

Wisconsin Recognizes Claim for Bad Faith Failure to Settle Within Insured's Deductible Where Verdict Was Within Policy Limits

Insurance Coverage Alert

Insights for Insurers Alert | 4 min read

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In *Roehl Transportation v. Liberty Mutual Ins. Company*, 2010 WI 49, 784 N.W.2d 542, the Wisconsin Supreme Court recognized a bad faith claim against an insurer for failing to settle a case within the insured's deductible, even though the ultimate payment was within the insurer's policy limit. This was the first time that the Wisconsin Supreme Court has recognized such a cause of action, which is also rare in other states.

The insured trucking company, Roehl Transportation was insured by Liberty Mutual. The automobile liability policy had \$2 million limits, with a \$500,000 deductible. Despite the large deductible, the policy provided that the insurer retained control over the investigation, defense and settlement of any claim. In a separate agreement, Liberty Mutual agreed to advise Roehl in settlement and claim handling and to discuss and obtain the insured's agreement on all bodily injury settlements.

A Roehl driver was involved in a collision, which seriously injured the plaintiff. Liberty Mutual took control of the case from the outset. Liberty Mutual did not settle the case, which was ultimately tried to an \$830,400 verdict against Roehl, consuming the full \$500,000 deductible. Thereafter, Roehl sued Liberty Mutual for bad faith, claiming that it had missed the opportunity to settle at an amount below the full \$500,000 deductible based on Liberty Mutual's mishandling of the claim and a lack of good faith efforts in pursuing settlement for less than the \$500,000 deductible.

After an unsuccessful motion to dismiss by Liberty Mutual, Roehl presented expert testimony at trial that the underlying case could have been settled for \$100,000 early in the claim process and asked the jury to award damages of \$400,000. The jury returned a verdict finding that Liberty Mutual had acted in bad faith and awarded

damages of \$127,000.

The Wisconsin Supreme Court, deciding a case of first impression, analyzed Wisconsin's tort of bad faith, and decided that it should be extended to the type of claim presented by Roehl. The Court found that this type of case was analogous to a traditional excess bad faith claim—in both instances, the insurer has control over settlement, the insured has direct financial exposure, and the interests of the insurer and insured may diverge. Thus, an insurer may be liable for the tort of bad faith when the insurer fails to act in good faith and exposes the insured to liability for sums within the deductible. As acknowledged by the Court, only a few jurisdictions (most notably New York and Texas) have addressed and allowed this type of bad faith cause of action to proceed.

Practice Note: Insurers and their defense counsel can protect the insured's interest and avoid this type of bad faith claim by following the four obligations courts have imposed on insurers when defending claims that could result in excess verdicts: (1) exercise reasonable diligence in ascertaining facts upon which a good faith decision to settle or not settle must be based; (2) where a likelihood of liability in excess of the deductible exists, the insurer must inform the insured so that the insured might properly protect itself; (3) the insurer must keep the insured abreast of any settlement offers received from the plaintiff and of the progress of settlement negotiations; and (4) an insurer has an affirmative duty to settle within the deductible if it can, even without a legally binding offer from the plaintiff.

For further information, please contact [Thomas R. Schrimpf](#) or your regular Hinshaw attorney.

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