

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

FILED  
U.S. DISTRICT COURT  
INDIANAPOLIS DIVISION

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SOUTHERN DISTRICT  
OF INDIANA  
LAURA A. BRIGGS  
CLERK

JIM ATTERHOLT, INSURANCE )  
COMMISSIONER OF THE STATE OF )  
INDIANA, in his capacity as the Liquidator of )  
the Indiana Construction Industry Trust, as )  
assignee of the claims of Frederick Dennerline, )  
III and Fillenwarth Dennerline Groth & Towe, )

**JURY TRIAL DEMANDED**

Plaintiff,

vs.

PRONATIONAL INSURANCE COMPANY, )  
a wholly owned subsidiary of )  
PROASSURANCE CORPORATION, )

Defendant. )

**1 : 08-cv-0834-DFH-JMS**

**COMPLAINT**

Plaintiff, Jim Atterholt, the Insurance Commissioner of the State of Indiana, in his capacity as the Liquidator of the Indiana Construction Industry Trust, for his complaint against the Defendant, ProNational Insurance Company, a wholly-owned subsidiary of ProAssurance Corporation, alleges as follows:

**PARTIES**

1. Plaintiff, Jim Atterholt, is the Commissioner of the Indiana Department of Insurance, and brings this action in his statutory capacity as the duly appointed Liquidator of the Indiana Construction Industry Trust, through the Special Deputy Liquidator, Indiana Insolvency, Inc. (hereinafter referred to as the "Liquidator"), pursuant to Indiana Code 27-9-3-9(b)(6), (12), (13) and (19) and the orders of the Marion Circuit Court in the liquidation proceedings of the Indiana Construction Industry Trust (hereinafter referred to at times as "ICIT") and as the assignee of claims of Frederick Dennerline, III and Fillenwarth Dennerline Groth & Towe

(hereinafter referred to at times as “Dennerline”) against Defendant ProNational Insurance Company, a wholly-owned subsidiary of ProAssurance Corporation.

2. Defendant ProNational Insurance Company, a wholly-owned subsidiary of ProAssurance Corporation (hereinafter referred to as “ProNational”), is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business in the State of Alabama, which does business in the State of Indiana.

### **JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because complete diversity exists among the parties and the amount in controversy exceeds the sum of \$75,000.00.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

### **FACTS**

5. Frederick Dennerline, III, a partner in the law firm of Fillenwarth Dennerline Groth & Towe, served as outside counsel to ICIT from 1998 to the time that ICIT was placed into liquidation by the Indiana Department of Insurance in 2002.

6. At all relevant times, Fillenwarth Dennerline Groth & Towe was a general partnership, and the individual partners of the law firm—including Frederick Dennerline, III, William Groth, Fred Towe, and Neil Gath—are personally liable for the debts and liabilities of that partnership.

7. ProNational issued a professional negligence insurance policy to Dennerline under Policy Number INL00016690-03, which provided malpractice insurance coverage to Dennerline

in the sum of \$1,000,000 (the "Insurance Policy"), a copy of which is attached hereto as Exhibit "A." The Insurance Policy further provides that the costs of defense are deducted from the Insurance Policy's \$1,000,000 in available coverage.

8. In March, 2003, the Liquidator sued Dennerline for legal malpractice in an action in the liquidation proceedings of ICIT in the Marion Circuit Court in which the Liquidator alleged that Dennerline breached the standard of care through various acts and omissions in representing and advising ICIT prior to the liquidation, and that such professional negligence caused ICIT to become insolvent and resulted in unpaid claims for health care benefits in the amount of \$17,991,043 (the "Malpractice Action").

9. ProNational undertook the defense of Dennerline pursuant to the Insurance Policy, and retained counsel to represent Dennerline in the Malpractice Action.

10. The Liquidator also sued more than 80 defendants other than Dennerline who participated in the management, operations, or sales of ICIT prior to its liquidation. After commencing discovery, the Liquidator entered into settlement negotiations with all defendants in the liquidation, and resolved all of the claims brought against the other defendants prior to trial, with the exception of the claims against Dennerline.

11. The evidence supporting the claims against Dennerline was overwhelming, and included, among other things, Dennerline's admissions that Dennerline failed to advise the Trustees of ICIT: (a) that Article 14.01 of the ICIT trust agreement provided that the trust "shall terminate" if the trust was insolvent; (b) that Indiana Code § 27-1-34-7 required ICIT to notify the Department of Insurance if it was in "imminent danger" of insolvency; (c) that ICIT's September 30, 2001, balance sheet indicated that ICIT was at least \$700,000 under water and

therefore insolvent, which triggered the application of the termination provision in Article 14.01 of ICIT's trust agreement as well as the reporting requirement of IC 27-1-34-7; and (d) ICIT's December 31, 2001, balance sheet listed "Precious Stones" as an asset of ICIT valued at \$2,932,811—which Dennerline knew was inappropriate—indicating that ICIT was millions of dollars under water and therefore insolvent, which again triggered the application of the termination provision in Article 14.01 of ICIT's trust agreement as well as the reporting requirement of IC 27-1-34-7.

12. The Liquidator made repeated settlement demands prior to trial, but ProNational refused to offer the policy limits to settle the Malpractice Action, and ProNational instead insisted upon continuing to litigate, thereby further reducing the available coverage under the Insurance Policy.

13. Prior to the trial in the Malpractice Action, three separate mediations took place in which the Liquidator sought to resolve the claims against Dennerline.

