

# Equitable Estoppel, Bad Faith Coverage Update

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## Equitable Estoppel – Tenth Circuit (Wyoming Law)

***Interstate Fire & Cas. Co. v. Apartment Mgmt. Consultants LLC***  
--- Fed. Appx. ---, 2020 WL 5049018 (10th Cir. Aug. 27, 2020)

The U.S. Court of Appeals for the Tenth Circuit upheld summary judgment in favor of Apartment Management Consultants, Inc. (AMC), holding that Interstate Fire & Casualty Co. (Interstate) owed coverage to AMC under a primary and excess policy with respect to a punitive damage award in an underlying bodily injury action. The underlying plaintiff alleged that she was living in an apartment managed by AMC when she sustained injuries from a carbon monoxide leak.

Although Interstate initially agreed to defend AMC in the action, shortly before trial, it reserved its right to rely on a punitive damages exclusion to deny any such damages that may be awarded to the underlying plaintiff. Ultimately, a jury found in favor of the underlying plaintiff and awarded \$3 million in compensatory damages and \$25.5 million in punitive damages. On appeal, the punitive damages award was reduced to \$1.95 million.

A few days before judgment was entered in the underlying action, Interstate brought a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify AMC with respect to any punitive damages award. The district court held that Interstate was equitably estopped from denying coverage because Interstate assumed AMC's defense without timely reserving its rights.

On appeal, the appellate court recognized the general rule under Wyoming law was that equitable estoppel cannot be used to expand coverage. However, the appellate court noted that an "unconditional defense of an action ... constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert the defense of noncoverage." Interstate argued that it should not be estopped from relying on the policy exclusion because AMC knew of the exclusion and, therefore, was not prejudiced from the delayed reservation of rights. The appellate court rejected this argument, reasoning that it "ignores the inherent nature of the prejudice that results from relinquishing control of the defense to the insurer. As the district court found, even if punitive damages were discussed in correspondence between Interstate and AMC, AMC did not know Interstate's intentions concerning reliance on the punitive damages exclusion."

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## Bad Faith – Pennsylvania

### ***Berg et al. v. Nationwide Mut. Ins. Co. Inc.***

--- A.3d ---, 2020 WL 5014927 (Pa. Aug. 25, 2020)

In a bad faith action stemming from the alleged mishandling of an auto accident claim, the Supreme Court of Pennsylvania rejected a request to reinstate a bad faith award of \$21 million against Nationwide Mutual Insurance Company, Inc. (Nationwide).

In 1996, the insureds Daniel and Cheryl Berg (the Bergs) were involved in an auto accident wherein their leased auto sustained significant damage. The Bergs submitted a claim to Nationwide, who contracted with an auto repair shop to repair the damage to the auto. The Bergs, however, believed that the auto should have been declared a total loss. Even after the repairs, they claimed that the auto would be unsafe in the event of a future collision because the frame of the car was permanently damaged.

This dispute prompted the Bergs to file suit against Nationwide for a variety of claims, including insurance bad faith. Nationwide initially received a directed verdict in its favor on the bad faith claim, but that ruling was reversed on a first appeal. At the retrial, Nationwide was found to have acted in bad faith and was ordered to pay \$18 million in punitive damage and an additional \$3 million in attorney fees. The Superior Court of Pennsylvania, however, reversed that verdict on the grounds that there was insufficient evidence that Nationwide pressured the repair shop, understood the extent of the damages, or acted in bad faith during litigation, and that the trial judge may have been biased against Nationwide as a large insurance company.

The Supreme Court of Pennsylvania ultimately affirmed that ruling, reasoning that there was no evidence that Nationwide was involved in the auto shop's faulty repairs. At most, according to the appellate court, Nationwide negligently entrusted the repairs to the auto shop, and mere negligence is insufficient to prove bad faith.

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