

# The Bad Faith Sentinel

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*Standing guard on developments in the law of insurance bad faith around the country*

## In New Jersey and Wisconsin, equitable doctrines bar plaintiffs from filing bad faith actions subsequent to trials on breach of contract issues

New Jersey court, relying on entire controversy doctrine, and Wisconsin court, relying on claim preclusion, hold that insureds' bad faith claims are barred by earlier suit for breach of contract. *Taddei v. State Farm Indemnity Company*, 2010 WL 183900 (N.J. Super. Ct. App. Div. Jan. 4, 2010) and *Viscusi v. Progressive Universal Insurance Company*, No. 2009AP942, 2010 WL 94024 (Wis. App. Jan. 12, 2010)

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In 2001, Taddei lost control of his vehicle and crashed into a concrete divider after he was cut off by another driver who left the scene of the accident. Because the identity of the tortfeasor was unknown, Taddei placed his own insurance carrier, State Farm, on notice of a potential uninsured motorist (UM) claim under his \$100,000 policy. After receiving treatment for a herniated disc and a shoulder injury, Taddei was examined by a physician on behalf of State Farm who determined that the treatments were necessary and appropriate. In 2003, State Farm notified Taddei that it would not "honor" his UM claim because Taddei was at fault for the accident and was barred from presenting a claim. Taddei subsequently requested a UM arbitration and suggested that State Farm consider settling his claim. The arbitration proceeding resulted in a finding that the uninsured motorist was 100 percent responsible for the accident and an award to Taddei for \$92,500 as compensation for his injuries.

In response to the arbitration award, State Farm tendered \$50,000 to Taddei, accompanied by a letter explaining that its efforts to resolve the claim through negotiation had reached an impasse. Taddei replied to State Farm's letter arguing that his case was worth "substantially more" than his \$100,000 policy limits, that the arbitration award was not excessive and that although he preferred to settle the case, he would not settle for the \$50,000 State Farm sent. Taddei then filed suit against State Farm for first-party damages, alleging that he had sustained personal injuries as a result of the negligence of the uninsured motorist. The complaint did not allege bad faith on the part of State Farm in its handling of the settlement negotiations or in its evaluation of his UM claim.

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In pretrial motions filed in 2007 Taddei mentioned, for the first time, a “potential bad faith case,” to which State Farm responded the bad faith had not been pleaded, and in any event, did not exist. Taddei did not pursue the bad faith claim during the trial. The jury returned a verdict of \$2,500,000 in damages for Taddei, but the Judge, over Taddei’s objection, molded the verdict to conform to Taddei’s UM policy limit of \$100,000. Taddei filed a notice of appeal challenging the Judge’s refusal to enter judgment against State Farm in an amount equal to the jury verdict.

While the appeal was pending, Taddei filed a second complaint against State Farm and its agents alleging bad faith. State Farm filed a motion to dismiss, which was based upon Taddei’s failure to assert the bad faith claim during the pendency of the first suit. The trial court dismissed the complaint, finding that Taddei could have and should have brought the bad faith claim in his first suit. The judge, relying on the entire controversy doctrine, held that both claims involved the same contract of insurance, the same parties and the same underlying facts and claims, and thus, dismissed the complaint.

Taddei appealed the trial court’s decision, arguing that application of the entire controversy doctrine was in error. Taddei first argued that barring his bad faith claim was unfair because the claim, for the most part, came to light during the first trial and he did not know until the jury verdict that State Farm had acted in bad faith. Taddei next argued that his claim did not ripen until the jury returned its verdict in the first suit in an amount that exceeded State Farm’s final settlement offer by more than \$2,400,000. Taddei also argued that the facts of the two suits were not interrelated and that raising the bad faith claims in the first suit would have resulted in a bifurcated trial, subverting the purpose of the entire controversy doctrine.

