

FIRST/THIRD PARTY BAD FAITH CLAIMS IN GEORGIA AND TENNESSEE

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First Party Bad Faith In Georgia

- 1. Statute and Penalties
- O.C.G.A. § 33-4-6 provides as follows:
- "In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50% of the liability of insurer for the loss or \$5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer. The action for bad faith shall not be abated by payment after the 60 day period nor shall the testimony or opinion of an expert witness be the sole basis for a summary judgment or directed verdict on the issue of bad faith."

First Party Bad Faith In Georgia

- Elements of a Cause of Action:
- 1. The claim is covered under the policy;
- 2. A timely demand was made at least 60 days prior to the filing of a lawsuit;
- 3. The failure to pay is motivated by bad faith on behalf of the insurer.

First Party Bad Faith in Georgia

- Expert witness testimony is required for the amount of attorney's fees.
- The trial court has discretion to review and amend the attorney's fees award (without disapproving the entire verdict) if the attorney's fees award is greatly excessive or is inadequate.
- Other requirements: within 20 days of filing suit the plaintiff shall mail to the Commissioner of Insurance and the Consumer's Insurance Advocate a copy of the demand letter and the complaint. However, there is no penalty for failing to do so, as same may be cured by delivering same at a later date.

First Party Bad Faith in Georgia

- The notice requirements are strictly construed because the statute is penal in nature.
- This statute is the exclusive remedy for bad faith refusal to pay a first party claim.
- Therefore, claims for attorney's fees and litigation expenses under other statutes are not available.
- However, a plaintiff can plead in the alternative for breach of contract.

First Party Bad Faith in Georgia

- Assignability
- Under Georgia law, claims for statutory penalties under O.C.G.A. 33-4-6 are not assignable. See Southern Gen. Ins. Co. v. Ross, 227 Ga. App. 191, 196 (1997). This rule apparently also extends to first party claims

First Party Bad Faith in Georgia

- Punitive Damages
- Punitive damages are unavailable because the statute is already punitive in nature.
- Defenses
- A. If it is not covered under the policy there is no bad faith. Please note that the burden is on the insured to prove that the claim is covered under the policy.
- B. Doubtful and disputed claim, e.g., arson suspected.
- C. Good faith basis.

Defenses Continued

- D. Doubtful or unsettled question of law. Where there is an unsettled question of law the insurer is not liable for bad faith penalties. *Georgia Farm Bureau Mut. Ins. Co. v. Jackson*, 240 Ga. App. 127 (1999).
- E. Demand or Untimely Demand
 - While the demand need not have any "magic" language, the demand must at least notify the insurer of the intent by the insured to file a claim for bad faith.
 - A proof of loss is insufficient. In *Lavoi Corp. v. National Fire Ins. Co. of Hartford*, 2008 WL 2468888, the policy required a certified proof of loss to be sent before a demand for payment was made. The policy also provided that payment was not due until 30 days after a certified proof of loss was sent. In this case, the insured sent their demand letter pursuant to O.C.G.A. § 33-4-6, on September 23, 2005, but the sworn proof of loss was not sent until January 19, 2006. Thus, the Court of Appeals held that the demand was inadequate and plaintiff did not have a right to sue at that time.

First Party Bad Faith in Georgia

- E. If there is fraud or misrepresentation of the insured (so long as the fraud or misrepresentations are serious and material) including on an application, bad faith cannot be found.
- F. Keys to defenses regarding coverage: Make sure your coverage defense is valid and done in good faith; a baseless coverage defense will result in a finding of bad faith.
- The definition of bad faith means, "frivolous and unfounded refusal to pay a claim."
- If there are any reasonable grounds for an insurer to contest the claim there is no bad faith.

First Party Bad Faith in Tennessee

- 1. Statute and Penalties
- T.C.A. § 56-7-105(a) provides as follows:
- "The insurance companies of this state, and foreign insurance companies and other persons or corporations doing an insurance or fidelity bonding business in this state, in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest on the bond, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss is not in good faith, and that the failure to pay inflicted additional expense, loss, or injury, including attorney fees, upon the holder of the policy or fidelity bond; and provided, further, that the additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury including attorney's fees thus entailed."

First Party Bad Faith in Tennessee

- T.C.A. § 56-7-105(b) provides a 12.5% penalty for an unauthorized or alien insurer or bonding company.
- The penalty is lower because of other penalties to unauthorized insurers pursuant to T.C.A. § 56-2-101, et. seq.
- Pursuant to T.C.A. § 56-2-108, the penalties for writing policies without have a Certificate of Authority from the Secretary of State is not less than \$100 or more than \$5,000 per violation.
- Every new day that the unauthorized business continues is a new violation. Thus, an unauthorized insurer could face penalties of \$5,000 per day on top of the 12.5% penalty pursuant to T.C.A. § 56-7-105.

First Party Bad Faith in Tennessee

- The penalties under this statute are only applicable against the insurer, not the agency issuing the policy.
- The insured is not allowed to recover any lost profits, lost lease or other speculative damages.
- Because the statute is penal in nature, it must be construed strictly and the courts are supposed to resolve any doubt in favor of the insurer.

First Party Bad Faith in Tennessee

- Elements of a bad faith claim:
 - 1. The policy of insurance must, by its terms, become due and payable (i.e., there is coverage under the policy);
 - 2. A formal demand for payment must have been made;
 - 3. The insured must have waited 60 days after making demand before filing suit; and
 - 4. The refusal to pay must not have been made in bad faith.

Elements of a Bad Faith Claim in Tennessee (First Party)

- 1. Policy Due and Payable
- Denial based upon lack of coverage can be a defense to a bad faith claim;
- An insurer has a right to refuse to pay a claim if it has reasonable grounds to believe it has a meritorious defense or that the claimant's demands are exorbitant;
- An insurance company is entitled to rely upon available defenses and refuse payment if there is substantial legal grounds that the policy does not afford coverage for the alleged loss; if the company unsuccessfully asserts a defense and the defense was made in good faith, a bad faith penalty is not permitted;

Elements of a Bad Faith Claim in Tennessee (First Party)

- Policy due and payable (cont'd)
- The insurance company is entitled to rely upon available defenses and refuse payment if there is a substantial legal ground that the policy does not afford coverage for the alleged loss;
- When the coverage question is one of first impression, the insurer has a right to have a ruling made on the question without incurring a penalty to the insured for refusal to pay on the policy.

