Convince the Court

Bad Faith Claims Against Sureties

By Patrick R. Kingsley

Fundamental differences between suretyship and insurance should work against the application of states' bad faith statutes.

Despite the fundamental differences between traditional insurance and suretyship, several courts have found that statutory and common law "bad faith" claims established to combat unscrupulous insurance claims practices nevertheless apply to sureties' handling of bond claims. The first and second section of this article discuss the arguments that have been endorsed and rejected by courts on both sides of the issue. The third section suggests some practical considerations for surety claims professionals to observe to avoid bad faith claims in the first place.

The Advent of and Legal Basis for Bad Faith Claims

The states have long recognized some implied duty of good faith and fair dealing in every contract. The good faith and fair dealing doctrine protects parties to a contract by prohibiting one party from interfering with the other party's right to receive the benefit of the bargain. Insurance policies, just as other contracts, were covered by this doctrine. *See*, *e.g.*, *Brassil v. Md. Cas. Co.*, 104 N.E. 622 (N.Y. 1914). Because it was a contract law doctrine, the remedy for the breach of this implied duty was historically limited to contract damages. However, in the early 1970s, courts began to expand the implied duty, holding that, when an insurer breached, it created an affirmative claim sounding in tort. *See*, *e.g.*, *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973). The early courts found that there was a "special relationship" between an insurer and its insured based on, among other things, the unequal bargaining power of the parties, both at the time of policy inception and at the point at which a claim is evaluated and a coverage determination made. Thus, the "bad faith" insurance claim was born.

At about the same time, the National Association of Insurance Commissioners adopted a model act entitled the "Unfair Trade Practices Act." It established rules for the regulation of unfair trade practices in the insurance industry. The model Unfair Trade Practices Act did not exclude suretyship from its scope. On the contrary, it seemed to encompass suretyship within the scope of regulated insurance activity by defining a "policy" as "a contract of insurance, indemnity, medical, health or hospital service, suretyship, or annuity

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issued, proposed for insurance, or intended for insurance by any insurer." Therefore, those states that adopted some or all of the model Unfair Trade Practices Act generally include suretyship within the scope of regulated insurance activities.

In 1990, the National Association of Insurance Commissioners adopted the model "Unfair Claims Settlement Practices Act," which was intended to define unfair claims practices with more exactitude. The model Unfair Claims Settlement Practices Act specifically excluded sureties with the following language:

> [The Act] is not intended to cover claims involving workers' compensation, fidelity, suretyship or boiler and machinery insurance.

The Unfair Claims Settlement Practices Act went on to expressly exclude suretyship from the definition of "policy":

> "Policy" or "certificate" for purposes of this Act shall not mean contracts of workers' compensation, fidelity, suretyship or boiler and machinery insurance.

However, not all of the states that have adopted that model act have incorporated the model language excluding suretyship.

In addition, both model acts, the Unfair Claims Settlement Practices Act and the Unfair Trade Practices Act, specify that they are not meant to create a private cause of action. For example, the Unfair Trade Practices Act provides, "Nothing herein shall be construed to create or imply a private cause of action for violation of this Act." And the Unfair Claims Settlement Practices Act provides, "This Act is inherently inconsistent with a private cause of action." Again, however, states that have adopted these model acts have not always incorporated this language into their statutory schemes. As a result, states differ on whether a private cause of action was implied by the statutes as written.

Which Arguments Work in Bad Faith Claims Against Sureties?

Suretyship and insurance share many superficial characteristics. However, the differences are more fundamental and, therefore, militate against the application of a "bad faith" tort created specifically to respond to the insurance industry. That fact notwithstanding, convincing a court that its state's bad faith claim statute should not apply to sureties has proven difficult. In several states it remains unresolved whether sureties are subject to bad faith claims, and in only a few states has the highest court definitively addressed the issue. Therefore, opportunities will continue to arise to address the applicability of bad faith claims to suretyship. Listed here are some of the arguments that seem to work in persuading the courts one way or the other.