The Superior Court rejected each of Taddei’s arguments in turn. The court held that first, and perhaps most important, Taddei himself referred to a potential bad faith claim against State Farm in pretrial motions during the first suit. Furthermore, the alleged facts on which Taddei based his bad faith claim, that State Farm had a policy of denying valid UM claims and had wrongfully denied Taddei’s claims, were known to Taddei at the time of the filing of his first complaint. The court concluded that although Taddei might

not have known the strength of his bad faith claim until the jury returned its verdict in the first suit, he had knowledge of the underlying facts of a bad faith claim and even indicated at the beginning of the trial that he might file such a claim. As to Taddei’s argument that the facts of the two suits were not interrelated, the court held that, to the contrary, the facts in both underlying actions would include evidence concerning Taddei’s accident, liability for that accident, and Taddei’s injuries — these issues would be important both to determining the amount of Taddei’s damages (UM claim) and whether State Farm had a good faith basis for denying the claim (bad faith claim). Finally, the court explained that the purpose of the entire controversy doctrine is to avoid fragmented litigation. The court went on to hold that although the UM and bad faith claims likely would have resulted in a bifurcated trial, this result would be more efficient and therefore more consistent with that purpose, than the alternative in this case: two separate sets of pretrial discovery, two sets of pretrial motions, and two separate appeals, all concerning the same underlying facts.

The Wisconsin Court of Appeals similarly dealt with a Plaintiff’s attempt to bring a separate suit for bad faith after initially filing suit only for breach of contract. In 2006, Viscusi struck a pothole with his vehicle, causing extensive damage. Progressive paid for external damage to the car, but denied coverage for engine damage, citing policy language requiring insureds to “take reasonable steps after a loss to protect the covered vehicle. . . from further loss.” Viscusi subsequently recovered over \$4,000 in a small claims suit alleging breach of contract and Progressive appealed. Progressive then admitted coverage for the engine damage, but disputed the amount of damages. Just before trial, Viscusi’s counsel informed Progressive that he was seeking consequential damages on the theory of bad faith. During the trial, Progressive objected to trying any bad faith claim because it was not sufficiently pleaded. In response to the court’s inquiry, Viscusi’s counsel explained that he was not yet pursuing a bad faith claim. After the circuit court entered its final order setting damages, Viscusi sought to amend the complaint and add a bad faith claim and request punitive damages. When the court denied his request, Viscusi filed a new action presenting those claims. The circuit court later dismissed the new action on the basis of claim preclusion and Viscusi appealed.

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On appeal, Viscusi argued that his bad faith claim was not barred by claim preclusion because there was no identity of claims between the causes of action. Viscusi also argued that the bad faith claim was not ripe until after the conclusion of the first trial because Progressive's bad faith continued through that time. The Court of Appeals disagreed and upheld the circuit court's dismissal. First, the court held that both the breach of contract and bad faith claims flowed from the same nexus of facts: Progressive's

failure to pay policy benefits for the engine damage to Viscusi's vehicle.

The court next pointed out that the facts pertaining to Progressive's investigation and nonpayment of Viscusi's policy claim were already in existence at the time Viscusi initiated the first action. The court therefore held that the bad faith claim was barred by claim preclusion and dismissed the complaint.

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## Pennsylvania court refuses to “open the floodgates” of litigation over arbitration award that is higher than insurer's offer, but lower than insured's demand

In a standard dispute over value of a UIM claim, a Pennsylvania court holds bad faith is not demonstrated by an arbitration demand that is higher than insurer's offer to settle. *Johnson v. Progressive Insurance Company, No. 3173 EDA 2008, 2009 WL 5066780 (Pa. Super. Dec. 28, 2009)*

