Is the Litigation Privilege Headed over a Cliff? – Current State of the Litigation Privilege and Emerging Theories, Causes of Action, and other Means Employed by Policyholders to Avoid Attachment of the Litigation Privilege.

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I. Introduction

Generally, the litigation privilege provides absolute immunity to communications or statements made in the course of judicial proceedings provided they are relevant to the subject controversy. *See, Simms v. Seaman*, 308 Conn. 523, 531-35 (2013) (providing a history of the litigation privilege and absolute immunity dating back to 11th Century England); *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 22 (Tenn. 2007). The privilege is recognized by a majority of jurisdictions. *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell*, supra., 232 S.W.3d at 23. Some jurisdictions have codified the privilege. *See, Wise v. Thirty Payless, Inc.*, 83 Cal.App.4th 1296, 1302 (2000) (California Civil Code §47(b)); *State Farm Fla. Ins. Co. v. Puig*, 62 So.3d 23 (Fla. 3rd DCA 2011) (Evidence Code §90.502, Florida Statutes).

Historically, the privilege was applied to bar a claim for defamation based on statements made during judicial or quasi-judicial proceedings. *Mozzochi v. Beck*, 204 Conn. 490 (1987). However, it has been expanded to apply to other retaliatory civil claims arising from communications or action occurring the court of judicial or quasi-judicial proceedings including claims for tortious interference, intentional infliction of emotional distress, fraud, and unfair trade practices violations. *Deutsche Bank AG v. Vik*, 349 Conn. 120, 137 (2024). *See also, Edwards v. Centex Real Estate Corp.*, 53 Cal.App.4th 15, 29 (1997).

Other considerations include whether pre-litigation activities or activities outside the judicial proceeding will trigger the privilege. These considerations vary by jurisdiction. Furthermore, vexatious litigation and malicious prosecution claims will not be subject to the privilege.

II. Litigation Privilege and Insurance Claims (Bad Faith)

While the modern litigation privilege typically provides immunity to certain causes of action against lawyers, it has been applied to the defense of insurance claims. As the below cases illustrate, the litigation privilege has been used with some success to challenge claims against insurers for bad faith conduct. However, these efforts have not been free from challenge and the crafty pleading of plaintiffs' counsel.

A. Dorfman I.

In *Dorfman v. Smith*, 342 Conn. 582 (2022), the plaintiff, Tamara Dorfman ("Dorfman") was injured in motor vehicle accident after colliding with a vehicle operated by Joscelyn Smith

("Smith") who failed to stop for a stop sign. Liberty Mutual Fire Insurance Company ("Liberty") insured Dorfman under an auto policy which included uninsured/underinsured motorist coverage pursuant to Connecticut statutory requirements. Since Smith was underinsured, Dorfman made a claim for underinsured motorist coverage under the Liberty policy. Through its investigation, Liberty obtained information confirming Smith's failure to stop at the stop sign, including the police report, Dorfman's recorded statement, and the recorded statement of a witness who was not listed on the police report. Two claims specialists concluded that Smith was 100% responsible for the collision. Liberty notified Dorfman that her right to pursue her underinsured motorist claim was conditioned on her providing an affidavit of no excess insurance. Dorfman sued Liberty for breach of contract in a lawsuit that also included Smith with whom she ultimately settled for the limits of his policy. Liberty hired attorneys to represent it but "deliberately" withheld from them files notes regarding the name/existence of the witness who provided the recorded statement and who was not listed on the police report, and the recorded statement itself. In answering the complaint, Liberty pleaded either that it denied or had insufficient information to admit the allegations that Smith failed to stop at the stop sign and Dorfman's resulting injuries and asserted a special defense of contributory negligence. *Id.* at 587.