Bad Faith Claims Found Applicable to Sureties

Courts concluding that sureties are properly subject to bad faith claims have endorsed one or more of the following arguments:

- Sureties are sufficiently similar to insurers to justify application of the claim. *See*, *e.g.*, *Loyal Order of Moose, Lodge 1392 v. Int'l Fid. Ins. Co.*, 797 P.2d 622, 628 (Alaska 1990); *Dodge v. Fid. & Deposit Co. of Md.*, 778 P.2d 1240, 1241 (Ariz. 1989); *Transamerica Premier Ins. Co. v. Brighton Sch. Dist.*, 940 P.2d 348, 351–52 (Colo. 1997); *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1231 (Fla. 2006); *Suver v. Pers. Serv. Ins. Co.*, 462 N.E.2d 415, 417 (Ohio 1984).
- The inclusion of suretyship within the regulatory scheme evidences the state's legislative intent to treat suretyship as a form of insurance, thus subjecting sureties to the same obligations and penalties as insurance companies. *See*, *e.g.*, *Dodge*, 778 P.2d at 1242; *Transamerica*, 940 P.2d at 352; *Dadeland Depot*, 945 So. 2d at 1225, 1231; *K-W Indus. v. Nat'l Sur. Corp.*, 754 P.2d 502, 504 (Mont. 1988); *Szarkowski v. Reliance Ins. Co.*, 404 N.W.2d 502, 504–05 (N.D. 1987).
- A bad faith cause of action is necessary to motivate a surety to honor its bond, and the absence of bad faith liability would "encourage the routine denial of payment of claims for as long as possible." *See*, *e.g.*, *Transamerica*, 940 P.2d at 353; *Suver*, 462 N.E.2d at 417.
- A "special relationship" exists between a surety and an obligee identical to the "special relationship" between an insurer and an insured, thus justifying the application of an insurance bad faith claim to a surety. *See*, *e.g.*, *Dodge*, 778 P.2d at 1242; *Transamerica*, 940 P.2d at 352.
- As with insurance companies offering insurance policies only on their terms, sureties have a superior bargaining power vis-à-vis obligees in the creation of surety bonds and the terms included in them, as well as over decisions to honor or deny surety bond claims, thus necessitating the existence of a bad faith claim. *See*, *e.g.*, *Transamerica*, 940 P.2d at 353.

Convincing a court that its state's bad faith claim statute should not apply to sureties has proven difficult.

Bad Faith Claims Found Inapplicable to Sureties

Courts determining that sureties are not properly subject to the tort of bad faith have endorsed one or more of the following propositions:

- Suretyship is a financial credit arrangement rather than an insurance arrangement; in other words, it is a credit accommodation, not insurance. *See*, *e.g.*, *United States ex rel. Simplex Grinnell, LP v. Aegis Ins. Co.*, 2009 WL 90233, at *3 (M.D. Pa. 2009); *Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407, 412 (Cal. 1999); *Masterclean, Inc. v. Star Ins. Co.*, 556 S.E.2d 371, 373–74 (S.C. 2001).
- The mere inclusion of suretyship in an insurance regulatory framework is not significant enough to indicate a legislative intent to expose sureties to a substantive cause of action created for the insurance industry. *See*, *e.g.*, *Cates Constr.*, 980 P.2d at 420; *Masterclean*, 556 S.E.2d at 374; *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 420–24 (Tex. 1995).
- The unequal bargaining power typically present in the case of insurance is not present in the case of suretyship because an obligee usually dictates the terms of the bond; in fact, surety bonds are typi-

cally either form bonds required by statute or form bonds required by the obligee in its bid documents, and in either case, a surety has little or no say in the terms. *See*, *e.g.*, *Simplex Grinnell*, 2009 WL 90233, at *3; *Cates Constr.*, 980 P.2d at 422; *Masterclean*, 556 S.E.2d at 375; *Great Am. Ins. Co.*, 908 S.W.2d at 418.