In 2005, Johnson was involved in an accident when another vehicle rear-ended his car. Johnson did not require immediate medical assistance, but did go to the emergency room the following day, complaining of knee and back pain. Over a year after the accident, Johnson advised Progressive that he intended to pursue his UIM coverage. Within days, Progressive acknowledged the claim. Johnson then sought permission to settle the underlying tort action against the driver of the other car and Progressive consented two days later. Just one month after the tortfeasor's claim was settled, Progressive sought documentation supporting the extent and nature of the injuries that Johnson suffered in the accident. Specifically, Progressive requested information on Johnson's wages, medical records, and his five prior automobile accidents in order to ascertain whether Johnson's physical complaints were related to those prior accidents or the 2005 incident. In response, Johnson made a demand for arbitration, did not provide any of the requested information, and then suggested that the request relating to the prior accidents was made in bad faith. In 2006, a doctor repaired Johnson's knee and issued a report opining that Johnson would suffer permanent impairment of that knee, while noting in Johnson's progress notes that the surgery was successful and that Johnson was improving. In light of these inconsistencies, Progressive

secured an independent medical examination. This IME resulted in a finding that the problems Johnson was experiencing were unrelated to the 2005 car accident.

In 2007, the case proceeded to arbitration wherein Johnson was awarded \$75,000, 25 percent less than his demand, but \$45,000 more than Progressive's settlement offer. Johnson then filed suit against Progressive, asserting claims for fraud and bad faith. Progressive filed a motion for summary judgment and the trial court concluded that there was no genuine issue of material fact and that Progressive had not exhibited bad faith in processing Johnson's UIM claim. After the court entered summary judgment in Progressive's favor, Johnson appealed.

The Superior Court held that Progressive did not act in bad faith and noted that the underlying facts involved “nothing more than a normal dispute between an insured and insurer over the value of an UIM claim.” The court then held that allowing the case to proceed “would invite a floodgate of litigation any time an arbitration award is more than an insurer's offer to settle, even though the award is substantially below the insured's demand.”

## Florida court determines that legislatively-created insurance company is a state body endowed with immunity against nearly all liability

*Citizens Property Insurance Corporation v. Garfinkel, No. 5D09-1641, 2009 WL 4874789 (Fla. App. Dec. 18, 2009)*

Garfinkel obtained a policy of windstorm insurance from Citizens covering his residence, which was subsequently damaged by multiple hurricanes in 2004. After a dispute with Citizens arose concerning the extent of damage to his residence, Garfinkel filed a two-count complaint to enforce his contract rights. The parties agreed to resolve these issues using the appraisal process and an appraisal award was eventually entered in favor of Garfinkel. When Garfinkel moved to confirm the award, he sought an amount in excess of the policy limits, asserting three distinct claims resulting from three separate occurrences. The trial court confirmed the award, but limited the amount awarded to the policy limits for a single occurrence. Garfinkel then amended his complaint, now asserting the right to final judgment on the breach of contract claim and in Count II, a bad faith claim against Citizens. Citizens moved to dismiss the bad faith claim on the basis of sovereign immunity, but the trial court denied the motion. Citizens then sought a writ of prohibition preventing the court from taking any further action with respect to the first-party bad faith claim.

The Florida legislature created Citizens in order to ensure the existence of an orderly market for property insurance, particularly windstorm insurance, within Florida. The enabling statute makes explicitly clear that Citizens is not a private insurance company, but

rather is a state body endowed with immunity against all liability and suit apart from five specific exceptions. Those exceptions are for: (1) willful torts; (2) breach of contract pertaining to insurance coverage; (3) suits with respect to issuance or payment of debt; (4) actions to enforce an assessable insurer's obligations to the corporation; and (5) breach of contract or action for benefits under a policy issued by the corporation. Citizens argued that the plain meaning of the statute permits only certain categories of suit against it, and bad faith claims are not among them. Garfinkel, referencing another section of the enabling act, asserted that the inclusion of a particular requirement that Citizens act in "good faith" suggested that the legislature fully intended to allow a policyholder to assert a bad faith claim.

The Florida court determined that because the legislature explicitly set forth five exceptions to its grant of sovereign immunity, it intended that there would be only those five exceptions and no more. In sum, the Florida court concluded that the legislature created Citizens as a state entity and made it immune from suit except for those suits of "a very particular variety." Because Garfinkel could not provide any support for an argument that Citizens waived its immunity, the court granted the writ of prohibition as to the count seeking bad faith liability.

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