

# Puerto Rico

By Kathy J. Maus

## Causes of Action

### ***Is there a statutory basis for an insured to bring a bad faith claim?***

No. “Though many jurisdictions have adopted statutes providing a cause of action against insurance companies for bad faith, Puerto Rico has no such law.” *Irizarry v. Ennia, N.V.*, 678 F. Supp. 957, 960 (D.P.R. 1988). “A person so aggrieved must proceed under the general provisions in the Civil Code concerning contract and tort law.” *Id.*; see *Oriental Fin. Group, Inc. v. Fed. Ins. Co.*, 598 F. Supp. 2d 199 (D.P.R. 2008).

### ***Can a third party bring a statutory action for bad faith?***

No. Puerto Rico does not have a bad faith statute.

### ***Is there a common law cause of action for bad faith?***

Puerto Rico courts have not yet decided whether an explicit bad faith cause of action exists under Puerto Rico law. *U.S. v. United Sur. & Indem. Co.*, No. Civ. 04-1135(HL), 2005 WL 1308919 (D.P.R. June 1, 2005); *Event Producers, Inc. v. Tyser & Co.*, 854 F. Supp. 35, 39 (D.P.R. 1993), *aff’d*, 37 F.3d 1484 (1st Cir. 1994) (where the court dismissed plaintiff’s bad faith claim, noting that “defendants’ behavior was appropriate and reasonable under the circumstances, and not at all reckless”). However, federal courts sitting in diversity have determined Puerto Rico courts would recognize such an action. *Id.*; see also *Feliciano v. United Servs. Auto. Ass’n*, 646 F.2d 695 (1st Cir. 1981) (where court found in favor of defendant insurer; plaintiff tort victims in automobile accident failed to show that defendant insurer had acted unreasonably, in bad faith, and contrary to way prudent insurer would have acted under similar circumstances); *Noble v. Corporacion Insular De Seguros*,

738 F.2d 51, 53 (1st Cir. 1984) (court acknowledged availability of separate action for wrongful refusal to pay claim in first-party context).

As mentioned above, the U.S. District Court for the District of Puerto Rico noted that “given the trend in other states and the general tendency in Puerto Rico to protect consumers, there can be a bad faith action against an insurer. The standard would be either conscious wrongdoing, reckless indifference, or the lack of a reasonable basis for denying the claim.” *Event Producers*, 854 F. Supp. at 39. Furthermore, the Supreme Court of Puerto Rico has stated that “(liability) may be imposed on the insurer if the latter unwarrantedly has refused a reasonable settlement offer to the prejudice of the insured, without it being necessary to establish with direct or circumstantial evidence that [it] acted in a dishonest or fraudulent manner.” *Morales v. Automatic Vending Service, Inc.*, 103 D.P.R. 281 (1975). Citing to its decision in *Event Producers, Inc.*, the United States District Court for the District of Puerto Rico recently noted that an insurer’s “behavior of outright withdrawing legal representation and denying coverage after more than three years—without even bothering to first secure declaratory relief in its favor—raises eyebrows.” *Zurich Am. Ins. v. Lord Elec. Co. of P.R.*, 986 F. Supp. 2d 104, 108, n.3 (D.P.R. 2013). Citing to Puerto Rico law that “makes clear that an insurer ‘must implement reasonable methods for the expeditious investigation of claims which may arise from the terms of a policy,’” the court warned the insurer it “would do well to keep these legal percepts in mind in going forward with this case.” *Id.*

### ***What cause of action exists for an excess carrier to bring a claim against a primary carrier?***

There does not appear to be any case law in Puerto

Rico that addresses any cause of action that an excess carrier can bring against a primary carrier.

**What causes of action for extracontractual liability have been recognized outside the claim handling context?**

Puerto Rico has a civil code that provides remedies against a party (not just insurers) for fraud, negligence, delay, or having acted contrary to its contractual obligations. See 31 P.R. Laws Ann. 3018. The Puerto Rico Insurance Code requires that an insurer confirm or deny coverage within a reasonable time, which can be as little as 45 days after submission of all requested documents, but never to exceed 90 days from date the claim was submitted. 26 P.R. Laws Ann. 2716a(5), (b)(1); *U.S. v. United Sur. & Indem. Co.*, No. Civ. 04-1135(HL), 2005 WL 1308919 (D.P.R. June 1, 2005).

