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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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UNITED HERITAGE PROPERTY AND
CASUALTY COMPANY, an Idaho
corporation,

Plaintiff,

v.

FARMERS ALLIANCE MUTUAL
INSURANCE COMPANY, a foreign
corporation,

Defendant.

NO. CIV. 1:10-456 WBS

MEMORANDUM AND ORDER RE:
MOTION TO AMEND COMPLAINT TO
ADD A CLAIM FOR PUNITIVE
DAMAGES

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Plaintiff United Heritage Property and Casualty Company
("United Heritage") brought this action against defendant Farmers
Alliance Mutual Insurance Company ("FAMI"), arising out of FAMI's
refusal to accept United Heritage's tender of an insurance-
related suit. Presently before the court is United Heritage's
motion to amend the Complaint to add a claim for punitive damages
pursuant to Idaho Code section 6-1604(2). (Docket No. 75.)

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1 I. Factual and Procedural Background

2 On April 10, 2003, the minor daughter of Connie and
3 Fabricio Zarate fell into a stairwell and suffered injuries at an
4 apartment leased to the Zarates by the owners, the Beddes family
5 and their partnership ("Beddes defendants"). (Compl. ¶¶ 8, 10
6 (Docket No. 1).) The Beddes defendants were insured by FAMI (the
7 "Beddes' policy"). (Id. ¶ 12.) At the time of the accident, the
8 apartment was managed by Blair Dance, the Managing Member of
9 Rentmaster, under a Property Management Agreement with the Beddes
10 defendants. (Id. ¶ 9.)

11 Unbeknownst to Rentmaster, the Beddes' policy defines a
12 covered insured as including, "[a]ny person (other than your
13 'employee'), or any organization while acting as your real estate
14 manager," (Thomson Aff. Ex. A at 9), which would include
15 Rentmaster. United Heritage claims that the evidence proves that
16 FAMI knew from the outset that Rentmaster was insured under the
17 Beddes' policy.

18 On December 4, 2003, FAMI received a General Liability
19 Loss Notice from its agent that identified Blair Dance as the
20 property manager for the property. (Id. Ex. B.) The demand
21 letter from the Zarates' attorney also notified FAMI that: "We
22 understand that you employed Blair Dance as manager and rental
23 liason for the apartments that the Zarate's [sic] live in when
24 the accident occurred." (Id. Ex. C.) Additionally, in the
25 liability report to its re-insurer dated March 9, 2004, FAMI
26 indicated that the insureds were: "David Leroy Beddes property
27 owner Blain [sic] Dance property manager." (Id. Ex. G.)
28 Defendant's casualty claim manager, Sandra Baldwin, stated during

1 her deposition testimony that it was her understanding, based on
2 the liability report, that FAMI had identified Blair Dance, the
3 Managing Member of Rentmaster, as an insured on the policy as
4 early as March 9, 2004. (Id. Ex. BB at 111.)

5 United Heritage claims that two weeks after FAMI
6 identified Rentmaster as an insured under the policy, FAMI had
7 the opportunity to settle the Zarate claim for \$125,000. (Id.
8 Ex. H.) United Heritage alleges that Rentmaster was not given
9 the opportunity to join the settlement discussions or to provide
10 input. (Id. Ex. BB at 88-89.) United Heritage further claims
11 that defendant's claim representative, Alice Lloyd, waited two
12 weeks before requesting authority to settle the claim and only
13 requested \$75,000. (Id. Ex. D, FAMI 0317.) United Heritage
14 argues that defendant therefore lost the opportunity to settle
15 the Zarate matter for less than one-half of the \$300,000 policy
16 limit. (Mot. to Amend at 8.)

17 On January 7, 2005, defendant's claim representative
18 sent the claim file to attorney John Bailey "to assess damages
19 and negligence." (Thomson Aff. Ex. D, FAMI 0319.) Bailey later
20 became the retained counsel for the Beddeses and communicated a
21 \$300,000 settlement offer to the Zarates' counsel on July 8,
22 2005. (Id. Ex. I.) Bailey did not include Rentmaster as a
23 releasee in his initial draft of the settlement papers, however
24 Lloyd insisted that Rentmaster be included as a releasee. (Id.
25 Ex. D, FAMI 0321.) The Zarates' counsel refused to settle if
26 Rentmaster was included as a releasee and FAMI allowed Rentmaster
27 to be removed from the agreement. (Id. Exs. J, K.) FAMI agreed
28 to add language expressly preserving any and all of Zarates'

1 claims against Rentmaster:

2 This release is not intended to release any other
3 tortfeasor . . . and is specifically intended to exclude
4 and does hereby exclude Rentmaster of Rexburg, any of its
5 owners, or assigns as possible tortfeasor in this matter
6 of Releasors. Such claims are specifically reserved and
7 are not compromised or released by his [sic] document.