14. Despite repeated requests from the Liquidator, from Dennerline, and from Dennerline's counsel, ProNational failed and refused to offer the limits of coverage available under the Insurance Policy to settle the claims against Dennerline. Upon information and belief, ProNational knew—from its own investigation, from its own expert witness, and from Dennerline's private counsel—that Dennerline's exposure to liability and damages in the Malpractice Action was virtually certain and vastly exceeded the amount of coverage available under the Insurance Policy, thereby placing Dennerline's personal assets at risk.

15. Prior to the trial in the Malpractice Action, Dennerline filed suit against ProNational in state court alleging, among other things, that ProNational's failure and refusal to

offer the limits of the Insurance Policy to settle the Malpractice Action constituted bad faith and a breach of its duty to Dennerline (the "First Bad Faith Action"). A copy of the Complaint filed in the First Bad Faith Action is attached hereto as Exhibit "B." The First Bad Faith Action was removed to this Court based upon diversity jurisdiction.

16. The record in the First Bad Faith Action demonstrates ProNational's bad faith in failing to make appropriate offers of settlement and by failing to offer the policy limits to settle the Malpractice Action.

17. Upon information and belief, the counsel retained by ProNational to represent Dennerline in the Malpractice Action advised ProNational to settle the claims against Dennerline by offering the proceeds of the Insurance Policy to the Liquidator.

18. On April 17, 2006, the Honorable Larry J. McKinney dismissed the First Bad Faith Action without prejudice on the grounds that the claims against ProNational would become ripe only after the entry of a judgment against Dennerline in the Malpractice Action in an amount in excess of the policy limits. In a subsequent entry denying Dennerline's request to reconsider the dismissal of the First Bad Faith Action, Judge McKinney emphasized that the Court expressed no views as to the merits of the bad faith claim, and its dismissal was without prejudice:

The Court's decision that this case is not ripe should not be taken as condoning any behavior that ProNational allegedly has undertaken or a suggestion that ProNational acted in good faith; the Lawyers may yet have a case against ProNational, and this is the reason the dismissal was without prejudice.

Order on Plaintiffs' Motion to Reconsider, entered on May 16, 2006 in *Frederick Dennerline, et al v. ProNational Insurance Company*, Case No. 105-cv-LJM-WTL, a copy of which is attached hereto as Exhibit "C."

19. The Malpractice Action was tried to a jury in the Circuit Court of Marion County, commencing on August 21, 2006.

20. On August 28, 2006, the jury returned a verdict against Dennerline and in favor of the Liquidator in the sum of \$17,991,043, and the Marion Circuit Court entered judgment in that amount against Dennerline on August 29, 2006. A copy of the judgment entered in the Malpractice Action is attached hereto as Exhibit "D."

21. On May 16, 2008, the Indiana Court of Appeals issued an opinion affirming the jury's verdict in the Malpractice Action "in all respects." Including post judgment interest at the rate of 8% per annum, the judgment against Dennerline as of the date of the filing of this complaint is in the amount of \$20,593,581.40 Interest continues to accrue on the judgment in the amount of \$3,943.24 per day.

22. Dennerline has assigned to the Liquidator the claims against ProNational that are the subject of this action.

**COUNT ONE**  
**BREACH OF CONTRACT**

23. Plaintiff incorporates the allegations set forth in paragraphs 1-22 of this Complaint as if fully set forth herein.

24. Under the Insurance Policy, ProNational obligated itself to pay on behalf of Dennerline all sums up to its policy limits that Dennerline owed as damages for the claims asserted in the Malpractice Action.

25. ProNational breached its obligation to pay the claims against Dennerline in the Malpractice Action by its unwarranted refusal to offer to pay the limits of the Insurance Policy when offered the opportunity to do so.

26. ProNational's breach of its obligations caused actual harm and damages to Dennerline and to the Liquidator in the amount of the Judgment, plus accrued interest.

WHEREFORE, the Liquidator respectfully prays for the entry of judgment against ProNational in an amount sufficient to provide compensation for the damages arising from the claims raised in this Complaint, together with interest, the costs of this action, and such other relief as may be proper.

**COUNT TWO**  
**BAD FAITH**

27. Plaintiff incorporates the allegations set forth in paragraphs 1-26 of this Complaint as if fully set forth herein.

28. ProNational breached its duty of good faith and fair dealing and further acted in bad faith and in ill will by its intentional and unfounded refusal to pay the limits of the Insurance Policy to settle the Malpractice Action as repeatedly requested by Dennerline and as recommended by attorneys retained by ProNational, particularly because ProNational knew that Dennerline's exposure in the Malpractice Action vastly exceeded the amount of coverage provided by the Insurance Policy, and that Dennerline's personal assets were at risk.

29. ProNational's breach of its duty of good faith and fair dealing and its bad faith in handling this matter caused actual harm to Dennerline and to the Liquidator in the amount of the Judgment, plus accrued interest.

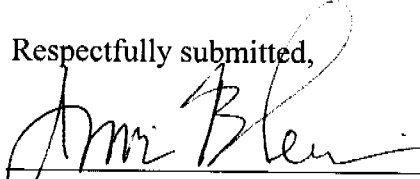
30. ProNational acted in a malicious, willful, oppressive, and unfounded manner in failing and refusing to offer to settle the Malpractice Action by paying the limits of the coverage under the Insurance Policy, such that an award of punitive damages is necessary to deter

ProNational from breaching its legal duties in such manner in the future.

WHEREFORE, the Liquidator respectfully prays for the entry of judgment against ProNational in an amount sufficient to provide compensation for the damages arising from the claims raised in this Complaint and, in addition to such compensation, an award of punitive damages not to exceed three times the amount of the compensatory damages as provided by Indiana law in order to deter ProNational from engaging in such misconduct in the future, and attorneys' fees and costs to the extent provided by law, together with interest, and such other relief as may be proper.

Dated: June 19, 2008

Respectfully submitted,



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