

# Breach of Duty to Defend, Bad Faith, Bodily Injury Coverage Update

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*The e-POST*

## **Breach of Duty to Defend – Nevada**

### ***Century Surety Co. v. Andrew***

--- P.3d ---, 2018 WL 6609591 (Nev. Dec. 13, 2018)

The Supreme Court of Nevada, answering a certified question from the U.S. District Court for the District of Nevada, held that an insurer may be liable for consequential damages where it has been found to have breached its duty to defend, even where the insurer did not act in bad faith. The holding places Nevada in the minority of courts nationwide on this issue.

Century Surety Company (Century) insured Blue Streak Auto Detailing LLC (Blue Streak) under a \$1 million commercial general liability policy. Blue Streak's employee struck and injured a minor for whom Dana Andrew (Andrew) was guardian. Century denied coverage to Blue Streak on the basis that the employee was not acting within the course and scope of his employment at the time of the accident and refused to defend Blue Streak in the case brought by Andrew. A default judgment of \$18 million was entered against Blue Streak and the company agreed to assign its rights under the policy to Andrew.

The district court previously found that Century had breached its duty to defend Blue Streak, though the same was not done in bad faith. The district court judge certified the question to the Supreme Court of Nevada, asking whether Century could be liable for consequential damages where there was no bad faith. The Nevada Supreme Court held that Century could be liable for consequential damages because of its refusal to defend Blue Streak in the liability action. The Supreme Court also found that Century's liability for consequential damages did not depend upon whether Century acted in bad faith or not, but that the question of the amount of damages for which Century would be liable is fact-specific and should be determined by a jury.

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## **Bad Faith – Eleventh Circuit (Florida Law)**

### ***Moore v. GEICO Gen. Ins. Co.***

--- Fed. Appx. ---, 2018 WL 6602094 (11th Cir. Dec. 14, 2018)

The U.S. Court of Appeals for the Eleventh Circuit upheld a jury's finding on retrial that an insurer did not act in bad faith when it failed to settle with a car accident victim's family. In the underlying case, the estate of a woman killed in a road rage accident received a verdict exceeding \$4 million against Joshua Moore (Moore), a policyholder with GEICO General Insurance Company (GEICO). Because GEICO failed to settle with the victim's estate prior to the verdict, Moore sued GEICO, asserting a claim of bad faith. Moore prevailed in his initial trial, but the district court judge granted GEICO's request for a new trial after finding that unfairly prejudicial evidence had been admitted. Specifically, the judge found that Moore should not have been allowed to present evidence of the claims handling process of Peak Property & Casualty Co. (Peak), which had successfully settled the estate's claims against the other driver involved in the accident.

On retrial, the jury found that GEICO did not act in bad faith when it failed to settle the personal injury claims against Moore. Moore appealed, arguing that the new trial was unwarranted because evidence concerning Peak's claims handling process was relevant to his bad faith case. The appellate court disagreed and found that "there was a danger that jurors would rely on evidence of the manner in which Peak handled the claims against its insured to find that any other manner of claims-handling (such as the approach employed by GEICO) amounted to bad faith." On that basis, the appellate court upheld the jury's finding that GEICO did not act in bad faith when it failed to settle the personal injury claims against Moore.

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## **Bodily Injury – Fourth Circuit (West Virginia Law)**

### ***State Auto. Mut. Ins. Co. v. Allegheny Med. Servs.***

--- Fed. Appx. ---, 2018 WL 6720635 (4th Cir. Dec. 20, 2018)

The U.S. Court of Appeals for the Fourth Circuit held that State Automobile Mutual Insurance Company (State Auto) had no duty to defend former doctor, J. Jorge A. Gordinho (Gordinho) against five lawsuits filed by former female patients claiming sexual misconduct during pain management at an addiction treatment facility. State Auto refused to defend Gordinho in the patients' suits and filed a declaratory judgment action in the U.S. District Court of the Southern District of West Virginia seeking a ruling affirming its coverage denial.

The district court granted summary judgment to State Auto, in part, on the basis that the underlying complaints, while containing allegations of a variety of emotional and psychological damages, did not contain any allegations of physical manifestations of those damages. Specifically, the district court held

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that the underlying complaints did not allege "bodily injury, sickness or disease" that would satisfy the policies' definition of "bodily injury." The district court also found that the former patients' suits did not meet the policies' requirement of an accidental "occurrence," because all of the underlying allegations concern purported intentional acts by Gordinho, which are explicitly excluded from coverage.

On appeal, Gordinho argued that the district court's decision was, at the very least, premature, because the patients could conceivably amend their complaints to allege "a physical manifestation related to a psychological injury." The appellate court disagreed and affirmed the trial court's ruling and adopted its reasoning. Specifically, while the underlying complaints contained allegations of unwanted physical contact and remarks by Gordinho, none of them asserted bodily injuries as defined by the liability policies that State Auto issued to Gordinho's clinic. Accordingly, State Auto did not have a duty to defend Gordinho in the underlying actions.

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