Elements of a Bad Faith Claim in Tennessee (First Party)

- 2. Formal Demand
- The demand must include specific notice to an insurer of an intent to file suit for bad faith;
- The demand does not have to be in writing;
- The demand must provide notice of intent to file suit for bad faith;
- Elements of a formal demand include:
 - (1) insurance company has an opportunity to investigate the insured's claim of loss;
 - (2) the insurance company is aware or has notice from the insured of insured's intent to assert a bad faith claim if disputed claim is not paid; and
 - (3) sixty (60) days expire after insured gives such notice before filing suit.
- There is no bad faith if the payment demanded is greater than the judgment ultimately recovered.

Elements of a Bad Faith Claim in Tennessee (First Party)

- 3. Sixty Day Waiting Period
- The suit for bad faith will be barred by the court if the sixty day waiting period requirement is not complied with.
- 4. Refusal to Pay Must Have Been in Good Faith
- Reasonableness of insurer's conduct:
 - Good faith factual basis is sufficient to avoid liability for insurer's pursuit of intentional defense or foregoing an appeal;
 - If the insurer unsuccessfully asserts a defense and the defense was made in good faith, bad faith penalty is not permitted merely for the failure of the defense to assert it;

Elements of a Bad Faith Claim in Tennessee (First Party)

- Refusal to Pay Must Have Been in Good Faith
- Negligence:
- Mere negligence is insufficient to prove bad faith;
- An insurer's mistaken judgment is not bad faith if it was made honestly and followed an investigation performed with ordinary care and diligence;
- Negligence may be considered along with other circumstantial evidence to suggest indifference to the insured's interests;
- The insured is not required to prove dishonest purpose, moral obliquity, conscious wrong doing, breach of a known duty through ulterior motive of ill will partaking of the nature of fraud, or an actual intent to mislead or deceive in order to obtain a judgment for bad faith.

First Party Bad Faith in Tennessee

- 3. Assignability
- It is well settled in Tennessee that an insured may assign an insurance policy **after** a loss has occurred, despite an anti-assignment clause purportedly prohibiting assignments without the consent of the insured. *Manley v. The Automobile Insurance Company of Hartford, Connecticut*, 169 S.W. 3rd 207 (2005); *Zaharis v. Vassis*, 789 S.W. 2d 906 (1989).
- However, the assignee of a policy "stands in the shoes" of the assignor and receives nothing more than what the assignor held.
- Thus, the assignee is still bound to meet the conditions for coverage which exist under the assignor's policy.
- 4. Punitive Damages
- Punitive damages are not available as the statute is penal in nature.

First Party Bad Faith in Tennessee

- While this is supposedly the exclusive remedy for an insured against its insurance carrier, the plaintiff may also bring a claim under the Tennessee Consumer Protection Act, T.C.A. § 47-18-108, et. seq.
- The elements of a claim under the TCPA require a plaintiff to prove:
 - (1) that the defendant engaged in a deceptive or unfair practice or act declared unlawful by the TCPA, and
 - (2) that the defendant's conduct caused an ascertainable loss of money or property or a commodity or thing of value wherever situated.

First Party Bad Faith in Tennessee

- The TCPA goes on to define an unfair practice as an act or practice that causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or the competition.
- **KEY – TREBLE DAMAGES & ATTORNEY'S FEES**
- T.C.A. § 47-18-104, further defines unfair or deceptive acts or practices as follows (Very Long List – I will not go into detail, but it is in the materials for your review):
 - 1. Falsely passing off goods or services as those of another;
 - 2. Causing the likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
 - 3. Causing likelihood of confusion or misunderstanding as to affiliation, connection, or association with or certification by another;

TCPA Claims

- 4. Using deceptive representations or designations of geographic origin in connection with goods or services;
- 5. Representing that goods or services has sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such person does not have;
- 6. Representing that goods are original or new if they are deteriorated, altered the point of decreasing the value, reconditioned, reclaimed, used or second hand;
- 7. Representing that goods and services are a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;
- 8. Disparaging goods, services or businesses of another by false or misleading representations of facts;
- 9. Advertising goods or services with the intent not to sell them as advertised;

TCPA CLAIMS

- 10. Advertising goods or services with the intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- 11. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
- 12. Representing that a consumer transaction confers or involves rights, remedies, or obligations that it does not have or involve or which are prohibited by law;
- 13. Representing that a service, replacement or repair is needed when it is not;
- 14. Causing confusion or misunderstanding with respect to the authority of a salesperson, representative or agent to negotiate the final terms of the consumer transaction;
- 15. Failing to disclose that a charge for the servicing of any goods in whole or in part is based on a predetermined rate or charge, a guarantee or warranty, instead of the value of the services actually performed;

TCPA CLAIMS

- 16. Disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;
- 17. Advertising any sale by falsely representing that a person is going out of business;
- 18. Chain referral sales plans in connection with the sale or offer to sell goods which uses a sales technique in which the buyer or prospective buyer is offered the opportunity to purchase goods or services and, in connection with the purchase, receives the seller's promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if the receipt of compensation or consideration is contingent upon the occurrence of an event subsequent to time that the buyer purchases the merchandise or goods;

TCPA CLAIMS

- 19. Representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve;
- 20. Selling or offering to sell a right of participation in a pyramid distributorship;
- 21. Using statements or illustrations in any advertisement which create a false impression of the grade, quality, quantity, make, value, age, size, color, usability, or origin of the goods or services offered;
- 22. Using any advertisement containing an offer to sell goods or services when the offer is not a bona fide effort to sell the advertised goods or service;
- 23. Representing in any advertisement a false impression that the offer of goods has been occasioned by a financial or natural catastrophe when such is not true;

