

# Insurer's Bad Faith is Actionable Tort for Purposes of Choice of Law Analysis

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When an insurer handles a claim in violation of its duty to act in good faith, policyholders are often eager to sue the insurer for bad faith, seeking extra contractual damages. Before filing suit, however, it is critical that policyholders consider what state's law applies to the bad faith claim.

In the recent case of *Scott Fetzer Co. v. Am. Home Assurance Co., Inc.*<sup>1</sup>, the Ohio Supreme Court held that Restatement (Second), Conflict of Laws, § 145 ("Section 145"), governed the choice of law dispute, which meant that the insured would be able to obtain discovery of Travelers' claims-handling procedures, guidelines, internal documents, and communications relating to the claim.<sup>2</sup> The insured, Scott Fetzer, argued that the materials were discoverable because documents evidencing an insurer's bad faith are not protected by attorney-client privilege in Ohio. In response, Travelers argued that the laws of either Indiana (the place where the parties entered into the insurance contract), or Michigan (the location of the insured risk) governed the discovery dispute because Restatement (Second) § 193 ("Section 193") governs the choice of law analysis for claims that "arise out of insurance contracts."<sup>3</sup> The laws of either Indiana or Michigan were more favorable for Travelers because Indiana does not allow discovery of materials covered by attorney-client privilege, and Michigan does not even recognize a cause of action for bad faith.

At the trial level, an administrative judge concluded that Ohio law governed discovery disputes on bad faith claims and found the materials discoverable as probative of the insurer's bad faith in the process, evaluation, or refusal to pay the claim.

The Court of Appeals recognized that deciding the applicable choice of law rules first depended upon classifying the claims in the action as either sounding in contract or tort because different choice of law rules applied depending upon the classification. Agreeing with the insured that bad faith is a tort claim, the Court of Appeals applied Section 145's choice of law analysis and held that Ohio law governed the discovery dispute as the state with the most significant relationship to the parties and Travelers' failure to make a timely coverage determination. Travelers appealed again, placing before the Ohio Supreme Court the question of whether Section 193 governs choice of law for bad faith claims.

The insured argued for the application of Section 145, which governs choice of law for actions sounding in tort. The insured posited that because Ohio courts had previously determined that bad faith is properly understood as a tort claim, and based upon the criteria in §145, the laws of Ohio should apply as the state with the most significant relationship to the place where the insurer's bad faith injured the insured. Travelers, on the other hand, argued that a bad faith claim is inseparable from an insurance contract claim. Because Section 193 governs choice of law for disputes concerning the validity of insurance contracts and the "rights created thereby," Travelers argued that Section 193 should control the choice of law determination. Pursuant to Section 193, the laws of either Indiana or Michigan would govern the discovery of the insurer's allegedly privileged materials.

The Court affirmed the decision of the appellate court, holding that Section 145 governed the choice of law analysis. In so doing, the Court recognized that Ohio courts have long considered a bad faith claim to be an independent tort that arises by operation of law. Section 145 clearly states that it provides the choice of law rules for torts. To the contrary, Section 193 provides choice of law rules for disputes over the validity of an insurance contract and contains no language that would cover bad faith claims.<sup>4</sup> Therefore, the Court affirmed the appellate court's choice of law analysis and conclusions regarding the discovery of the allegedly privileged documents.<sup>5</sup>

As illustrated in the Fetzer Co. decision, choice of law can play an important role in litigating bad faith claims against an insurer and should be carefully considered during the forum selection process.

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