When Dorfman's counsel noticed Liberty's deposition to explore the factual basis for its answer and special defense, it moved for a protective order. Also, Liberty provided inaccurate responses to Dorfman's discovery requests that denied its knowledge of any witnesses not listed in the police report and/or the existence of any recorded statements. During the deposition, Liberty's corporate designee testified under oath that there was no basis in fact for Liberty's assertion that Dorfman was in any way responsible for the accident and that Liberty knew there was nothing Dorfman could have done to avoid the accident. Liberty's corporate designee also admitted its awareness of the existence of a witness and his recorded statement and its failure to disclose this information in its discovery responses. *Id*. at 588. Based on the foregoing, Dorfman alleged that Liberty "used intentional misstatements, intentional misrepresentations, intentionally deceptive answers, and violated established rules of conduct in litigation" and "knowingly and intentionally engaged in dishonest and sinister litigation practices by taking legal positions that were without factual support" to attempt to prevent the plaintiff from receiving benefits owed to her under the insurance policy. Liberty's corporate designee also testified that it did not single out Dorfman for special or unique treatment when it conditioned the receipt of underinsured motorist benefits on the submission of an affidavit of no excess insurance but was instead following conduct that Liberty routinely takes in handling of these types of claims. Similar testimony was provided with regard to the false discovery responses. Dorfman then sought to amend her complaint to add claims for breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and violation the Connecticut Unfair Trade Practices Act ("CUTPA") and Connecticut Unfair Insurance Practices Act ("CUIPA"). The court allowed the amendment and also allowed Liberty's motion to bifurcate the breach of contract claim from the extracontractual claims. At the trial on the breach of contract claim, Liberty withdrew its special defense, admitted liability, and the jury awarded Dorfman $169,928. *Id*. at 588-89.

Liberty then moved to dismiss the remaining claims for lack of subject matter jurisdiction arguing that the claims were barred by the litigation privilege. The trial court granted the motion as to the claims for breach of the implied covenant of good faith and fair dealing and negligent infliction of emotional distress because those claims were predicated on communications and statements during the course and related to the judicial proceeding. Accordingly, the litigation privilege applied. Also, to the extent Dorfman's CUTPA/CUIPA claim was based on the allegation of business practice of responding falsely to discovery requests, the litigation privileged applied. However, the trial court concluded to the extent Dorfman's CUTPA/CUIPA claim was based on the allegation that defendant maintained an improper business practice of conditioning receipt of underinsured motorist benefits on the providing of an affidavit of no excess insurance, in violation of Connecticut's uninsured/underinsured motorist statute, the litigation privilege did not bar that claim because the practice did not occur during judicial proceedings but instead occurred prior to the commencement of the action. Dorfman's initial appeal of the trial court's decision was dismissed for lack of a final judgment given that continued viability of the CUTPA/CUIPA claim. Accordingly, Dorfman amended her complaint to remove allegations related to violation of the uninsured/underinsured motorist statute and the trial court rendered judgment in favor of Liberty on the extracontractual claims. Dorfman then appealed to the Appellate Court and the appeal was transferred to the Supreme Court.

On appeal, Dorfman, recognizing that the litigation privilege and its absolute immunity does not apply to claims of vexatious litigation, argued her extracontractual claims were not barred because they were premised on Liberty's improper use of the courts and thus were the functional equivalent of a claim for vexatious litigation. The Court addressed each claim in turn. Dorfman's claims for breach of the implied covenant of good faith and fair dealing was based on Liberty falsely responding to the complaint, including asserting a special defense that it knew was baseless, and falsely responding to interrogatories. The Court points out that there is a distinction between attempting to impose liability in a judicial proceeding for the words used therein and attempting to impose liability on a litigant for its improper use of the judicial system. *Id*. at 596, citing *MacDermid, Inc. v. Leonetti*, 310 Conn. 616, 629 (2013). "That is to say, that it is not enough for the plaintiff to allege that the misconduct at issue constituted an improper use of the judicial system, but, rather the cause of action itself must challenge the *purpose* of the underlying litigation or litigation conduct." *Id*. at 597. The Court concluded that Dorfman's claim did not challenge the purpose of the underlying litigation but instead challenged Liberty's conduct in defending against her underinsured motorist claim. *Id*. Further, Dorfman's claim for breach of the implied covenant of good faith and fair dealing was not designed to hold an individual liable for improper use of the judicial system but instead was designed to hold an individual liable for improper conduct in fulfilling its contractual obligations. Accordingly, the court found that although Dorfman's allegations did implicate the underlying judicial proceeding, they did not challenge its purpose. *Id.* at 599. Therefore, it was not akin to a vexatious litigation claim but more akin to a claim of defamation or fraud to which the litigation privilege applied. In reaching this conclusion the Court compared the elements of Dorfman's breach of the implied duty of good faith and fair dealing with the elements of a defamation claim and the elements of a vexatious litigation claim. It found that Dorfman's claim