TCPA CLAIMS

- 24. Assessing a penalty for prepayment or early payment of a fee or charge for services by a utility or company which has been issued a franchise license by a municipal governing body to provide services;
- 25. Discriminating against any disabled individual;
- 26. Violating the provisions of T.C.A. § 65-5-106 (dealing with telephone carriers);
- 27. Engaging in any other act or practice which is deceptive to the consumer or to any other person;
- 28. Failure of a motor vehicle or parent facility to return to a customer any parts which were removed from the motor vehicle and replaced during the process of repair if the customer requested return of such parts;

TCPA CLAIMS

- 29. Advertising that a business is "Going Out of Business" more than ninety (90) days before such business ceases to operate;
- 30. Failing to comply with statutes when a municipality has adopted the Regulations of Liquidation Sales;
- 31. Offering lottery winnings in exchange for making a purchase or incurring a monetary obligation;
- 32. The act of misrepresenting the geographic location of a person through a business name or listing in a local telephone directory or on the Internet;

TCPA CLAIMS

- 33. Advertising that a person is an electrician for hire when such person is not licensed by a local jurisdiction to perform electrical work;
- 34. Unreasonably raising prices or unreasonably restricting supplies of essential goods, commodities or services in direct response to a crime, act of terrorism, war, or natural disaster;
- 35. Representing that a person is a licensed contractor when such person has not been licensed;
- 36. Using any advertisement for a workshop, seminar, conference or other meeting that contains a reference to a living trust or revocable living trust;
- 37. Refusing to accept the return of clothing or accessories sold at retail directly to a purchaser, who seeks to return the same for any reason for refund or credit;

TCPA CLAIMS

- 38. Requiring a purchaser to present that purchaser's driver's license as a prerequisite for accepting the return of clothing or accessories for a refund or credit;
- 39. Engaging in the business of debt adjusting (with several subsections dealing with specifics thereof);
- 40. Representing that a person or such person's agent, authorized designee or delegee for hire has conducted a foreclosure on real property when it was not actually conducted;
- 41. Importing a second hand mattress for the purpose of resale;
- 42. Knowingly advertising or marketing for sale a newly constructed residence as having more bedrooms than a permitted by the newly constructed residence's subsurface sewage disposable system permit;

TCPA CLAIMS

- 42. Knowingly advertising or marketing for sale a newly constructed residence as having more bedrooms than a permitted by the newly constructed residence's subsurface sewage disposable system permit;
- 43. Offering a check that contains an obligation to advertise with the person upon endorsement of the check;
- 44. Practice of directly or indirectly selling radar jamming devices or offering to reimburse for motor vehicle traffic citations for person who purchases a radar detector or radar jamming device.

Third Party Bad Faith - Georgia

- An insurance company may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim.
- In deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interests of the insured.
- The jury generally must decide whether the insurer, in view of the existing circumstances, has accorded the insured "the same faithful consideration it gives its own interests."

Third Party Bad Faith - Georgia

- An insurance company does not act in bad faith solely because it fails to accept a settlement offer within the deadline set by the injured person's attorney. In *Southern General Insurance Co. v. Holt*, 262 Ga. 267, 416 S.E. 2d 274 (1992), the Georgia Supreme Court dealt with the following facts:
 - Bridgett Holt drove her automobile through a stop sign and injured Geneva Fortson on June 19, 1987. Holt's liability for the collision is undisputed and her insurance carrier, Southern General Insurance Company paid for Fortson the property damage claim.
 - On July 27, 1987, Southern General's Claims Representative wrote Fortson's attorney seeking information on her personal injuries for settlement purposes.
 - On October 7, 1987, Fortson's attorney wrote Southern General offering to settle the claim within ten (10) days for \$30,000. He included medical bills and asserted claims for additional medical expenses and lost wages.

Third Party Bad Faith - Georgia

- On October 13, 1987, he withdrew the offer when Fortson entered the hospital for treatment of a ruptured disc.
- On October 19, 1987, he requested information regarding the amount of the policy.
- On October 28, 1987, Southern General refused to reveal the policy limits but sought medical information on the ruptured disc.
- On November 2, 1987, Fortson's attorney again wrote Southern General offering to settle Fortson's claim for the policy limits and stating that her medical bills totaled more than \$10,000 and her lost wages exceeded \$5,000. He included doctors' notes showing that Fortson had a herniated disc and medical bills totaling \$6,568.00. He left the offer open for ten (10) days.
- On November 9, 1987, Fortson's attorney reiterated that the offer to settle for the policy limits was open until November 12, 1987

Third Party Bad Faith - Georgia

- On November 10, 1987, he sent proof of additional medical expenses of \$4,335.00.
- On November 12, 1987, he extended the offer to settle for the policy limits for five more days until November 17, 1987, and enclosed a certified copy of Fortson's complete medical records.
- Southern General did **not** seek more time to evaluate the claim nor did it respond to the offer before it expired.
- On November 18, 1987, Fortson's attorney withdrew the settlement offer.
- On November 20, 1987 and again on December 4, 1987, Southern General offered to settle Fortson's claim for the policy limits of \$15,000. Fortson rejected the offer.

Third Party Bad Faith - Georgia

- At trial the jury returned a verdict of \$82,000 in favor of Fortson.
- Holt assigned her claim against Southern General for bad faith refusal to settle within the policy limits to Fortson.
- Fortson sued Southern General based upon its assignment seeking \$67,000 plus interest for the insurance company's bad faith failure to settle.
- Holt additionally brought a claim for intention infliction of emotional distress and for punitive damages.
- A jury awarded \$83,000 in compensatory damages to Fortson and \$25,000 in compensatory damages and \$100,000 in punitive damages to Holt.