- Because the surety merely backs the obligations of its principal, it is entitled to "test the merits" of an obligee's claim without the imposition of extra-contractual damages, should the surety lose, as is its principal. *See*, *e.g.*, *Superior Precast, Inc. v. Safeco Ins. Co. of Am.*, 71 F. Supp. 2d 438, 452 (E.D. Pa. 1999); *Great Am. Ins. Co.*, 908 S.W.2d at 420.
- Suretyship is a tripartite relationship in which a surety merely backs the obligation of its principal, as opposed to a bilateral, insurer-insured relationship in which an insured can look only to its insurer in the event of a loss. *See*, *e.g.*, *Cates Constr.*, 980 P.2d at 425; *Masterclean*, 556 S.E.2d at 373–74; *Great Am. Ins. Co.*, 908 S.W.2d at 418–19.
- A surety has a contractual relationship with two parties—an obligee and its principal—that necessarily have conflicting interests in the event of a claim requiring the surety to balance these interests. The need to balance these conflicting interests is not present in the insured-insurer relationship. *See*, *e.g.*, *Simplex Grinnell*, 2009 WL 90233, at *3; *United States ex rel. Ehmcke Sheet Metal Works v. Wausau Ins. Cos.*, 755 F. Supp. 906, 911 (E.D. Cal. 1991); *Cates Constr.*, 980 P.2d at 425–26.
- Unlike insureds, obligees are typically parties with commercial sophistication with access to both legal and technical advice. *See*, *e.g.*, *Simplex Grinnell*, 2009 WL 90233, at *3; *Great Am. Ins. Co.*, 908 S.W.2d at 420.
- An insurance policy spreads the risk of an individual loss to other policy holders acquiring similar insurance products, whereas, in the case of suretyship, a surety is indemnified by the principal and assumes in its underwriting that no loss will be suffered. Because risk is assumed to remain with the bonded principal, surety bond premiums are low and are not meant to compensate a surety for the risk of loss. *See*, *e.g.*, *Simplex Grinnell*, 2009 WL 90233, at *4.
- Obligees are able to negotiate for and include in underlying contracts liquidated damages, and other provisions, which are enough to discourage delays by sureties even in the absence of bad faith claims. *See*, *e.g.*, *Cates Constr.*, 980 P.2d at 425.
- Allowing bad faith claims to exist may pressure sureties into paying meritless claims or into paying more on properly disputed claims because sureties will seek to minimize their risks of paying tort damages. *See*, *e.g.*, *Ehmcke Sheet Metal Works*, 755 F. Supp. at 910–11; *Cates Constr.*, 980 P.2d at 426.
- The general principle in most states that a surety's liability can be no greater than that of its principal would be violated by the imposition of extra-contractual damages. *See*, *e.g.*, *Simplex Grinnell*, 2009 WL 90233, at *4; *Superior Precast*, 71 F. Supp. 2d at 452.
- The inclusion of suretyship in a regulatory scheme serves as any necessary deterrent to improper conduct and preempts a private "bad faith" action. *See*, *e.g.*, *Ehmcke Sheet Metal Works*, 755 F. Supp. at 911; *Tudor Dev. Group, Inc. v. U.S. Fid. & Guar. Co.*, 692 F. Supp. 461, 465–66 (M.D. Pa. 1988); *Cates Constr.*, 980 P.2d at 425.

Conduct that evinces a "dishonest purpose" or "ill will" will generally suffice to demonstrate bad faith.

A list of the applicable state statutes is included as Table I, on page 73. A list of the leading case law by state is included as Table II, on pages 74–75. Not every case in Table II squarely addresses the issue. If no case was found on point, the most relevant cases were included. These lists do not exhaustively summarize each state's laws, but merely offer a starting point for further research.

Practical Considerations While Addressing Claims

In practically addressing claims, understanding the elements of bad faith that courts have agreed on will well serve surety claims professionals. In addition, surety claims professionals will want to avoid certain conduct and observe particular best practices to guard against and facilitate the defense of bad faith claims.

What Is Bad Faith?

Although courts differ on the standards defining and elements constituting bad faith, they seem to agree that a finding of bad faith requires more than simple negligence on the part of a surety. Conduct that evinces a "dishonest purpose" or "ill will" will generally suffice to demonstrate bad faith. *Far W. Ins. Co. v. J. Metro Excavating, Inc.*, 2008 WL 859182, at *11 (N.D. Ind. 2008). The Supreme Court of Colorado has held that "a commercial surety acts in bad faith when the surety's *conduct is unreasonable* and the surety *knows* that the conduct is unreasonable or *recklessly disregards* the fact that its conduct is unreasonable." *Transamerica Premier Ins. Co. v. Brighton Sch. Dist.*, 940 P.2d 348, 354 (Colo. 1997); *see also Dodge v. Fid. & Deposit Co. of Md.*, 778 P.2d 1240, 1243–44 (Ariz. 1989) (suggesting that the mere "*absence of a reasonable basis* for denying a claim" rises to the level of bad faith, but also stating that bad faith tort liability does not arise unless a surety "*intended* its act or omission, lacking a founded belief that such conduct was permitted by the policy"). Other courts have explained that lack of good faith involves more than negligence or bad judgment, but requires dishonest purpose or conscious wrongdoing. *Fid. & Guar. Ins. Co. v. Star Equip. Corp.*, 541 F.3d 1 (1st Cir. 2008).

One court has defined a surety's duty to investigate to avoid bad faith in the following terms:

> [T]he failure to investigate, standing alone and not accompanied by other evidence of an improper motive, is not enough to constitute bad faith… [A]lthough mere negligence or failure to make the inquiries which a reasonably prudent person would make does not of itself amount to bad faith, if a party fails to make an inquiry for the purpose of remaining ignorant of facts which he believes or fears would disclose a defect in the transaction, he may be found to have acted in bad faith. Accordingly, a surety's failure to conduct

an adequate investigation of a claim upon a payment bond, when accompanied by other evidence, reflecting an improper motive, properly may be considered as evidence of the surety's bad faith.

PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 838 A.2d 135 (Conn. 2004).

However, the Supreme Court of Alaska has held that a surety's duty to investigate is evaluated by its reasonableness under the circumstances. *Local Order of Moose Lodge 1392 v. Int'l Fid. Ins. Co.*, 797 P.2d 622 (Alaska 1990).

Conduct to Avoid

The model Unfair Claims Settlement Practices Act defines 14 categories of prohibited conduct that give rise to liability on the part of an insurer if "committed flagrantly." Those 14 acts are:

- Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverage at issue;

Table I: Bad Faith Against Sureties: Relevant Statutes and Regulations

Jurisdiction	Relevant Statutes and Regulations
Alabama	Ala. Code §§27-12-1–27-12-24, 27-13-68
Alaska	Alaska Stat. §§21.36.010–21.36.460, 27-12-24
Arizona	Ariz. Rev. Stat. Ann. §§20-441–20-469
Arkansas	Ark. Code Ann. §§23-66-201–23-66-321
California	Cal. Ins. Code §§790.0–790.15; Cal. Code Regs. tit. 10, §2695.2(i)–(j)
Colorado	Colo. Rev. Stat. §§10-3-1101–10-3-1116
Connecticut	Conn. Gen. Stat. §§38a-816(6)
Delaware	Del. Code Ann. tit. 18, §§2301–2318
District of Columbia	D.C. Code §§31-2231.01–31-2231.25
Florida	Fla. Stat. §§624.155, 626.951–626.99
Georgia	Ga. Code Ann. §§10-7-30, 33-4-6, 33-6-1–33-6-37
Hawaii	Haw. Rev. Stat. §§431:13-102–431:13-204
Idaho	Idaho Code Ann. §§41-103, 41-1301–41-1337
Illinois	215 Ill. Comp. Stat. 5/154.6, 5/155; 815 Ill. Comp. Stat. 505/1–505/12; Ill. Admin. Code tit. 50, §919.20
Indiana	Ind. Code §§27-4-1-1–27-4-1-19
Iowa	Iowa Code §§507B.1–507B.14
Kansas	Kan. Stat. Ann. §§40-2401–40-2442
Kentucky	Ky. Rev. Stat. Ann. §§304.12-010–304.12-270, 446.070
Louisiana	La. Rev. Stat. Ann. §§9:3902, 22:142, 22:1921–22:1973
Maine	Me. Rev. Stat. Ann. tit. 24-A, §§4, 2151–2187, 2436-A
Maryland	Md. Code Ann., Ins. §§27-101–27-105, 27-301–27-304
Massachusetts	Mass. Gen. Laws ch. 93A, §§2, 3, and 9; ch. 176D, §§1–14
Michigan	Mich. Comp. Laws §§500.2001–500.2093
Minnesota	Minn. Stat. §§72A.02–72A.53, 72A.201(5)
Mississippi	Miss. Code Ann. §§83-5-29–83-5-51
Missouri	Mo. Rev. Stat. §§375.1000–375.1018
Montana	Mont. Code Ann. §§33-18-101–33-18-1006
Nebraska	Neb. Rev. Stat. §§44-1521–44-1544
Nevada	Nev. Rev. Stat. §§686A.010–686A.730; Nev. Admin. Code §686A.600(2)
New Hampshire	N.H. Rev. Stat. Ann. §§401:1(VII), 417:1–417:31; N.H. Code Admin. R. Ann. Ins. 1001.01–1001.02
New Jersey	N.J. Stat. Ann. §§17:29B-1–17:29B-19; N.J. Admin. Code §11.2-17.2
New Mexico	N.M. Stat. §§59A-1-5, 59A-16-1–59A-16-30
New York	N.Y. Ins. Law §§107, 2601–2615; N.Y. Comp. Codes R. & Regs. tit. 11, §§216.5–216.6
North Carolina	N.C. Gen. Stat. §§58-63-1–58-63-75
North Dakota	N.D. Cent. Code §§26.1-04-01–26.1-04-19
Ohio	Ohio Rev. Code Ann. §§3901.19–3901.26, 5725.01(C); Ohio Admin. Code 3901:1-54; Ohio Rev. Code Ann. §5725.01(C)
Oklahoma	Okla. Stat. tit. 36, §§1250.1–1250.16
Oregon	Or. Rev. Stat. §§742.061, 746.005–746.308
Pennsylvania	40 Pa. Stat. Ann. §§1171.1–1171.15; 42 Pa. Cons. Stat. Ann. §8371; 31 Pa. Code §146.1
Puerto Rico	P.R. Laws Ann. tit. 26, §§409, 2201–2205, 2701–2740; tit. 31, §§3018, 4891–4898
Rhode Island	R.I. Gen. Laws §§9-1-33, 27-9.1-1–27-9.1-9
South Carolina	S.C. Code Ann. §§27-1-15, 38-57-10–38-57-320, 38-59-20
South Dakota	S.D. Codified Laws §§58-1-2(10), 58-33-1–58-33-134
Tennessee	Tenn. Code Ann. §§56-7-105, 56-8-101–56-8-111
Texas	Tex. Ins. Code Ann. §§541.001–541.454, 542.001–542.302; 28 Tex. Admin Code §21.203
Utah	Utah Code Ann. §§31A-1-301(83)(b), 31A-26-303
Vermont	Vt. Stat. Ann. tit. 8, §§4721–4726; 21-02-008 Vt. Code. R. §3
Virgin Islands	V.I. Code Ann. tit. 22, §§458, 1101–1104, 1201–1228
Virginia	Va. Code. Ann. §§38.2-100, 38.2-209, 38.2-500–38.2-517; 14 Va. Admin Code §5-400-10
Washington	Wash. Rev. Code §§48.30.010–48.30.900; Wash Admin. Code §§284-30-300–284-30-380
West Virginia	W. Va. Code §§33-11-1–33-11-10
Wisconsin	Wis. Stat. §§600.03(25)(a)2, 628.46; Wis. Admin. Code Ins. §§6.11(3), 6.55–6.60
Wyoming	Wyo. Stat. Ann. §§26-1-102(xvi), 26-13-101–26-13-202

- Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;
- Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;
- Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;
- Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;

Table II: Bad Faith against Sureties: Leading Cases from around the Country

Jurisdiction	Relevant Case Law
Alabama	*Chavers v. Nat'l Sec. Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981); *United States v. Fid. & Deposit Co. of Md.*, 875 F. Supp. 803 (M.D. Ala. 1995); *Victore Ins. Co. v. Ross Neely Sys., Inc.*, 757 So. 2d 473 (Ala. Civ. App. 2000)
Alaska	*Loyal Order of Moose, Lodge 1392 v. Int'l Fid. Ins. Co.*, 797 P.2d 622 (Alaska 1990)
Arizona	*Dodge v. Fid. & Deposit Co. of Md.*, 778 P.2d 1240 (Ariz. 1989)
Arkansas	*R.J. "Bob" Jones Excavating Contractor, Inc. v. Firemen's Ins. Co. of Newark, N.J.*, 920 S.W.2d 483 (Ark. 1996); *Travelers Cas. & Sur. Co. of Am. v. Ark. State Highway Comm'n*, 120 S.W.3d 50 (Ark. 2003); *Old St. Paul Missionary Baptist Church v. First Nation Ins. Group*, 2010 WL 1540827 (E.D. Ark. 2010)
California	*United States ex rel. Ehmcke Sheet Metal Works v. Wausau Ins. Cos.*, 755 F. Supp. 906 (E.D. Cal. 1991); *Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407 (Cal. 1999); *In re Commercial Money Ctr., Inc.*, 603 F. Supp. 2d 1095 (N.D. Ohio 2009)
Colorado	*Transamerica Premier Ins. Co. v. Brighton Sch. Dist.*, 940 P.2d 348 (Colo. 1997)
Connecticut	*Elm Haven Constr. LP v. Neri Constr. LLC*, 376 F.3d 96 (2d Cir. 2004); *Blakeslee Arpaia Chapman, Inc. v. U.S. Fid. & Guar. Co.*, 1994 WL 76383 (Conn. Super. Ct. 1994); *Acoustics, Inc. v. Travelers Ins. Co.*, 2004 WL 1559214 (Conn. Super. Ct. 2004)
Delaware	*Int'l Fid. Ins. Co. v. Delmarva Sys. Corp.*, 2001 WL 541469 (Del. Super. Ct. 2001)
District of Columbia	*Fireman's Fund Ins. Co. v. CTIA-The Wireless Ass'n*, 480 F. Supp. 2d 7 (D.D.C. 2007)
Florida	*Reliance Ins. Co. v. Barile Excavating & Pipeline Co.*, 685 F. Supp. 839 (M.D. Fla. 1988); *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216 (Fla. 2006)
Georgia	*Ayers Enters., Ltd. v. Exterior Designing, Inc.*, 829 F. Supp. 1330 (N.D. Ga. 1993); *In re Commercial Money Ctr., Inc.*, 603 F. Supp. 2d 1095 (N.D. Ohio 2009)
Hawaii	*Bd. of Dirs. of the Assoc. of Apt. Owners of the Discovery Bay Condominium v. United Pac. Ins. Co.*, 884 P.2d 1134 (Haw. 1994); *Wailua Assocs. v. Aetna Cas. & Sur. Co.*, 27 F. Supp. 2d 1211 (D. Haw. 1998)
Idaho	*Simpar v. Farm Bureau Mut. Ins. Co. of Idaho*, 974 P.2d 1100 (Idaho 1999)
