

## *Jim's Perspective...*

### Assignment of Insured's First-Party Bad Faith Cause of Action Against Insurer

The Nebraska Supreme Court recently issued two opinions involving the question of whether a policyholder can validly assign a tort claim for first-party bad faith against an insurer. [See Millard Gutter Company v. Shelter Mutual Insurance Company, 312 Neb. 606 (2022); Millard Gutter Company v. Farm Bureau Prop. & Cas. Ins. Co., 312 Neb. 629 (2022).] In connection with a 2013 storm, Millard Gutter obtained assignments from various policyholders of Farm Bureau and Shelter who sustained damage from the storm. The assignments involved the insureds' claims for first-party property damage coverage under the policies and the assignments also involved claims for first-party bad faith against the insurers for failing to properly settle the underlying storm damage claims.

On appeal to the Supreme Court, there was no argument about assignment of the contractual claim for coverage for storm damage to property. The issue on appeal was whether a policyholder can assign his/her claim against the insurer for first-party bad faith failure to properly provide coverage for the storm losses sustained by the insureds. As you know, insurers are held to a standard of an "implied covenant of good faith and fair dealing" under insurance contracts. This standard is applied to insurers because the insurance contract is a document prepared solely by the insurer and the policyholder can either accept it, or not, but cannot change the contract. This type of contract is described by the courts as a "contract of adhesion."

In any contract between two parties, basic contract law provides that each party to the contract must act in "good faith" to follow, and comply with, the terms of the contract. In the case of an insurance contract, however, the insurer is held to a higher standard of "good faith", described as "utmost good faith." This does not reach the level of a fiduciary, but it is something more than just "good faith." It is this higher standard of conduct on the part of the insurer which forms the basis for the tort claim of bad faith.

In a civil tort case, the person filing the tort claim in court must have proper "standing" to proceed with the claim in court. In other words, if you are hurt in an auto accident, I do not have any standing to proceed with your bodily injury claim in court. You must file your own B.I. tort claim in court. Under Nebraska law, you are the "real party in interest," not me. Nebraska has a real party in interest statute which provides in part that "every action shall be prosecuted in the name of the real party in interest." The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the tort claim or a direct interest in the subject matter of the litigation. So the question in the two Millard Gutter cases is whether Millard Gutter has standing to proceed with bad faith claims of policyholders that were assigned to it.

A fundamental principle of the law of assignments is the concept that the person receiving the assignment (assignee) takes nothing more by an assignment than the person giving the assignment (assignor) had. An assignor cannot assign any rights greater than that which he/she

held. The intention of the assignor must be to transfer a present interest in a debt or fund or subject matter. In the Nebraska Supreme Court case of Millard Gutter Co. v Farm Bureau Prop. & Cas. Ins. Co., 295 Neb. 419, 889 N.W.2d 596 (2016), the Court held that in the absence of a statute to the contrary, an insured may validly assign a post-loss breach of contract claim for insurance proceeds due under a homeowner's policy. The Court also held that the assignee of such a claim has standing to bring the breach of contract claim in its own name. The Court further explained that after a loss occurs, the insurance policy is no longer an executory contract, but rather it is now a vested claim against the insurer and can be freely assigned or sold. This assignment of post-loss insurance proceeds for weather-related physical damage to insured property is different from a policyholder's assignment of his/her tort claim for first-party bad faith. With the insured's first-party bad faith tort claim, a policyholder must show both an absence of a reasonable basis for denying benefits of the insurance policy, and the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. The Court recognizes the insured's first-party bad faith claim as an intentional tort. The damages for the tort of bad faith differ too, from post-loss insurance proceeds that are due under a property insurance policy. Damages for the tort of bad faith are grounded in traditional tort damages, including damages for mental distress and economic loss. These things are specific to the policyholder.

Nebraska case law has reviewed some issues related to assignment of tort claims. In Mutual of Omaha Bank v. Kassebaum, 283 Neb. 952, 814 N.W.2d 731 (2012) the court adopted the rule that "where only the proceeds of tort litigation, and not control of the litigation, have been assigned, such assignments are valid and enforceable under Nebraska law. So Nebraska law allows a person to assign the proceeds from a personal injury action, but does not allow assignment of the right to prosecute or control the personal injury action. The Court, in the two Millard Gutter cases concluded:

As such, even assuming without deciding that the proceeds from first-party bad faith actions can be validly assigned under Nebraska law, we hold that a policyholder cannot validly assign the right to prosecute or control such an action. So, regardless of the validity for other purposes, the post-loss assignments from Shelter's [and Farm Bureau's] policyholders could not, as a matter of law, give Millard Gutter standing to prosecute the policyholders' tort actions for first-party bad faith against Shelter [and Farm Bureau].

The Court's holding that an insured cannot assign his/her first-party tort claim of insurance bad faith is the correct outcome in these cases. The tort bad faith claim includes all of the potential damages that can be recovered in any civil tort claim. This includes things which are very personal to the injured person asserting the claim, such as mental distress and economic loss. Because of that personal connection, the injured person should be required to prosecute and control the personal injury action. I think the injured policyholder could assign the proceeds from such an action, but simply cannot assign the right to file the lawsuit and control the trial in a court of law. Note too, that in 2018, the Nebraska Legislature amended the Insured Homeowners Protection Act to add specific provisions governing the validity of post-loss assignment of benefits under property and casualty insurance policies. There is nothing in these provisions related directly to the assignment of the insured's first-party bad faith claim against the insurer,

so it is not clear whether these 2018 provisions would have any impact on assignment of the insured's first-party bad faith claim. Since the assignments to Millard Gutter occurred in 2013, the 2018 law is not applicable to the Millard Gutter assignments. It should be noted too, however, that not all states have reached the same conclusion as the Nebraska Supreme Court. Pennsylvania and Florida do allow assignment of a first party tort bad faith claim against an insurer, but Alabama and North Carolina reached a conclusion similar to Nebraska. As with many things related to insurance, it can often be complicated, and that is so true with the issue of assignment of an insured's first party bad faith tort claim.

*James B Dobler*

Jim Dobler, CPCU

PIA Legislative Coordinator

Questions or Comments? Please email [jbdobler@outlook.com](mailto:jbdobler@outlook.com)