Third Party Bad Faith - Georgia

- The Supreme Court held (in addition to the principles outlined above regarding the elements of bad faith) as follows:
- They noted that nothing in their decision was intended to lay down a rule of law that would mean a plaintiff's attorney under similar circumstances could "set up" an insurer for an excess judgment merely by offering to settle within the policy limits and by imposing an unreasonably short time within which the offer would remain open.
- The Court did reject, however, Southern General's argument that an insurance company has no duty to its insured to respond to a deadline to settle a claim within policy limits **when the company has knowledge of clear liability and special damages exceeding the policy limits.**

Third Party Bad Faith - Georgia

- The Court held that the liability of Southern General was not based solely on their failure to settle within a time frame set by the plaintiff's attorney.
- Rather, the evidence showed that Holt's liability for the automobile accident was clear and that Fortson had medical bills and lost wages exceeding the limits of Holt's policy.
- Indeed, Southern General's Claims Manager testified under cross-examination that a claims representative should have concluded that Fortson's claim was a policy limits case after he saw the November 2, 1987, letter and enclosures.
- The Claims Representative also testified that he did not doubt the statements made by Fortson's attorney regarding her injuries but needed medical documents to support it.
- However, neither he nor the Claims Manager requested an extension of time to evaluate Fortson's claims.

Third Party Bad Faith - Georgia

- However, the Supreme Court reversed the punitive damage award given to Holt because Holt had already assigned her claim for compensatory damages and Georgia law provides that punitive damages may not be recovered where there is no entitlement to compensatory damages.
- Thus, while a bad refusal to settle within policy limits claim is assignable to the judgment plaintiff, punitive damages are not assignable.
- If the judgment plaintiff or the insured wants to maintain a claim for punitive damages, suit will have to be brought in the name of the insured.
- Under such a scenario punitive damages are available if the insured does not assign the claim for compensatory damages.

Third Party Bad Faith - Georgia

- *State Farm v. Smoot*, 381 F.2d 331
- Policy limits \$10,000 per person, \$20,000 per incident and \$5,000 property damage
- Insured rear ended plaintiff while admittedly distracted.
- The impact was enough to involve five vehicles and knocked one of the passengers in plaintiff's vehicle in the floor of the vehicle.
- Initially plaintiff's attorney orally offered to settle the claim for \$2,500.
- Later a written offer was submitted to settle for \$4,000.
- State Farm rejected both of these offers.

Third Party Bad Faith - Georgia

- Subsequently, based upon continued symptoms plaintiff was experiencing, State Farm again rejected another offer to settle for \$5,000.
- The insured was not informed of any of these offers and the refusals of same.
- When suit was filed, plaintiff claims \$33,980 in damages and plaintiff's husband claimed approximately \$3,000 for loss of consortium.
- After suit was filed, State Farm warned the insured that the amount sought in the suit was in excess of the policy limits and advised him to retain his own attorneys.

Third Party Bad Faith - Georgia

- Just before the trial, State Farm offered to settle both cases for \$5,000.
- The offer was refused.
- The jury returned a verdict totaling \$26,902.83.
- At the bad faith trial, the jury awarded the insured \$23,858.40 in special damages; \$10,000 in general damages; and \$10,000 in punitive damages plus attorney's fees of \$21,929.20.
- Total verdict was \$65,787.60, that verdict plus the \$20,000 in policy limits had State Farm ultimately responsible for over \$85,000 in damages on a claim they could have settled for \$5,000.
- That is seventeen times the amount they could have settled for.
- These numbers were obtained in the 1950's.

Third Party Bad Faith - Georgia

- *Ponse v. Atlanta Casualty Co.*
- Offer to settle within policy limits of \$15,000.
- Insurer simply did not defend the case but never sent a letter denying coverage.
- Case went into default and a judgment of over \$160,000 was obtained.
- No information on the verdict for the bad faith case as this was simply a reversal of summary judgment granted to the insurer.

Third Party Bad Faith - Georgia

- In Georgia, an excess carrier has the right to file a bad faith refusal to settle a claim against the primary insurer.
- The primary insurer, under Georgia law, has the same duty to an excess carrier as it does to its insured.
- *Great American Insurance Co. v. International Insurance Co.*, 753 F.Supp. 357 (M.D. Ga. 1990).
- *Home Insurance Company v. North River Insurance Company*, 192 Ga. App. 551 (1989).

Third Party Bad Faith - Georgia

- When liability is clear and the amount of damages incurred by the plaintiff are in excess of the policy limits, this presents a very questionable situation in terms of a conflict of interest between the insurer and the insured.
- One consideration that has to be accounted for is the liability of other parties when evaluating whether or not to settle a claim now that Georgia has gone to comparative fault and eliminated joint and several liability. This can include a notice of fault of non-party pursuant to O.C.G.A. § 51-12-33. For Tennessee it is T.C.A. § 20-1-119.

Third Party Bad Faith - Tennessee

- It is well established that an insurer having exclusive control over the investigation and settlement of a claim may be held liable to its insured for an amount in excess of its policy limits if as a result of bad faith it fails to effect a settlement within policy limits.
- The insured is under a duty to cooperate with the insurer in the defense of the matter.
- The insurer has the right to assume that its insured is acting in good faith and telling the truth when they furnish information concerning the facts and circumstances surrounding the act or acts over which the claim arises.
- The insurer also has the right to assume and trust that the insured is not acting in collusion with the injured party in an attempt to induce the company to make a payment under a false claim.

Third Party Bad Faith - Tennessee

- Bad faith is rarely admitted and almost always is proven by circumstantial evidence.
- Bad faith is most readily inferable when the severity of the plaintiff's injuries is such that any verdict against the insured is likely to be greatly in excess of the policy limits.
- It is further readily inferable when the facts of the case indicate that a defendant's verdict on the issue of liability is doubtful.

Third Party Bad Faith - Tennessee

- Factors that should be considered in deciding whether an insured's refusal to settle was done in bad faith:
 - The strength of the injured claimant's case on the issue of liability and damages.
 - The attempts by the insurer to induce the insured to contribute to a settlement.
 - Failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured.
 - The insurer's rejection of advice of its own attorney or agent.
 - Failure of the insurer to inform the insured of a compromise offer.
 - The amount of financial risk to which each party is exposed in the event of a refusal to settle.