**Damages**

**Are punitive damages available?**

No. Under Puerto Rico law, an insured cannot recover punitive damages against an insurer for any alleged bad faith in handling, adjusting or paying the insured's claim. *NPR, Inc. v. Am. Int'l Ins. Co. of P.R.*, 242 F. Supp. 2d 121, 127 (D.P.R. 2003). "Punitive damages do not exist in Puerto Rico." *Id.* (citing *Noble v. Corporacion Insular De Seguros*, 738 F.2d 51, 54 (1st Cir. 1984)).

**Are attorneys' fees recoverable?**

Yes. A Puerto Rico rule of civil procedure mandates an attorneys' fee award where losing party acts obstinately or frivolously forces the prevailing party to needlessly assume costs of litigation. See P.R. R. Civ. Pro. 44.4; *Fajardo Shopping Ctr. v. Sun Alliance Ins. Co. of P.R.*, 81 F. Supp. 2d 331 (D.P.R. 2000).

**Are consequential damages recoverable?**

Yes. See *Irizarry v. Ennia, N.V.*, 678 F. Supp. 957, 960 (D.P.R. 1988) (foreseeability standard).

**Can a plaintiff recover damages for emotional distress?**

Yes. See *Irizarry v. Ennia, N.V.*, 678 F. Supp. 957, 960 (D.P.R. 1988) (foreseeability standard).

**Elements of Proof**

**What is the legal standard required to prove bad faith in a first-party case?**

In Puerto Rico, the relevant legal standard is a conscious wrongdoing, reckless indifference, or the lack of a reasonable basis for denying the claim. See *Event Producers, Inc. v. Tyser & Co.*, 854 F. Supp. 35, 39 (D.P.R. 1993), *aff'd*, 37 F.3d 1484 (1st Cir. 1994). It is apparently necessary to plead fraud or bad faith or it is lost. *Irizarry v. Ennia, N.V.*, 678 F. Supp. 957, 960 (D.P.R. 1988); *Gonzalez Mena v. Danner Miller Coffee Co.*, 48 P.R.R. 590, 598 (1935). This is so because good faith is presumed and fraud must be pleaded with particularity. *Irizarry*, 678 F. Supp. at 960.

**What is the legal standard required to prove bad faith in a third-party failure to settle a claim?**

In the third-party context, liability may be imposed if the insurer unwarrantedly has refused a reasonable settlement offer to the prejudice of the insured. *Feliciano v. United Servs. Auto Ass'n*, 646 F.2d 695, 698 (1st Cir. 1981) (citing *Morales v. Automatic Vending Serv., Inc. & Boston Ins. Co.*, 103 D.P.R. 281 (1975)). The insured is not obligated to establish that the insurer acted in a dishonest or fraudulent manner. *Id.*

**Is there a separate legal standard that must be met to recover punitive damages?**

No, punitive damages are not recoverable at all. *NPR, Inc. v. Am. Int'l Ins. Co. of P.R.*, 242 F. Supp. 2d 121, 127 (D.P.R. 2003).

**Does a bad faith claim require evidence of a pattern or practice of unfair or deceptive conduct?**

No.

**On what issues is expert evidence required to establish bad faith?**

None.

**On what issues is expert evidence precluded?**

None.

***Is a bad faith claim viable if a coverage decision has been determined to be correct?***

It appears a bad faith claim would not be viable if a coverage decision has been determined to be correct. As stated in *Event Producers*, the elements for a bad faith action are “conscious wrongdoing, reckless indifference or the lack of a reasonable basis for denying claim.” Accordingly, where it has been determined that the insurer “conducted a reasonable investigation as expeditiously as possible,” in ultimately denying the claim, no bad faith cause would lie. *Event Producers, Inc. v. Tyser & Co.*, 854 F. Supp. 35, 41 (D.P.R. 1993), *aff’d*, 37 F.3d 1484 (1st Cir. 1994). Similarly, if an insurer correctly denied coverage for a claim, no bad faith will lie.