Illinois	*Fisher v. Fid. & Deposit Co. of Md.*, 466 N.E.2d 332 (Ill. App. Ct. 1984); *Premier Elec. Constr. Co. v. Am. Nat'l Bank of Chicago*, 658 N.E.2d 877 (Ill. App. Ct. 1995)
Indiana	*Far W. Ins. Co. v. J. Metro Excavating, Inc.*, 2008 WL 859182 (N.D. Ind. 2008)
Iowa	*Mechanicsville Trust & Sav. Bank v. Hawkeye-Security Ins. Co.*, 158 N.W.2d 89 (Iowa 1968); *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790 (Iowa 1988)
Kansas	*Mabery v. W. Cas. & Sur. Co.*, 250 P.2d 824 (Kan. 1952); *Fid. & Deposit Co. of Md. v. D.M. Ward Constr. Co.*, 2008 WL 2761314 (D. Kan. 2008)
Kentucky	*Kentucky Ins. Guar. Ass'n v. Dooley Constr. Co.*, 732 S.W.2d 887 (Ky. Ct. App. 1987); *Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co.*, 983 S.W.2d 501 (Ky. 1998)
Louisiana	*Smith v. Midland Risk Ins. Co.*, 699 So. 2d 1192 (La. Ct. App. 1997)
Maine	*Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644 (Me. 1993); *Federal Ins. Co. v. Me. Yankee Atomic Power Co.*, 183 F. Supp. 2d 76 (D. Me. 2001)
Maryland	*Republic Ins. Co. v. Bd. of County Comm'rs of St. Mary's County*, 511 A.2d 1136 (Md. Ct. Spec. App. 1986); *Inst. of Mission Helpers of Baltimore City v. Reliance Ins. Co.*, 812 F. Supp. 72 (D. Md. 1992); *Bell BCI Co. v. HRGM Corp.*, 276 F. Supp. 2d 462 (D. Md. 2003)
Massachusetts	*R.W. Granger & Sons, Inc. v. J. & S. Insulation, Inc.*, 754 N.E.2d 668 (Mass. 2001); *United States v. Enviroserve, Inc.*, 301 F. Supp. 2d 56 (D. Mass. 2003); *C&I Steel, LLC v. Travelers Cas. & Sur. Co. of Am.*, 876 N.E. 2d 442 (Mass. App. Ct. 2007)
Michigan	*Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50 (Mich. 1980); *Ackron Contracting Co. v. Oakland County*, 310 N.W.2d (Mich. Ct. App. 1981); *State Auto. Mut. Ins. Co. v. Reschke*, 2008 WL 4937971 (E.D. Mich. 2008)
Minnesota	*Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46 (Minn. 1983)
Mississippi	*Gibson v. Markel Intern., Ltd.*, 2008 WL 3842977 (S.D. Miss 2008); *Bryant v. Prime Ins. Syndicate, Inc.*, 2009 WL 982792 (S.D. Miss. 2009)

- Refusing to pay claims without conducting reasonable investigations;
- Failing to affirm or deny coverage of claims within a reasonable time after having completed its investigations related to those claims;
- Attempting to settle or settling claims for less than amounts to which a reasonable person would believe insureds or beneficiaries were entitled by reference to written or printed advertising material accompanying or made part of applications;
- Attempting to settle or settling claims on the basis of applications that were materially altered without notice to, or knowledge or consent of, the insureds;