Third Party Bad Faith - Tennessee

- Factors that should be considered in deciding whether an insured's refusal to settle was done in bad faith:
 - The fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts.
 - In Tennessee there does not have to be a demand for settlement within the policy limits. *State Automobile Insurance Company of Columbus, Ohio v. Rowland*, 221 Tenn. 421, 427 S.W. 2d 30 (1968).
 - The fact that no offer was made to settle within the policy limits is only one factor to be considered.

Third Party Bad Faith - Tennessee

- *Bell v. Commercial Insurance Co. of Newark, New Jersey*, 280 F.2d 514 (1960) - cited by the Supreme Court of Tennessee in the *Rowland* case. There was a \$10,000 policy limits and the only offer made by the claimant was for \$25,000. The Court determined there was enough evidence of bad faith to let the case go to the jury.
- There was no question of liability.
- The insurer took the position that the offer was beyond the policy limits and therefore it was under no duty to make a counteroffer or pursue negotiations – WRONG!!!

Third Party Bad Faith - Tennessee

- If insurer deals fairly and honestly in arriving at its best judgment it is not guilty of bad faith.
- There must be such a state of facts proven that the jury may find or reasonably infer that the actions of its insurer and its agents (including attorneys) must have been such as to show that they subordinated the rights of the insured to their own interests.
- If the insurer unsuccessfully asserts a defense but the defense was made in good faith, no bad faith penalty is permitted.
- Mere negligence is insufficient to impose liability for bad faith.
- However, negligence may be considered along with other circumstantial evidence to suggest indifference to the insured's interests.

Third Party Bad Faith - Tennessee

- An insurer's mistaken judgment is not bad faith if it was made honestly and followed an investigation performed with ordinary care and diligence.
- The insurer must exercise ordinary care and diligence in investigating the claim and the extent of the damage for which the insured may be held liable.
- The manner of investigating the claim has an important bearing on the question of bad faith.
- The insured's conduct can be a defense.
- The courts will look to the facts available to the insurer at the time of denial that should have been considered.
- As long as the denial was reasonable and in good faith based upon the facts available to the insurer at the time of the denial, there will be no bad faith findings.

Third Party Bad Faith - Tennessee

- If the policy gives the insurer the right to settle any claim or suit, then the insured does not have veto power and failure to consult with the insured does not give rise to a bad faith claim, provided the insurer consults with the insured for more expensive claims.
- Proof would consist of facts that tend to show a willingness on the part of the insurer to gamble with the insured's money or any intentional disregard of the financial interests of the insured and the hope of escaping full liability.
- If the plaintiff's damages exceed policy limits then the insurer's conduct is subject to closer scrutiny because of the potential conflict of interest between the insurer and the insured.

Third Party Bad Faith - Tennessee

- The insurer has a duty to keep the insured informed of offers of settlement.
- The insured's failure to do so is a material fact to be considered in determining whether the insurer acted in bad faith.
- First party claims in Tennessee sound in contract; third party bad faith claims while they arise out of a contract are considered to be *ex delicto* (literally "from a wrong"). This simply means that it is a tort in nature. Because it is a tort, Tennessee has held that bad faith refusal to settle claims are **not** assignable.
- Punitive damages are available under Tennessee law for third party bad faith claims.

Third Party Bad Faith - Tennessee

■ *State Automobile Insurance Company of Columbus Ohio v. Rowland*

- \$5,000 policy limits;
- Suit filed alleging damage in the amount of \$50,000;
- Verdict was \$18,000;
- Post verdict the insurer paid \$5,000 for personal injuries (policy limits) and \$429.58 for property damage leaving an unpaid balance of \$12,570.42; jury verdict for the unpaid portion of the judgment plus interest for a total of \$13,880.85
- Claims adjuster testified that after conducting an investigation of the accident, she indicated it was a case of clear liability as to her insured.
- After the depositions of the plaintiff and the defendant and the plaintiff's treating physician, were not favorable to the defendant, the insurer did not offer to settle within policy limits.

Third Party Bad Faith - Tennessee

- On the day of trial the plaintiff's attorney offered to settle the case for \$11,500 which represented \$10,000 for personal injury plus out-of-pocket expenses and property damages.
- Defense counsel made no reply whatsoever and walked away and never communicated this offer to the insured.
- Defense counsel also refused to tell plaintiff's counsel if the demand was above the policy limits.
- At trial the attorney for the insured did not notify them, conducted a trial without them present and didn't introduce any evidence on their behalf.
- The plaintiff's attorney testified that had he been offered policy limits plus property damage of \$429.00 he would have recommended an acceptance of that offer.
- No offer was ever made.

Third Party Bad Faith - Tennessee

- *Johnson v. Tennessee Farmer's Mutual Insurance Co.*, 205 S.W. 3rd 365 (2006)
- Insured's policy limits were \$25,000/\$50,000 with equal amounts of uninsured motorist coverage; plaintiff's policies were identical.
- Tennessee Farmers was sued as an uninsured motorist carrier against a third driver, John Doe, and Tennessee Farmers paid its UM coverage policy limits to each policy holder.
- Plaintiff offered to settle his liability claim against the insured for the policy limits of \$25,000.
- Tennessee Farmers refused; jury allocated 50% of fault to the insured and 50% to John Doe with a total award of \$387,500.
- Judgment against the insured in the amount of \$193,750.

Third Party Bad Faith - Tennessee

- In the bad faith trial against Tennessee Farmers, the jury awarded \$279,430.92.
- Facts of case: Insured was driving in the left inside lane when a van driven by John Doe suddenly moved left into his lane of traffic. In an attempt to avoid contact with the van, Johnson swerved left crossing the median into oncoming traffic and collided with plaintiff's vehicle.
- Thus, while it was clear, John Doe was culpable to some degree and it was also clear that the insured's actions of going into oncoming traffic were clearly an unreasonable reaction to the situation presented.

Third Party Bad Faith - Tennessee

- *Tip's Package Store v. Commercial Insurance Managers,*
- This is a dram shop case.
- Alcohol supplied to a minor by Tip's Package Store led to a DUI accident in which two University of Tennessee students were killed.
- This is a failure to procure insurance case.
- Defendants were already insured through Lexington Insurance Company with policy limits of \$300,000 on a "claims made" policy.
- Defendant agent approached him about providing him with their liability coverage and ultimately provided him with a policy that was an occurrence based policy.
- Tip's Package Store made it clear that they did not want to have a gap in coverage.

