



COLORADO COURT OF APPEALS CLARIFIES WHEN INSUREDS MAY ASSIGN CLAIMS AGAINST INSURERS



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Colorado has long recognized an insured's right to protect him or herself by assigning their claims against insurers when the insurer refuses to defend or settle a third-party claim. The parameters of exactly when an insured may enter into an assignment (referred to as Nunn agreements), and what defenses may be available to the insurer, are uncertain. The Court of Appeals decision in *State Farm Mutual Automobile Insurance Company v. Goddard* offers both insurers and insureds some guidance. 2021COA15 (Feb. 11, 2021).

The case arose out of an auto accident in which Ms. Goddard and two others were injured. The driver, Mr. Griggs, was insured under an auto policy issued by State Farm. The policy afforded \$25,000 per person, \$50,000 aggregate limits.

Goddard and the two others all asserted claims against Griggs. Prior to litigation, Goddard's counsel sent State Farm a letter with a time-limited demand for the policy's limits; the letter documented \$2,410 in medical expenses, noting that the hospital charges remained pending, and claiming loss of income of \$141.60. The demand did not claim any future medical care was needed. The demand imposed a time limit for acceptance. Prior to the deadline, State Farm offered \$5,000; Goddard did not respond to the offer. She later provided documentation of additional treatment, including neurological evaluation and psychotherapy. At that point, State Farm had settled the other two claims and offered her the remaining limits of \$18,500. Again, Goddard did not respond to the offer but pursued litigation against Griggs.

State Farm defended Griggs. Goddard informed Griggs that she was not willing to settle for the remaining limits but offered to enter into a Nunn agreement. She later amended her complaint to add a claim for punitive damages and some months after that the parties entered into a Nunn agreement whereby Griggs admitted liability for the accident, agreed to arbitrate Goddard's damages, and assigned all contract and extracontractual claims he had against State Farm to Goddard. Goddard agreed not to execute or enforce the judgment against Griggs' assets. State Farm did not consent to the agreement. The parties then arbitrated the damages and State Farm continued to provide Griggs a defense; the arbitration award was for \$837,193.36.

After the arbitration award was entered State Farm filed a declaratory

judgment action asserting that Griggs breached the policy by, among other things, entering into the Nunn agreement. Goddard, as assignee, counterclaimed and asserted a bad faith claim against State Farm for failure to settle within the policy limits. The case was tried and the jury found in favor of State Farm, determining that Griggs breached the contract and that Goddard failed to prove State Farm acted in bad faith.

The *Goddard* decision clarifies when an insured may enter into an enforceable Nunn agreement. The decision rejects the proposition that such agreements can never, as a matter of law, constitute a breach of the insured's duties under the policy. The decision also explains that each of these issues entail fact questions for juries to decide.

The decision clarifies that "before an insured is justified in stipulating to a judgment and assigning its claims against the insurer to a third-party claimant, it must first appear that the insurer has unreasonably refused to defend the insured or to settle the claim within policy limits." The court distinguished this standard - when an insured may enter into an assignment - from when such an agreement is enforceable against the insurer. Colorado law requires a finding that the insurer acted in bad faith before such agreements are enforceable against it as the measure of damages for its bad faith. But the court held this was too harsh a standard to impose on insureds when entering a Nunn agreement; insureds need only establish that the insurer *appeared* to act unreasonably in denying a defense or rejecting a policy limits demand. The court observed that "it is conceivable that an insurer may appear to have acted unreasonably in rejecting a policy-limits offer, but not actually acted unreasonably in settling the claim. Under that scenario, the insured would not have breached the insurance contract and the insurer would not have acted in bad faith."

Goddard urged that, because the Colorado Supreme Court expressly recognizes insureds may protect themselves by utilizing such assignments, entry into such an agreement can never, as a matter of law, constitute a breach of the insured's duties under an insurance policy. The court rejected this proposition emphasizing that Griggs was entitled to enter into the assignment only if it appeared State Farm unreasonably rejected the offer. Whether State Farm's actions were reasonable, and whether it appeared that its actions were unreasonable, were fact questions for the jury. The court upheld the jury's verdict that Griggs breached the policy.

If you would like further details of the case and its implications, please contact: Lisa F. Mickley, mickleyl@hallevans.com, 303.628.3325, or Stephanie A. Montague, montagues@hallevans.com, 303.628.3494.