***Is a bad faith claim asserted in connection with a policy that provides third-party coverage viable if the plaintiff does not prevail in the underlying claim?***

No. Under Puerto Rico law, the “Puerto Rico Insurance Code specifies the nature and extent of a liability insurer’s responsibility for the damage caused by its insured.” *Tokyo Marine & Fire Ins. Co., Ltd. v. Perez*, 142 F.3d 1, 7 (1st Cir. 1998). Furthermore, “as in the case of joint tortfeasors, the liability imposed by the Insurance Code upon insurers is coextensive with that of their insured, up to the limits of the policies in question.” *Id.*; *see also* P.R. Laws Ann. tit. 26, §2003 (plaintiff can maintain action against insurer and recover from insurer after securing final judgment against insured). Accordingly, it stands to reason that any third-party bad faith claim would be premised on the plaintiff prevailing in the underlying claim.

**Practice and Procedure**

***Statute of limitations***

Under Puerto Rico law, claims for bad faith denial of a claim are subject to a fifteen-year limitations period for contracts rather than a one-year period for torts, as liability was premised on pre-existing contractual obligations. *King v. T.L. Dallas & Co., Ltd.*, 270 F. Supp. 2d 262, 270 (D.P.R. 2003); 31 Puerto Rico Laws Ann. §5294.

***Under what circumstances will bad faith claims be dismissed or stayed pending the resolution of the underlying claims?***

No court in Puerto Rico has expressly ruled that an underlying claim must be resolved before a bad faith determination can be made. Based on the projected standard for bad faith claims outlined in *Event Producers, Inc. v. Tyser & Co.*, 854 F. Supp. 35, 41 (D.P.R. 1993), *aff’d*, 37 F.3d 1484 (1st Cir. 1994) of “either conscious wrongdoing, reckless indifference, or the lack of a reasonable basis for denying claim,” and third-party action against the insurer being premised on the plaintiff prevailing in the underlying claim, it would appear a pending action would have to be resolved before a claim of bad faith could proceed. *Cf. Morales v. Automatic Vending Services, Inc.*, 3 P.R. Offic. Trans. 390 (1975) (“in those jurisdictions where the insurer is liable for the full amount of a judgment rendered in excess of the coverage when an offer of settlement is rejected, the filing of a separate action is required to claim from the insurer what the insured has paid in excess of the policy limit.” However, that court went on to hold, “[a]lthough it is true that the judge acted incorrectly in taking cognizance of the question raised in the present suit, and retarded the execution of the judgment to the prejudice of plaintiffs, nothing would be gained by remanding the case so that a new action be filed when the trial has already been held and an adjudication has been made.”).

***Under what circumstances will bad faith claims be severed for trial from the underlying claim?***

Normally the filing of a separate action is required to raise the issue of bad faith failure to settle within policy limits. *Cf. Feliciano v. United Servs. Auto Assn.*, 646 F.2d 695, 697–98 (1st Cir. 1981) (remand would serve no purpose where separate trial had been held on bad faith issue albeit under title of original complaint).

***Under what circumstances will the compensatory and punitive damages claims be bifurcated?***

Punitive damages are not recoverable.

***How does a bankruptcy petition (by either the insured or the insurer) affect the prosecution and defense of bad faith and extracontractual claims?***

No case law in Puerto Rico directly addresses the effect of a bankruptcy petition by either the insured or insurer on the prosecution or defense of bad faith and extracontractual claims.

***How does insolvency or the intervention of a state guaranty fund affect the prosecution and defense of bad faith and extracontractual claims?***

Under Puerto Rican law, the Puerto Rico Miscellaneous Insurance Warranty Association is an association, made compulsory by law, composed of all insurers authorized to transact insurance in Puerto Rico, except life, disability, and health insurance. *See Silva v. Bergman*, Civ. No. 93-1370 (JAF), 1994 WL 394862 (D.P.R. July 21, 1994). Under section 40.210 of the Puerto Rico Insurance Code, 26 L.P.R.A. §4021, upon the issuance of an order naming a liquidator to an insurer, no judicial action shall be filed against the insurer or against the liquidator.” *Silva*, 1994 WL 394862, at \*4 n.2.

**Defenses and Counterclaims**

***Is evidence regarding the reasonableness of the conduct of the insured or third-party claimant admissible?***

Yes. *See Feliciano v. United Servs. Auto Ass’n*, 646 F.2d 695, 698 (1st Cir. 1981).

***Is “advice of counsel” a recognized defense?***

Advice of counsel does not appear to be a recognized defense in the few bad faith cases reported in Puerto Rico.

***Is there a cause of action for reverse bad faith?***

No. There does not appear to be a cause of action for reverse bad faith in Puerto Rico.

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