and its breach is a contract breach that won't support a tort claim for reverse bad faith and cannot be subject to comparative fault defenses such as comparative bad faith or negligence. *Stephens v. Safeco* and *Burton v. Mountain West* in Montana and *Kransco v. American Empire* and *Agricultural Ins. Co. v. Superior Court* in California all express a consistent and well reasoned approach to dealing with the defenses of comparative bad faith or comparative negligence in a bad faith claim. Those defenses and the tort claim of reverse bad faith, like werewolves and vampires, are but scary illusions and should be struck by trial courts when they appear. After editing this, Pat Sheehy said that they are really more like the pod persons in the movie, *Night of the Living Dead*. "You can kill them many times, but they just keep coming back under some other guise. It would be nice if the consumer's bar could just find these defenses in their 'pod person' stage and get them all then. But that's a different movie."

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For more information, a copy of Dr. Donahue's CV, or questions about consultation, please call or e-mail:

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Notes

1. 3 Cal. 4th 296, 314, 834 P.2d 696 (1992).
2. Douglas R. Richmond, *The Two-Way Street of Insurance Bad Faith: Under Construction, But Not Yet Open*, 28 Loyola U. Chicago L.J. 95, 140 (1996).
3. 27 M.F.R. 331 (2000).
4. 258 Mont. 142, 852 P.2d 565.
5. 23 Cal.4th 390, 2 P.3d 1 (2000).
6. 202 Mont. 1, 15, 655 P.2d 970, 977.
7. 242 Mont. 436, 791 P.2d 767 (1990).
8. *Id.*, at 776.
9. 231 Mont. 96, 752 P.2d 140 (1988).
10. 207 Mont.1, 674 P.2d 485 (1983).
11. *Martel*, 752 P.2d at 143.
12. *Stephens*, 852 P.2d at 568-69.
13. *Id.*
14. *Kransco*, 2 P.3d at 11, 13.
15. 173 Cal.App.3d 274, 218 Cal.Rptr.817 (1985).
16. *Kransco*, 2 P.3d at 12.
17. *Id.*, at 16.
18. *Id.*, at 17.
19. Ch. 278, L. 1987; See, Munro, *Development and Status of Insurance Bad Faith in Montana*, Trial Trends, Summer 2000.
20. 1999 MT 312, 992 P.2d 237 (Mont. 1999).
21. *Burton*, 27 M.F.R. at 333.
22. 253 Mont. 278, 833 P.2d 191 (Mont. 1992).
23. Richmond, *supra* note 2, at 115.
24. *Juedeman*, 833 P.2d at 193.
25. 2000 MT 153.
26. *Kransco*, 2 P.3d at 13.
27. 70 Cal.App.4th 385 (1999).
28. *Id.*, at 389-390.
29. Richmond, *supra*, note 2, at 141.
30. *Agricultural*, 70 Cal.App.4th at 390.
31. MCA § 33-18-201. ■

MTLA MEMBERS ELECTED FOR PUBLIC SERVICE

Voters in the 2000 elections put their trust in several MTLA members. Montana's voters elected MTLA members to two statewide positions and to four legislative seats.

Patricia Cotter was elected as an Associate Justice of the Montana Supreme Court. Pat is a past member of the MTLA Board and formerly chaired MTLA's Amicus Committee. Justice Cotter was elected to the seat vacated by the retiring Justice William Hunt.

John Morrison was elected as Montana's State Auditor and Commissioner of Insurance. John is a past president of MTLA. Morrison brings to his office years of experience representing the interests of consumers in insurance related disputes.

Four MTLA members were elected to seats in the Montana House of Representatives. The perspective they can bring to the House is much welcomed. The MTLA members elected and their

MTLA pertinent committee assignments are: **Dave Gallik** of Helena, Business and Labor; **Christopher Harris** of Bozeman, Judiciary; **Larry Jent** of Bozeman, Human Services; and **Ken Peterson** of Billings, Judiciary.

These four new members of the House join two MTLA members who are currently members of the Montana Senate — **Steve Doherty** of Great Falls and **Jon Ellingson** of Missoula. ■