

Insurer Bad Faith 2021 and Beyond: A Survey of Extra Contractual Law and Where Things Stand

2021 Annual Meeting

September 22-24, 2021

Chicago, IL

Robert D. Allen/The Allen Law Group

Jennifer Mathis/Troutman Pepper Hamilton Sanders LLP



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Considerations/Statistics

- In 2016, the costs and compensation paid in the tort system amounted to approx. \$429 billion or 2.3 percent of U.S. gross domestic product (of this amount \$250 billion (58%) stemmed from general and commercial liability exposure; \$160 billion (37%) attributable to auto exposures; \$19 billion (4%) attributable to medical malpractice litigation).
- Judicial “Hellholes” 2020-2021
 - (1) Philadelphia Court of Common Pleas & the Supreme Court of Pennsylvania; (2) New York City; (3) California; (4) South Carolina Asbestos Litigation; (5) Louisiana; (6) Georgia; (7) City of St. Louis, Missouri; (8) Cook, Madison and St. Clair Counties, Illinois; (9) Minnesota
 - WATCHLIST: Florida (former No. 1 Judicial Hellhole); Oklahoma; New Jersey; Colorado; Maryland; West Virginia; and Montana Supreme Court

Costs and Compensation of the U.S. Tort System, U.S. Chamber Institute for Legal Reform, Oct. 2018, https://instituteforlegalreform.com/wp-content/uploads/2020/09/Tort_costs_paper_FINAL_WEB.pdf.



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Bad Faith Statistics

- The 10 largest bad faith verdicts from 2013 to 2018 averaged approximately \$21 million.- A few specific areas of increased general civil litigation exposure got much attention in 2019. These include the following.
 - **Cyber security and data breach.** The average cost of data breach litigation was \$3.62 million, with the loss cost per affected record or file being \$141.
 - **Employment-related losses.** The average claim takes 275 days to resolve, the average cost to defend and settle is \$125,000, the median judgment is approximately \$200,000, and 25 percent of employment cases result in a judgment of \$500,000 or more.
 - **Securities actions.** In 2016, plaintiffs filed 270 federal securities cases, a 44 percent increase over the prior year; 3.9 percent of US exchange-listed companies were subject to class action filings in 2016, 39 percent above the historical average.
- Recent case volumes at one national law firm show that the volume of litigation and the time required to resolve cases are increasing. Civil case filings increased 5 percent overall for 2016, and the median time from filing to disposition was 9.2 months, up 5 percent from 2015.

Statistics

- According to the Institute for Legal Reform (US Chamber of Commerce), the following are the 10 worst states (10th being worst) for civil litigation outcomes in the United States.

1. Georgia
2. Alabama
3. New Jersey
4. Missouri
5. West Virginia
6. Florida
7. Mississippi
8. California
9. Louisiana
10. Illinois

Statistics

- The following are the five worst (fifth being worst) jurisdictions for civil litigation outcomes in the United States as of 2018.
 1. Jefferson County, Texas
 2. New York, New York
 3. San Francisco, California
 4. Los Angeles, California
 5. Chicago or Cook County, Illinois

Bad Faith Failure to Settle

- *Pinto v. Farmers Ins. Exch.*, 61 Cal. App. 5th 676 (2021), *review den.*, (June 23, 2021).
- Court of Appeal holds that the trier of fact in a bad faith “failure to settle” case must specifically find that the insurer acted unreasonably in order to find against the insurer on a bad faith claim.
- This opinion has significant implications for bad faith “failure to settle” cases, especially for jury instructions and verdict forms used in California.

Pinto (continued)

- Court of Appeal reverses a \$10 million judgment against the insurer, because the special verdict form given to the jury, based on Judicial Council of California Jury Instruction (CACI) 2334, did not include the requirement that the insurer acted unreasonably, only that the insurer failed to accept a reasonable settlement demand within policy limits.
- Because the verdict form did not include this element, the jury made no finding that the insurer acted unreasonably, and therefore, Farmers could not be liable for bad faith.
- The court remanded the case with directions for judgment to be entered for Farmers.

Bad faith failure to settle (*continued*)

- *Pureco v. Allstate Indem. Co.*, 817 F. App'x 398, 401 (9th Cir. 2020) rejects a bad faith set-up.
 - Faced with a policy limits demand, the insurer asked for more information regarding the claimant's injuries, which the claimant's counsel denied or ignored. Based on the information that it had, the insurer declined the policy limits demand. When the insurer finally received the information it requested, it immediately tendered the policy limits, which the claimant declined.
 - Court grants summary judgment for insurer, concluding that it did not act in a deliberate manner that would support a finding of bad faith.
 - “Even viewing the facts in the light most favorable to [the claimant], there is nothing to suggest that [the insurer]’s delayed acceptance was anything more than an honest mistake, bad judgment, or negligence.” *Pureco*, 817 F. App'x at 401 (internal citations omitted).

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