

# **A Brief Summary of Minnesota Statute § 604.18 Insurance Standard of Conduct: Minnesota's New Good Faith Law**

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### **The Common Law:**

Duty of good faith has a basis in the common law. The new Minnesota Statute does not replace the common law duty of the insurer to exercise good faith in settling claims. The new law adds to it by providing a new cause of action and consequences.

Under the common law, and insurer still has a duty to inform the insured of: the possibility of an excess verdict; the client's personal liability beyond the policy limits; the right of the insured to obtain separate and independent counsel; the consequences of an excess verdict; and information regarding all settlement demands.

This does not mean that the insured has a duty to settle all claims. The "Clear Liability Rule" provides that there is no duty (and therefore no breach of duty) where: 1) there is a reasonable belief that the insured is not liable; or 2) if the demand is unreasonably high (such that a jury would not award that amount as a verdict).

Basically, an insurer has a duty to do a reasonable investigation of the facts which will serve as a reasonable basis for the insurer's valuation.

Mere mistakes in judgment do not create a bad faith claim.

### **The New Statute:**

The new statute is being praised by both the defense bar and the plaintiff's bar as a win. It is too new to tell how the courts will interpret the law and apply it.

The new law is modeled after the standard set in a Wisconsin case: *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (1978). It is expected that Wisconsin case law will be used in the initial battles over the meaning of the new law.

The new law applies only to first party claims (insured's claim against insurer). It does not apply to third party claims.

The new law does not apply to arbitrations, so it will not apply to No-fault arbitrations regarding PIP.

The new law has a separate pleading requirement (much like a punitive damages claim). A party making a bad faith claim will need to move the court for an amended complaint to add the alleged bad faith claim. The motion will need to be supported by affidavits. It is uncertain if the insured will be able to force the deposition of the adjuster prior to this motion, and this will likely be decided on a case-by-case basis.

The burden is on the insured to prove bad faith against the insurance company. The plaintiff must establish:

1. that there was no reasonable basis for the insurance company's denying plaintiff's claim for benefits under his policy; and

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2. that the insurer, in denying the claim, either knew or recklessly failed to ascertain that the claim should have been paid.

Wisconsin jury instructions define “bad faith” on the part of an insurance company toward its insured as “the absence of honest, intelligent action or consideration of its insured’s claim.” *See* WIS JI-CIVIL 2761. Bad faith exists if the jury is able to conclude that the insurer had no reasonable basis for denying the insured’s claim. *Id.* In making their determination, the jury is instructed to consider whether plaintiff’s claim was properly investigated and whether the results of the investigation were given a reasonable evaluation and review. *Id.* If the insurer either refused to consider the insured’s claim for damages, made no investigation, or conducted its investigation in such a way as to prevent it from learning the true facts upon which the insured’s claim is based, the insurance company can be found to have exercised bad faith. This is because one can infer from those facts a reckless disregard on the part of the insurer to learn that there was no reasonable basis for it to deny the claim. *Id.*

The intent of the Minnesota law is that the judge determines (after the jury trial) if bad faith existed. In Minnesota it is not an issue for the jury to determine. But there is already talk amongst the plaintiff’s bar of trying to get evidence of bad faith in front of the jury, so defense counsel will need to be prepared to object to this tactic. This evaluation by the judge will be based on the same criteria outlined in the Wisconsin jury instructions (i.e. a consideration of the investigation conducted and the evaluation and review of that investigation by the adjuster denying the claim).

The Minnesota statute allows for the court to award the following taxable costs for a violation of the good faith statute:

1. an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or \$250,000, whichever is less;
2. reasonable attorney fees actually incurred to establish the insurer’s violation of this section.

There is a cap on both the amount of damages (\$250,000) and the amount of attorney fees (\$100,000) that the court can award.

It is expected that the word “proceeds” will be contested. It is undefined in the statute. It is expected that defense counsel will argue that proceeds means the policy limits (because the insurer should not be required to pay beyond the limits). Plaintiff’s counsel will try to set the meaning of “proceeds” as the verdict amount. It should be noted here that Wisconsin allows for the collection of awards that are in excess of the policy limits.

Time will tell how this new good faith statute will be interpreted and applied by Minnesota Courts.