was based on false statements made in pleadings and other document in relation to Liberty's defense of the breach of contract claim to which the litigation privilege applied. *Id*. at 601-02. The Court rejected Dorfman's argument that her claim was not premised on false communications but misconduct in the course of litigation based upon its conclusion that the crux of her claim concerned false communications regardless of how Liberty went about making those false communications. *Id*. at 602.

Additionally, for the reasons articulated with regard to Dorfman's claim for breach of the implied covenant of good faith and fair dealing, the Court concluded that the litigation privilege applied to her negligent infliction of emotional distress claim because it was premised on communications made during and relevant to the underlying judicial proceeding. *Id*. at 612-13. Likewise, the Court found that Dorfman's CUTPA/CUIPA claim was subject to the litigation privilege because it was premised on allegations of Liberty's false responses to discovery requests.

B. Dorfman II.

While the appeal in *Dorfman I* was pending, Dorfman filed a second separate action against Liberty in which she alleged claims for common law vexatious litigation based on Liberty's pleading conduct in the underlying action against Smith, specifically the manner in which it responded to the allegations in the complaint i.e. denial or pleading lack of sufficient information to admit or deny. Dorfman alleged that Liberty refused to admit the allegations of the complaint without probable cause and with a malicious intent to vex and trouble Dorfman and force her to incur increased litigation costs. *Dorfman v. Liberty Mut. Fire Ins. Co.*, 227 Conn.App. 347, 356-57 (2024), cert. denied, 351 Conn. 907 (2025). In addition, to the common law vexatious litigation claim, Dorfman also asserted claims against Liberty for statutory vexatious litigation pursuant to Connecticut General Statute §52-568(1), and statutory vexatious litigation with malice pursuant to Connecticut General Statute §52-568(2) based upon the same allegations as the common law claim. Dorfman, in separate counts, also alleged claims for violations of CUTPA and CUIPA.

Liberty filed a motion for summary judgment that argued: (1) Dorfman's vexatious litigation claims did not differ materially from the claims that were previously dismissed based upon Liberty's entitlement to absolute immunity based upon the litigation privilege; (2) Dorfman's claims were barred by the doctrine of res judicata given the prior dismissal; (3) the claims are unfounded because Liberty had probable cause for its pleading and there was no malice; (4) Liberty relied on counsel to prepare the answer in the underlying case; and (5) the CUTPA/CUIPA claims were barred by absolute immunity under the litigation privilege as previously determined by the Supreme Court. *Id*. 361-62. The trial court granted Liberty's motion for summary judgment finding that the pleadings filed in the underlying action were filed with probable cause. *Id*. at 363. Therefore, it did not address Liberty's other arguments. Dorfman appealed.

The Appellate Court first addressed whether a claim for vexatious litigation could be based on untrue responses to the allegations in a complaint. In doing so, it examined the application of §674 of the Restatement (Second) of Torts which provides "[o]ne who takes an active part in the in the litigation, *continuation* or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claims in which the proceedings are based… ." (Emphasis in original) *Id*. at 370. The Appellate Court referred to this as the continuation theory and concluded that in Connecticut actions for vexatious litigation have been and can be based on a party's conduct in the continuation of a civil or administrative proceeding without probable cause. *Id*. at 376.