Third Party Bad Faith - Tennessee

- Because of the switch from a claims made to an occurrence based policy there was a gap in coverage and plaintiff's accident occurred during the gap in coverage.
- The occurrence based policy had limits of \$1M; plaintiff's attorney put the defendant agent on notice and told the agent to put his E&O carrier on notice.
- Lawsuit was not filed until over three years after the defendant agent was put on notice.

Third Party Bad Faith - Tennessee

- Tip's Package Store agreed, prior to trial of the underlying action, to the entry of a judgment against it for compensatory damages with a stipulated amount of damages; plaintiffs released any claims for punitive damages and agreed not to enforce or execute the judgment against Tip's but retained their rights as third party beneficiaries of the bad faith claim (because these claims are not assignable, the suit was brought in the name of Tip's Package Store).
- At the trial of the underlying action, Tip's was found 1/3 liable for the deaths of the two girls.
- Damages awarded by the jury totaled approximately \$1,360,000, leaving Tip's responsible for \$453,000.
- In the bad faith trial the defendant agent was found liable to the plaintiffs for \$1M.

Third Party Bad Faith - Tennessee

- Unlike Georgia, because third party bad faith claims are non assignable in Tennessee, the excess carrier does not have the right to bring a bad faith claim against the primary insurer, as the claim belongs to the insured not to the excess carrier. Furthermore, under Tennessee law, a primary liability insurer does not owe a duty to an excess carrier to settle the claim within the primary policy's limits of coverage. *Electric Insurance Co. v. Nationwide Mutual Ins. Co.*, 384 F.Supp.2d 1190 (2005).
- However, the excess carrier can pursue a claim against the primary insurer pursuant to subrogation.

Bad Faith in Workers' Compensation Georgia

- No true bad faith
- Bad faith refusal to provide coverage to the insured for workers' compensation claim. This proceed like any other bad faith claim and the insurer would ultimately have to prove that there was no coverage under the policy.
- More of a bright line rule of as to whether or not benefits were paid timely
- O.C.G.A. § 34-9-221(e) and Board Rule 221
 - If injured employee is out of work for more than 7 days, you must commence benefits unless you deny the claim within 21 days from DOA
 - If benefits are not paid when due – 15% penalty is owed.
 - If a hearing is requested, can get hit with 25% add-on attorney's fees
 - Late fees for not paying a properly submitted medical bill – O.C.G.A. § 34-9-203 and Board Rule 203 – 10% after 30 days; 20% after 60 days; after 90 days – add interest of 12% (in addition to the penalties above).
 - 20% penalty for failure to pay pursuant to an order or award (a settlement is an award)
 - For an award, must mail same within 17 days if insurer is out of state or within 20 days if the insurer is in state.

Bad Faith in Workers' Compensation Tennessee

- T.C.A. § 50-6-205(b)(3)(A) provides that if an employer or employer's insurer fails to pay or untimely pays temporary disability benefits within 20 days after the employer has knowledge of any disability that would qualify for benefits, a workers' compensation specialist shall have the authority to assess against the employer or the employer's insurer a civil penalty in addition to the temporary disability benefits that are due to the employee. The penalty, if assessed, shall be an amount equal to 25% of the temporary disability benefits that were not paid. The penalty may be assessed as to all temporary disability benefits that are determined not to be paid.

Bad Faith in Workers' Compensation Tennessee

- Technically the statute says the specialist shall issue a written request to the employer or insurance carrier to provide documentation as to why the civil penalty should not be assessed.
- However, the recent policy at the DOL is that this will not be a separate written request; rather, when the employee files a Request for Assistance on Form C-40B, the specialist provides a notice to the employer that a Request has been filed and provides a date by which the employer must submit documentation and a position statement with regard to the Request. In addition, the notice states that prior to the date listed the employer should provide written documentation as to why the civil penalty should not be imposed.

Bad Faith in Workers' Compensation Tennessee

- This is done in every Request for Assistance, not just those that may raise the possibility of a penalty.
- Therefore, it is necessary for the attorney responding to the Request for Assistance to provide the documentation regardless of the likelihood of a penalty being imposed.
- This statute also provides that if the specialist determines that the employer or insurer was not in compliance by failing to pay, the specialist shall issue a written order that assesses the penalty and a specific dollar amount to be paid directly to the employee. If the employer or insurer fails to comply with the order within 15 calendar days of the date the order becomes final, the employer or insurer shall be subject to the penalties as set forth in T.C.A. § 50-6-238(d).

Bad Faith in Workers' Compensation Tennessee

- The penalty pursuant to T.C.A. § 50-6-238(d) is a flat \$10,000 with an additional \$1,000 per day assessed for every day that the amount is not paid, beginning with the 21st day following the notification that a penalty has been assessed.
- The courts have generally held that a showing of bad faith must be made for the court to impose those penalties and the DOL follows the same reasoning for the most part, but there is not a published body of case law for DOL decisions like there is for court cases.
- Thus, if you are dealing with the DOL rather than a court, it is unclear what standard that will actually apply.

Bad Faith in Workers' Compensation Tennessee

- No penalty assessed by court when initial medical opinion supported employer's assertion that claimant did not sustain a work-related injury. The key here is the initial medical opinions. Even if later opinions disprove this assertion, the initial denial would not be subject to a penalty. Any continued denial following disproving of the initial opinion would likely incur a penalty.
- A claim for a bad faith penalty to be assessed by a court must be asserted in the employee's complaint to ensure that the employer has adequate notice in order to rebut the claim for a penalty.
- Cannot use subsequently acquired facts to justify a denial:
- Courts assessed a penalty in situations where, for example, the events that purportedly explained the denial did not exist at the time the claim was denied. As with liability benefit claims, workers' compensation benefit claims also assess the information available to the employer or the insurer at the time of the denial. As long as the employer or insurer had a good faith basis for denying the claim at the time the claim was denied, the penalty will not be imposed.

