

*Fall, 2015*

## AEI CLAIMS LAW QUIZ

*(ref. Law of Contracts, Para. 1.04 and  
Good Faith Claims Handling, Para. 1.01)*

**FACTS:** Bed Bath & Beyond, Inc. (BBB) sold fire pots and gel fuel products that it purchased from Napa Home & Garden, Inc. (Napa), a wholesale distributor of those products. Napa had a contractual agreement to indemnify BBB for property damage and bodily injury claims resulting from the gel fuel products. Napa was obligated to name BBB as an additional insured on Napa's CGL policies with Allied and its umbrella policies with AMCO, which it did. BBB was also a contractual indemnitee under two CGL policies issued to Napa by AMCO.

Five individual lawsuits were filed against BBB and Napa that alleged bodily injury or property damage resulting from the use of the fire pots and gel fuel products distributed by Napa. BBB tendered the underlying suits to Napa's insurers in July of 2011, requesting they provide it with a defense and indemnification. Napa's insurers denied coverage to BBB and refused to cover any of its defense costs because the policy limits had been exhausted settling claims against Napa. On April 13, 2012 Napa's insurers filed a declaratory judgment action against BBB and its insurer seeking a declaration that they had no obligation under their policies to defend or indemnify BBB.

BBB filed a counterclaim that included an allegation the insurers committed bad faith when they failed to defend or indemnify BBB in the underlying suits. BBB argued that the insurers wrongfully exhausted the policy limits settling claims on behalf of the named insured. BBB claimed that this preference of the named insured over it, the additional insured, was in violation of Georgia's bad faith statute (O.C.G.A. § 33-4-6). The statute allowed an insured that proved its insurer acted in bad faith to recover a penalty and attorney's fees. The insurers responded by filing a motion to dismiss for failure to state a claim, arguing, among other things, that BBB lacked standing to sue for bad faith because it was not the holder of the policy.

**QUESTION:** Does an additional insured have a right to sue an insurer for bad faith despite the fact that it is not the policy holder?

**ANSWER:** Yes. In *Allied Property and Casualty Co., et al v. Bed Bath & Beyond, Inc., et al*, 2013 U.S. Dist LEXIS 14878 (D. Ga. 2013), applying Georgia law, the federal district court ruled that an insured, whether the named insured or an additional insured, is entitled to bring a bad faith claim under the state's bad faith statute.

The insurers argued that BBB could not sue under the bad faith statute because the statute uses the term “holder of the policy” exclusively, the additional insured was not the holder of the policy, and, therefore, could not sue under the bad faith statute. O.C.G.A. § 33-4-6 states:

In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer ... and all reasonable attorney’s fees for prosecution of the action against the insurer.

The court found that the cases cited by the insurers involving the issue of who is entitled to sue an insurer for bad faith differentiated between an insured and a third party but did not differentiate between a policy holder (named insured) and an additional insured. The court pointed to an earlier decision of the Georgia Supreme Court, *J. Smith Lanier & Co. v. Southeastern Forge, Inc.*, 630 SE2d 404 (Ga. 2006), in which the court said that “bad faith claims under the Georgia insurance code ... are available only as between insureds and their insurers.” The federal district court found it noteworthy that the Georgia Supreme Court used the all-inclusive word “insureds” without distinguishing between named insureds and additional insureds. The court in this case said that it is clear that BBB is an insured and, as such, is entitled to sue for bad faith under the statute.

The court went on to say that its holding is consistent with case law that recognizes that, generally, an additional insured has the same benefits under an insurance policy as the named insured.

The *Allied Property and Casualty* case continued through the courts on other issues, but the district court’s holding that BBB had a right to pursue a statutory bad faith action was not contested. Ultimately it was held that BBB was entitled to reimbursement of a portion of its defense costs incurred prior to exhaustion of the policy limits but that because the Napa insurers had a reasonable basis to dispute coverage, BBB was not entitled to recover bad faith penalties. The related cases are *Allied Property and Casualty v. Bed Bath & Beyond*, 2014 U.S. Dist. LEXIS 42977 and 2014 U.S. Dist LEXIS 156062.

The specific language considered by the court is unique to the Georgia statute. Nonetheless, other court decisions have held that an additional insured has a right to sue for bad faith. They include:

<b>Alaska</b>	<i>Ennen v. Integon Indemnity Corp.</i> , 268 P3d 277 (Alaska 2012)
<b>Arizona</b>	<i>Nahom v. Blue Cross &amp; Blue Shield of Arizona</i> , 885 P2d 1113 (Ariz. App. 1994)
<b>California</b>	<i>Cancino v. Farmers Insurance Group</i> , 80 Cal. App. 3d (Cal. App. 1978)
<b>Hawaii</b>	<i>Donaldson v. Liberty Mutual</i> , 947 F. Supp. 429 (D. Haw. 1996) (applying Hawaii law)
<b>Indiana</b>	<i>Donald v. Liberty Mutual</i> , 18 F3d 474 (7th Cir. 1994) (applying Indiana law)
<b>New Mexico</b>	<i>Hendren v. Allstate</i> , 672 P2d 1137 (N.M. App. 1983)
<b>Washington</b>	<i>Escalante v. Sentry Insurance</i> , 743 P2d 832 (Wash. App. 1987)