Concluding that a vexatious litigation claim could be based on the continuation of a judicial proceeding, the court turned next to the question of whether Liberty's bad faith responses in the answer to Dorfman's complaint fell within the type of conduct on which a vexatious litigation action could be premised. *Id*. at 379. On this issue, the court concluded that Connecticut case permits the assertion of a claim for vexatious litigation based upon the assertion of a counterclaim or special defense without probable cause. *Id*. at 383. The Appellate Court reach the same conclusion with respect to Dorfman's statutory claims for vexatious litigation. As indicated, claims of vexatious litigation are not subject to the litigation privilege and do not bar the claim based on absolute immunity. However, the Appellate Court concluded that Dorfman's CUTPA/CUIPA claims were barred by the doctrine of absolute immunity based on the litigation privilege because they were based on the submission of false discovery responses. *Id*. at 420. The Appellate Court noted that its ruling leaves open the possibility that other CUTPA/CUIPA claims may not be barred by the litigation privilege. *Id*. at 423.[1] Therefore, summary judgment was affirmed as to that portion of the complaint. Judgment was reversed as to the vexatious litigation counts and remanded for further proceedings. *Id.* at 425-26.

C. Bouazza v. Geico Gen. Ins. Co.

In another case stemming from a claim for underinsured motorist benefits, the Connecticut Appellate Court reversed the trial court's dismissal of plaintiff's bad faith claim basedon upon its determination that the litigation privilege did not apply to all of the allegations supporting the bad faith claim. In *Bouazza v. Geico Gen. Ins. Co.*, 230 Conn.App. 297 (2025), Saadia Bouazza ("Bouazza") was involved in a motor vehicle accident with a driver who was insured for liability coverage limits of $20,000 per person and $40,000 per accident. After settling with the at-fault driver for its Policy limits, Bouazza then sought underinsured motorist benefits under an auto policy issued by Geico General Insurance Company ("Geico"). She commenced suit with a single-count complaint seeking underinsured motorist benefits. The day prior to jury selection, Bouazza requested leave of court to file an amended complaint adding a second count alleging bad faith (breach of the implied covenant of good faith and fair dealing) which the court permitted. The court granted a motion to bifurcate the trial. The jury returned a verdict for

[1] Indeed, in 2022 Dorfman filed a third action against Liberty that asserted a claim for violation of CUIPA/CUTPA based on allegations other than its false discovery responses.

Bouazza well in excess of the Geico policy limits. Geico moved to dismiss the bad faith count based on its asserted immunity from suit under the litigation privilege. *Id*. at 300. The trial court granted the motion stating that all the allegations support the bad faith count stemmed from Geico's communications and conduct in negotiating the settlement of plaintiff's underinsured motorist claim in the course of and related to the judicial proceeding. The trial court relied on *Dorfman I* in concluding that Bouazza was not challenging the purpose of an underlying action but Geico's conduct in negotiating the settlement of the underinsured motorist claim; thus, the litigation privilege provided Geico with absolute immunity. *Id*. 300-01. Bouazza appealed the trial court's dismissal of her bad faith claim.

On appeal, Bouazza argued that her bad faith claim was based on abuse of process and exempt from the litigation privilege. She also argued that she properly raised a claim of bad faith outside the litigation privilege that was based upon allegations regarding Geico's dilatory and unscrupulous behavior in handling her claim. *Id*. at 301. Although the Appellate Court also relied on the Supreme Court's analysis in *Dorfman I*, it reached a different result than the trial court. The allegations supporting Bouazza's bad faith claim included Geico's refusal to accept plaintiff's offer of compromise, refusal to make a reasonable settlement offer despite repeated demands and Bouazza's diligent efforts to provide Geico with all the medical records, bills, reports, and other documentation requested to evaluate her claim. *Id*. at 311-12. Additional allegations supporting the bad faith claim included Geico's intentional refusal to promptly adjust Bouazza's claim, its delayed resolution of her claim, and harassing conduct in its effort to deny full liability and force Bouazza to accept an unreasonably low offer to exploit her vulnerable position, and refusal to negotiate in good faith when the policy clearly afforded coverage. *Id*. at 312-13.