Bad Faith in Workers' Compensation Tennessee

- Department of Labor Rules:
- The penalty program of the Department of Labor governed by DOL Rules Chapter 0800-2-13. This Chapter states that if the specialist determines that a civil penalty may be assessed, the employer shall have 7 days to provide the following:
 - (1) documented proof that the employer or insurer timely paid all workers' compensation benefits to which an employee is or was entitled or;
 - (2) a verified, sworn affidavit with supporting documentation that either:
 - (a) No worker's compensation benefits are or were owed to an employee;
 - (b) All worker's compensation benefits owed to an employee under the Workers' Compensation Law have been and continue to be timely paid to the employee; or
 - (c) The employer or insurer has acted diligently, as determined by the Commissioner or Commissioner's Designee to obtain necessary information to process the claim and has not been able to obtain it.

Bad Faith in Workers' Compensation Tennessee

- However, if you recall, since the DOL has started informing the employer of the potential penalty at the time the Request for Assistance is filed, the 7 day rule is not followed. In most cases, the employer has more than 7 days so that is not an issue.
- Administrative Review:
 - If the DOL assesses a penalty, the employer has 7 calendar days after the issuance of the decision to request administrative review. This is essentially an appeal to an official at the DOL here in Nashville, who is not involved in the previous decision. A request is made in writing. The administrative review is an informal process, usually handled via telephone conference, at which the attorney for the employer or insurer argues that the penalty should not have been assessed. The attorney for the employee is also included and makes any response they deem necessary. Written submissions are not required; however, we will submit a written submission statement outlining why a penalty should not have been imposed.

Bad Faith in Workers' Compensation Tennessee

- In addition, the employer or insurer has the right to request a contested case hearing under the Uniform Administrative Procedures Act. This is essentially a trial in front of an Administrative Law Judge with the DOL to determine if a penalty should have been assessed. The parties at the trial are the employer or insurer and the DOL. The employee will be notified of the decision but is generally not involved in the hearing. If a contested case hearing is requested, it will be scheduled no more than 30 days following the filing of the request.
- Finally, following the contested case hearing, the employer or insurer has 60 days to file a Notice of Appeal in the Chancery Court of Davidson County for judicial review.
- Denial of coverage. Same standards for bad faith apply. The insurer has show that there was no coverage under the policy or at least a good faith basis for denial of same.

Standards for Punitive Damages as Determined by the United States Supreme Court

- 1. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).
- Facts:
- Gore purchased a new BMW from an Alabama dealer and discovered that the car had been repainted.
- The jury returned a verdict finding BMW liable for compensatory damages of \$4,000.
- Jury also assessed \$4M in punitive damages.
- Holding - \$2M punitive damages award is grossly excessive and exceeds the Constitutional limits.
- The Court affirmed that punitive damages can be imposed in furtherance of legitimate state interest and the punish and occurrence of unlawful conduct and such awards only violate the Due Process Clause of the Fourteenth Amendment when such awards are grossly excessive in relation to those interests.

Standards for Punitive Damages as Determined by the United States Supreme Court

- The Court employed three "guideposts": (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the award and the actual or potential harm suffered by the plaintiff; and (3) the difference between the award and the comparable criminal sanctions available for such conduct.
- Many people assume that the Court in *BMW* established a bright line ratio between punitive damages and compensatory damages arguing that anything exceeding a single digit ratio multiplier is automatically excessive.

Standards for Punitive Damages as Determined by the United States Supreme Court

- The Court never made such a holding.
- The Court did state in *dicta* that few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy Due Process.
- The court also said in *dicta* that "a punitive damages award of 'more than 4 times the amount of compensatory damages' might be 'close to the line'" of constitutional impropriety.
- However, the Court did not overrule its decision in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) which upheld a punitive damage award 526 times greater than the actual damages sustained. (Oil and gas development project brought declaratory judgment action against lessor and lessee of the development rights; lessor and lessee's counterclaimed alleging slander of title; jury awarded lessor and lessee \$19,000 in compensatory damages and \$10M in punitive damages).
- The Supreme Court expressly held that a "particular egregious act" can justify both a larger gross award and a high ratio.

Standards for Punitive Damages as Determined by
the United States Supreme Court

- 2. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).
- Facts of Case:
- Insured Campbell caused an accident in which one person was killed and another permanently disabled.
- All investigators and witnesses concluded that accident was Campbell's fault.
- State Farm contested liability and declined to settle the claims of the \$50,000 policy limits.
- State Farm ignored its own investigators' advice and took the case to trial.
- They assured Campbell and his wife that they had no liability for the accident.
- They said State Farm would represent their interests and they did not need separate counsel.

Standards for Punitive Damages as Determined by
the United States Supreme Court

- Judgment was entered against the Campbells for over 3 times the policy limits.
- State Farm paid the entire judgment.
- Campbell sued State Farm for bad faith, fraud and intention infliction of emotional distress.
- The jury awarded the Campbells \$2.6M in compensatory damages.
- \$145M in punitive damages.
- Trial court reduced the compensatory damages to \$1M and the punitive damages to \$25M.
- The Utah Supreme Court reinstated the \$145M in punitive damages award applying the analysis in *BMW v. Gore*, supra.

Standards for Punitive Damages as Determined by the United States Supreme Court

- The United States Supreme Court reversed and held the \$145M in punitive damages violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
- Applying the first guidepost of *BMW v. Gore*, the Court held that plaintiff failed to demonstrate that the totality of State Farm's conduct toward him was sufficiently reprehensible to justify the award, even though there was evidence that State Farm had put other policy holders in jeopardy by engaging in a national scheme to cap payouts on claims.
- The Supreme Court rejected the "bad acts" evidence that the plaintiff offered as unworthy of consideration by the jury in that particular case.