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Table II, *cont.*

Jurisdiction	Relevant Case Law
Missouri	*Missouri Dep't of Transp. v. Safeco Ins. Co. of Am.*, 97 S.W.3d 21 (Mo. Ct. App. 2002)
Montana	*K-W Indus. v. Nat'l Sur. Corp.*, 754 P.2d 502 (Mont. 1988)
Nebraska	*J.B. Contracting Servs., Inc. v. Universal Sur. Co.*, 624 N.W.2d 13 (Neb. 2001)
Nevada	*Great Am. Ins. Co. v. Gen. Builders, Inc.*, 934 P.2d 257 (Nev. 1997); *Trustees of the Plumbers & Pipefitters Union Local 525 Health & Welfare Trust Plan v. Developers Sur. & Indem. Co.*, 84 P.3d 59 (Nev. 2004)
New Hampshire	*Shaheen v. Preferred Mut. Ins. Co.*, 668 F. Supp. 716 (D.N.H. 1987)
New Jersey	*In re Tech. for Energy, Corp.*, 123 B.R. 979 (E.D. Tenn. 1991); *United States ex rel. Don Siegel Constr. Co. v. Atul Constr.*, 85 F. Supp. 2d. 414 (D.N.J. 2000); *Eagle Fire Prot. Corp. v. First Indem. of Am. Ins. Co.*, 678 A.2d 699 (N.J. 1996); *SBW, Inc. v. Ernest Bock & Sons, Inc.*, No. 07-4199 (D.N.J. March 17, 2009)
New Mexico	*Salas v. Mountain States Mut. Cas. Co.*, 202 P.3d 801 (N.M. 2009)
New York	*Spancrete Ne., Inc. v. Travelers Indem. Co.*, 491 N.Y.S.2d 848 (N.Y. App. Div. 1985); *Morse/Diesel, Inc. v. Fid. & Deposit Co. of Md.*, 715 F. Supp. 578 (S.D.N.Y. 1989); *USAlliance Fed. Credit Union v. CUMIS Ins. Soc., Inc.*, 346 F. Supp. 2d 468 (S.D.N.Y. 2004)
North Carolina	*Tomlinson v. Camel City Motors, Inc.*, 408 S.E.2d 853 (N.C. 1991); *Henry Angelo & Sons, Inc. v. Prop. Dev. Corp.*, 306 S.E.2d 162 (N.C. Ct. App. 1983); *Wilson v. Wilson*, 468 S.E.2d 495 (N.C. Ct. App. 1996); *Cincinnati Ins. Co. v. Centech Bldg. Corp.*, 286 F. Supp. 2d 669 (M.D.N.C. 2003)
North Dakota	*Szarkowski v. Reliance Ins. Co.*, 404 N.W.2d 502 (N.D. 1987); *Farmer's Union Cent. Exch., Inc. v. Reliance Ins. Co.*, 675 F. Supp. 1534 (D.N.D. 1987); *Bilden v. United Equitable Ins. Co.*, 921 F.2d 822 (8th Cir. 1990)
Ohio	*Suver v. Pers. Serv. Ins. Co.*, 462 N.E.2d 415 (Ohio 1984); *St. Clair Builders, Inc. v. Aetna Cas. & Sur. Co.*, 611 N.E.2d 1009 (Ohio Ct. App. 1992); *Int'l Fid. Ins. Co. v. Vimas Painting Co.*, 2008 WL 926577 (S.D. Ohio 2008); *In re Commercial Money Ctr., Inc.*, 603 F. Supp. 2d 1095 (N.D. Ohio 2009)
Oklahoma	*Walter v. Chouteau Lime Co.*, 849 P.2d 1085 (Okla. 1993)
Oregon	*Employers' Fire Ins. Co. v. Love It Ice Cream Co.*, 670 P.2d 160 (Or. 1983)
Pennsylvania	*Tudor Dev. Group, Inc. v. U.S. Fid. & Guar. Co.*, 692 F. Supp. 461 (M.D. Pa. 1988); *Superior Precast, Inc. v. Safeco Ins. Co. of Am.*, 71 F. Supp. 2d 438 (E.D. Pa. 1999); *United States ex rel. Simplex Grinnell, LP v. Aegis Ins. Co.*, 2009 WL 90233 (M.D. Pa. 2009)
Puerto Rico	*Oriental Fin. Group, Inc. v. Fed. Ins. Co., Inc.*, 598 F. Supp. 2d 199 (D.P.R. 2008)
Rhode Island	*Marshall Contractors, Inc. v. Peerless Ins. Co.*, 827 F. Supp. 91 (D.R.I. 1993)
South Carolina	*Masterclean, Inc. v. Star Ins. Co.*, 556 S.E.2d 371 (S.C. 2001)
South Dakota	*Tracy v. T&B Constr. Co.*, 182 N.W.2d 320 (S.D. 1970)
Tennessee	*Wynne v. Stonebridge Life Ins. Co.*, 2010 WL 712748 (W.D. Tenn. 2010); *Brad Sidle Constr. Co. v. RNJ Interstate Corp.*, 1994 WL 276982 (Tenn. 1994)
Texas	*Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415 (Tex. 1995); *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276 (Tex. 1998)
Utah	*Broadwater v. Old Republic Sur.*, 854 P.2d 527 (Utah 1993)
Vermont	*Ins. Co. of N. Am. v. Tucker*, 262 A.2d 489 (Vt. 1969); *Fid. & Deposit Co. of Md. v. Wu*, 552 A.2d 1196 (Vt. 1988)
Virgin Islands	*Justin v. Guardian Ins. Co.*, 670 F. Supp. 614 (D.V.I. 1987)
Virginia	*Transamerican Premier Ins. Co. v. Turf Specialists of N. Va., Inc.*, 1993 WL 945965 (Va. Cir. Ct. 1993); *Bell BCI Co. v. Old Dominion Demolition Corp.*, 294 F. Supp. 2d 807 (E.D. Va. 2003); *Park Ctr. III LP v. Ins. Co. of the State of Pa.*, 91 F. App'x 255 (4th Cir. 2004)
Washington	*Colo. Structures, Inc. v. Ins. Co. of the W.*, 167 P.3d 1125 (Wash. 2007)
West Virginia	*S. W.Va. Paving, Inc. v. Elmo Greer & Sons, LLC*, 2009 WL 1867678 (S.D. W.Va. 2009)
Wisconsin	*Munro v. Golden Rule Ins. Co.*, 760 N.W.2d 184 (Wis. Ct. App. 2008)
Wyoming	*State Sur. Co. v. Lamb Constr. Co.*, 625 P.2d 184 (Wyo. 1981); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855 (Wyo. 1990); *Herrig v. Herrig*, 844 P.2d 487 (Wyo. 1992)