The Appellate Court agreed that some of the allegations related to Geico's communications and conduct during a judicial proceeding i.e. Geico's alleged refusal to accept Bouazza's offer of compromise and its failure to make a reasonable settlement offer once litigation had commenced. *Id*.at 313. The Appellate Court concluded that these allegations challenge Geico's conduct in defending against Bouazza's claim and did not challenge the purpose of the underlying litigation. *Id*. These allegations would be subject to the litigation privilege. However, the Appellate Court disagreed with the trial court's findings that all the allegations supporting the bad faith count, involved conduct or communications made during the course of a judicial proceeding that would implicate the litigation privilege. *Id*. at 313-14. The Appellate Court recognized that the litigation privilege extended beyond statements made during the judicial proceeding to pre-litigation communications that may be directed to the goal of the judicial proceeding but it questioned whether the allegations that Geico refused to properly adjust Bouazza's claim in the same manner as it handled other claims, involved conduct during the course of the judicial proceeding. *Id*. at 314. Furthermore, the Appellate Court noted that the use of phrases such as "at all time herein" and the "aforesaid conduct" made it difficult to determine if the conduct took place prior to or as part of the judicial proceeding. *Id*. at 314-15.

Accordingly, the Appellate Court concluded that the allegations regarding Geico's refusal to adjust Bouazza's claim properly, evaluate her claim in the same manner as other claims, and its

delay and harassment did not have a connection or logical relation to the ongoing judicial proceed and therefore were not covered by the litigation privilege. *Id.* at 315. In addition, the Appellate Court found that Bouazza's claim included conduct that occurred outside the judicial proceeding that was not subject to the litigation privilege including forcing Bouazza to file suit.

III. Limitations on Application of the Litigation Privilege in the Insurance Context

Sticking with the traditional application of the litigation privilege, Wisconsin limits the litigation privilege to claims of defamation. Therefore, an insurer could not rely on the litigation privilege to object to discovery related to post litigation conduct because a bad faith claim was not sufficiently analogous to a defamation claim. *Herman v. Integrity Prop. & Cas. Ins. Co.*, 2023 U.S. Dist. LEXIS 112139 (E.D.Wisc. June 29, 2023) (insurers actions in defending a bad faith claim are not within the scope of Wisconsin's litigation privilege). Other jurisdictions also may not recognize the litigation privilege in the context of insurance disputes and bad faith claims.

Arizona courts have concluded that under certain circumstances litigation conduct will not support a claim for bad faith *See, Safety Dynamics Inc. v. Gen. Star. Indem. Co.*, 2015 U.S. Dist. LEXIS 177744 (D.Ariz. Feb. 6, 2015) (insured alleged that insurer committed bad in the arguments it made relative to its duty to defend in the coverage litigation action); *Lexington Ins. Co. v. Scott Homes Multifamily, Inc.*, 2015 U.S.Dist. LEXIS 21205 (D.Ariz. Feb. 23, 2015) (bad faith claim could not be based on arguments by insurer in a motion for summary judgment in a declaratory judgment action even where the court found those arguments unreasonable). However, the litigation privilege was held not to apply in *Tucson Airport Auth. v. Certain Underwriters at Lloyd's, London*, 186 Ariz. 45 (Ariz. Ct. App. 1996), where it was determined that the bad faith claim was not based on communications in the course of litigation but on the insurer's alleged wrongful and tortious conduct during the coverage actions.

Many jurisdictions limit the litigation privilege to statements or communications made in a judicial or quasi-judicial proceeding. Therefore, pre-litigation communication or activities or communications and activities outside the judicial proceeding will not be subject to the privilege. As a result, where the allegations supporting the cause of action include communications occurring both as part of the judicial proceeding and outside the judicial proceeding, a court is not likely to grant a motion to dismiss or motion for summary judgment. But it may be possible to keep out evidence of statements or communications that are part of the judicial proceeding.

Also, of note, is that in order for the privilege to apply, the statements or communications (and activities) at issue must relate to the litigation. *See, Capogrosso v State Farm Ins. Co.*, 2009 U.S. Dist. LEXIS 97544, *14 (D.N.J., Oct. 20, 2009).

IV. Emerging Policyholder Causes of Action Potentially Evading to the Litigation Privilege

Similar to *Dorfman I & II* and *Bouazza*, insurers can expect, particularly in those states where the litigation privilege may bar claims for bad faith based on conduct during litigation including

pre-litigation conduct, that insureds and their counsel will attempt to plead different types of causes of action in order to secure extracontractual damages and coverage for verdicts in excess of the policy limits.