Standards for Punitive Damages as Determined by the United States Supreme Court

- The Supreme Court did note that even lawful out of state conduct may be probative where it demonstrates the deliberateness and culpability of the defendant's action in the state where the tort is committed so long as the conduct has a nexus to the specific cause suffered by the plaintiff.
- Using the second prong of *BMW v. Gore*, the Supreme Court again reiterated that there was no bright line ratio which a punitive damage award must not exceed compensatory damages. However, the Supreme Court concluded that the award of \$145M was disproportionate to the amount of damages sustained as evidenced by the compensatory award of \$1M.
- Finally, the Court held that the \$145M in punitive damages was not proportionate to any criminal penalty that could have been imposed against State Farm under Utah law.

Supreme Court Decisions Applied in Georgia

- *Southeastern Security Ins. Co. v. Hotle*, 222 Ga.App. 161 (1996).
- Facts of case:
 - Employee sued employer and supervisor for sexual harassment and intentional infliction of emotional distress.
 - Jury awarded general damages of \$1.00 and punitive damages in the amount of \$45,000.
 - Georgia Court of Appeals distinguished that case from *BMW* in terms of the state interest involved and the reprehensibility of the conduct.
 - The state interest involved is protecting women from being subjected to harassment in the workplace which is more important than Alabama's interest in protecting consumers from non-disclosure of a repainting of a car.
 - Furthermore, the tortuous behavior in *Hotle* was "degrading and reprehensible" whereas there was no such finding in the *BMW* case and thus punitive damages award was upheld.

Supreme Court Decisions Applied in Georgia

- *Kent v. A.O. White*, 253 Ga.App. 492 (2002).
- Facts of case:
 - Defendant was sued for breach of contract and fraud for failing to pay for services rendered.
 - Jury found that Kent had committed fraud.
 - Compensatory damages of \$18,407 were awarded.
 - Punitive damages of \$750,000 were awarded (reduced per statute to \$250,000).
 - Punitive award of 13.58 times the compensatory award was upheld.

Supreme Court Decisions Applied in Georgia

- Standard in Georgia:
- Clear and convincing evidence.
- Punitive damages are limited to \$250,000 except in products liability cases and in cases involving a specific intent to cause harm.
- Plaintiff must prove by clear and convincing evidence that defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to the consequences.
- Negligence is not enough.
- Gross negligence is not enough.
- Bifurcation required.

Supreme Court Decisions Applied in Tennessee

- Tennessee case applying the Supreme Court factor - *Flax v. Dinger Chrysler Corp.*, 272 S.W. 3rd 521 (2008). This case was actually tried in Nashville.
- Facts of case (BAD FACTS MAKE BAD LAW):
- Minivan was rearended by a truck.
- Plaintiff's 8 year old son was in a child safety seat in the captain's chair directly behind the front passenger seat which was occupied.
- Upon impact the back of the seat yielded rearward into a reclining position - the front passenger seatback collapsed far enough to allow the back of the occupant's head to collide with the forehead of the 8 year old boy.
- This resulted in a fracture of his skull and caused severe brain damage.
- The child ultimately died.

Supreme Court Decisions Applied in Tennessee

- Experts for both parties acknowledged that absent the seatback failure the 8 year old boy would not have been seriously injured.
- Jury awarded \$5M for wrongful death and \$2.5M to plaintiff for negligent infliction of emotional distress.
- Trial was bifurcated and in the second stage the jury awarded \$65.5M in punitive damages for the wrongful death of the son and \$32.5M in punitive damages to the plaintiff for the negligent infliction of emotional distress.
- Total punitive damage award was \$98M.
- Daimler Chrysler was also responsible for \$3.75M in compensatory damages (the driver that caused the wreck was held 50% liable).

Supreme Court Decisions Applied in Tennessee

- The trial court reduced the punitive damages to \$20M.
- Applying the factors in *BMW v. Gore*, the Supreme Court of Tennessee held that the evidence in the case clearly demonstrates that Daimler Chrysler Corporation's conduct was reprehensible. (There was clear evidence that they knew this was happening and causing significant injuries).
- Since the harm suffered was physical rather than economic and involved the death of a child such that it was far more serious than mere economic loss, the second guidepost in *BMW* was satisfied.
- Daimler Chrysler deceitfully covered up evidence of the deficiencies of its seat design while simultaneously advertising the Caravan as a vehicle that puts children's safety first.

Supreme Court Decisions Applied in Tennessee

- Looking at the second guidepost the ratio between punitive damages and compensatory damages, the Court was only measuring the \$13,367,345.00 punitive damages for the wrongful death compared to the compensatory damages of \$2.5M which results in a ratio of 1 to 5.35 and such a ratio is clearly not impermissible. (Note that the claim for negligence infliction of emotional distress was thrown out due to evidentiary issues).
- The third guidepost of *Gore* when you compare the punitive damages to penalties for criminal sanctions, the Court looked at the reckless homicide statute (T.C.A. § 39-13-215). The maximum statutory punishment for corporations that commit reckless homicide is a fine of \$125,000.

Supreme Court Decisions Applied in Tennessee

- The Court held that they must accord "substantial deference" to the General Assembly's decision that \$125,000 is an appropriate sanction against corporations guilty of reckless homicide.
- Thus, under the third guidepost, the punitive damage award should be limited to \$125,000.
- However, although the Court was unsure how to reconcile the third guidepost with the first two, they decided to give the first two guideposts considerably more weight (the U.S. Supreme Court said the first guidepost is the most important and never said that the third guidepost was dispositive).
- They also noted that a punitive damage award of \$125,000 would clearly not adequately punish Daimler Chrysler or deter future conduct.

Supreme Court Decisions Applied in Tennessee

- Standard in Tennessee:
 - Clear and convincing evidence.
 - Plaintiff must prove by clear and convincing evidence that a defendant has acted either intentionally, recklessly, maliciously, or fraudulently.
 - Clear and convincing evidence is a different and higher standard than a preponderance of the evidence. That means that the defendant's wrong, if any, must be so clearly shown that there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.
 - Bifurcation required only when requested by defendant by motion (hint: you want to request bifurcation).
 - *Hodges v. S.C. Toof & Co.*, 833 S.W. 2d 896 (1992).

QUESTIONS???