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- Making claims payments to insureds or beneficiaries without indicating the coverage under which each payment has been made;
- Unreasonably delaying the investigation or payment of claims by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form;
- Failing in the case of claims denials or offers of compromise settlements to promptly provide reasonable and accurate explanations of the basis for such actions;
- Failing to provide forms necessary to present claims within 15 calendar days of requests with reasonable explanations regarding their use;
- Failing to adopt and implement reasonable standards to assure that the repairs are performed in a workmanlike manner by repairers owned by or that an insurer requires insureds or claimants use.

Recommended Practices

A surety claims professional should always be mindful that his or her conduct may become the central focus of a bad faith claim prosecuted by a disgruntled obligee or other claimant. Some of the practices recommended below may not avoid bad faith claims entirely, but they may nevertheless facilitate the defense of a claim.

- ***Respond promptly to claims.*** Often obligees maintain that their sureties' unnecessarily long delays are evidence of bad faith. Document all reasons for delay and implement a system for reminders to progress claims.
- ***Investigate properly.*** Frequently the factual basis for a bad faith claim will be that a surety failed to perform a proper evaluation of the underlying claim, demonstrating that the surety has not reasonably exercised its own judgment.
- ***Evaluate independently.*** As with any investigation, a surety's evaluation must demonstrate how it exercised its own judgment about the appropriateness of a claim and did not merely "rubber stamp" the principal's position.
- ***Obtain competent professionals when necessary.*** If the resolution of a technical issue is outside the scope of a claims professional's experience or expertise, a consultant should be retained. Retaining a consultant demonstrates that a surety conducts a neutral, thorough, objective evaluation and exercises its independent judgment based on, among other items, fact-based advice or opinions.
- ***Respond promptly to correspondence.*** Keeping an open dialogue is not only good because it may practically benefit a particular claim, but it also ensures that an obligee cannot argue that it has been "ignored" by a surety.
- ***Respond in writing.*** Even brief follow-up letters or emails can confirm important points addressed in phone calls that an obligee may later deny or recall differently than the claims professional.
- ***Keep a log or diary of conversations.*** This has two benefits. First, the substantive communications by an obligee may help in defending both the underlying claim and its bad faith component. Second, the *process* of documenting phone calls itself demonstrates that a surety claims professional was attentively evaluating a claim.
- ***Thoroughly detail the denial of a bond claim.*** Often the declination letter will be one of the most crucial pieces of evidence in a bad faith claim. If a surety will deny a claim, then a well-thought-out, articulate declination letter can only help persuade a jury that a surety's decision was made in good faith even if a jury ultimately decides that the decision was wrong.
- ***Be accurate.*** Make sure that all representations are accurate. The common practice of quoting relevant contract and bond provisions verbatim is wise. Attaching relevant documents is also good practice.
- ***Keep it professional.*** Often an obligee or claimant becomes frustrated with a defaulting principal and vents anger to and expresses anger with a surety claims professional. Avoid responding to unprofessional words in kind, especially in writing.
- ***Never threaten.*** Sometimes litigants expressly threaten prolonged and expensive litigation as a reason to settle a claim. This is a threat that a surety claims professional cannot afford to make. FD