While a claim for vexatious litigation will not be subject to the litigation privilege, many jurisdictions outside of Connecticut reject the notion that a claim for vexatious litigation can be based on "malicious defense." *See, Bertero v. National General Corp.*, 13 Cal.3d 43, 52 (1974) (although there is no action for malicious prosecution or vexations litigation based on litigant's defense of an action, an affirmative action by the litigant in the form of a cross-claim or counterclaim is actionable); *California Physicians' Service v. Superior Court*, 9 Cal.App.4th 1321, 1325 (1992). The court in *Coleman v. Gulf Ins. Group*, 41 Cal.3d 782, 793 (1986), refused to extend the distinction recognized in *Bertero* to a defendant's filing of an appeal. Hawaii has similarly rejected a cause of action for malicious defense against an insurer. *Young v. Allstate Ins. Co.*, 119 Haw. 403, 410 (2008). *See also, Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis.2d 56, 73 (1981). However, New Hampshire has chosen to recognize a cause of action for malicious defense. *Aranson v. Schroeder*, 140 N.H. 359 (1995).

Additionally, recent cases have seen an expansion in the type of claims and damages insureds can seek against an insurer for its conduct in handling claims and defending underlying actions. Oregon Supreme Court in *Moody v. Oregon Community Credit Union,* 371 Or. 772, 805 (2023), recognized the right of a plaintiff who sought life insurance benefits for the accidental shooting death of her husband to assert a claim for common law negligence and recover emotional distress damages based on insurance claim practices articulated in ORS §746.230 (unfair claim settlement practices). The Court seemingly cautioned that its holding is limited to the facts of the case and that its decision is not intended to make "every contracting party liable for negligent conduct that causes psychological damage" or to make every statutory violation a basis for a common law negligence claim for emotional distress damages. *Id*. at 805-06.

However, the court in *Harris v. Safeco Ins. Co.*, 2025 U.S. Dist. LEXIS 79992, *13-*15 (D Or. Apr 28, 2025), relied on *Moody* in concluding that to the extent the plaintiffs prevail on their claim under ORS §746.230(g) – defining as an unfair claim settlement practice compelling claimants to initiate litigation to recover amounts due by offering substantially less than amounts ultimately recovered – they can recover for litigation related emotional distress damages. The court acknowledged that the majority of other jurisdictions hold that litigation-related emotional distress damages are not recoverable against an insurance company. *Id.* at *11-*12. *See, e.g. Allen v. State Farm Mut. Ins. Co.*, 2018 U.S. Dist. LEXIS 48993, *22 (D. Alaska, March 26, 2018).

Neighboring Washington's courts, for many years, have maintained that litigation emotional distress is not compensable in bad faith lawsuits against the insurer. *See Richardson v. Gov't Emps. Ins. Co.,* 200 Wn. App. 705 (Wash. Ct. App. 2017), cert. denied, 190 Wn.2d 1008 (2018). Nonetheless, *Harris* court stated that Washington law was to the contrary citing *O'Neal v. State Farm Fire & Cas. Co.*, 2024 U.S. Dist. LEXIS 195064 (W.D. Wash. Oct. 25, 2024). That case involved the entry of Order on a motion in limine which precluded the plaintiff from offering

evidence of any emotional distress stemming from the adversarial nature of litigation, while it allowed a "narrow category of evidence" supporting emotional distress caused by conduct that violates the reasonable expectations and procedural rules and ethics, "if any such conduct is alleged in this case."

V. Final Thoughts

As insured and policyholder counsel seek to assert new causes of action in an effort to expand the amount of insurance coverage available and inflate their claim values, insurers need remain vigilant in challenging these claims based on the law and available arguments in the particular jurisdiction. This is not intended to be a discussion of good faith claims handling. However, asserting "standard" affirmative or special defense in every case can lead to the types of claims discussed herein when the defense is not supported by the facts. Likewise, conditioning payment of benefits on the insured's submission of documentation or other information that is not permitted under applicable legal authorities in relation to the jurisdiction can lead to extracontractual claims.