8 (Id. Ex. K.)

9 Following FAMI's settlement of the Zarate claims, FAMI
10 provided an update on the case to its re-insurer stating that:

11 Sorry this is so late in response. The insured is the
12 owner of the property. We went ahead and settled the
13 insured out of the claim to protect his interests. The
14 other party is the property manager actually all I
15 believe they do is collect rent. Their company called me
16 and advised me they are not going to settle this case
17 they will force litigation. They did not mention a
18 tender of defense or indemnification. Anyway. With the
19 insured out of the case the rent collector has an empty
20 chair if they are forced into litigation. The plaintiff
21 really has blown their case by settling with us and not
22 everyone together.

23 I don't know if we will be called upon to defend but we
24 I [sic] tried to include them in the settlement. We
25 couldn't let the insured be exposed to litigation if we
26 could avoid it.

27 (Id. Ex. N.)

28 United Heritage also alleges that FAMI actively
concealed the terms of the Beddes' policy to prevent Rentmaster
from learning that it was an insured under the policy. (Mot. to
Amend at 12.) The Zarates' counsel requested a copy of the
policy in February 2004, (Thomson Aff. Ex. E), but was only
provided with the portion of the policy addressing medical
payment coverage, (id. Ex. F). After the Zarates sued Rentmaster
and Rentmaster filed a third-party complaint against the Beddes
defendants, Rentmaster's counsel subpoenaed Mr. Beddes and
demanded that he bring a copy of the Beddes' policy to his

1 deposition. (Id. Ex. P.) Neither Mr. Beddes nor his counsel,
2 Bailey, produced a copy of the Beddes' policy. (Id. Ex. Q.) On
3 April 15, 2008, the Beddeses, through Bailey, served answers and
4 responses to Rentmaster's written discovery in the underlying
5 litigation. (Id. Ex. R.) On June 2, 2008, Rentmaster's counsel
6 sent Bailey a meet-and-confer letter requesting supplementation
7 of the requested insurance information. (Id. Ex. S.) Rentmaster
8 finally received a copy of the Beddes' policy when a mediator
9 received a copy in May 2010. (Mot. to Amend at 13.)

10 Rentmaster, which had an insurance policy with United
11 Heritage, had previously tendered the defense and indemnity of
12 the Zarate litigation to United Heritage, and United Heritage
13 accepted. (Compl. ¶¶ 20-21.) After reviewing the Beddes' policy
14 and discovering Rentmaster's status as an insured, both
15 Rentmaster and United Heritage tendered the duty to defend and
16 indemnify the Zarate claim to FAMI. (Thomson Aff. Exs. V, W.)
17 United Heritage claims that FAMI never accepted the tenders in
18 writing. (Mot. to Amend at 14.) United Heritage further claims
19 that FAMI refused to retain Rentmaster's long-time counsel, and
20 instead offered the services of Bailey, who was currently
21 representing the Beddeses. (Thomson Aff. Ex. X.) Instead of
22 accepting Bailey's services, Rentmaster continued to incur costs
23 and fees with its own counsel because it feared that Bailey's
24 representation of the Beddeses was a conflict of interest. (Mot.
25 to Amend at 14.)

26 Several months after United Heritage and Rentmaster
27 tendered to FAMI, FAMI retained Donald Carey on behalf of
28 Rentmaster to monitor the minor's compromise proceeding in the

1 Zarate action. (Thomson Aff. Ex. Z.) United Heritage alleges
2 that Carey's role was to protect FAMI's or the Beddeses'
3 interests in the proceeding, and not those of Rentmaster. (Mot.
4 to Amend at 14-15.) Rentmaster and United Heritage eventually
5 settled with the Zarates for \$500,000. Upon receipt of
6 Rentmaster's unredacted legal bills, FAMI did not reimburse any
7 of Rentmaster's defense costs for over four months, nor did it
8 reimburse any expenses incurred prior to April 2007. (Reply to
9 Mot. to Amend at 24-25.)

10 Rentmaster assigned all of its claims against FAMI to
11 United Heritage, which filed this lawsuit against FAMI alleging
12 claims for subrogation, breach of duty to defend, breach of duty
13 to indemnify, bad faith, intentional infliction of emotional
14 distress, fraud, unjust enrichment, and declaratory judgment.

15 II. Discussion

16 A. Standard of Review

17 "Punitive damages are not favored in the law and should
18 be awarded in only the most unusual and compelling
19 circumstances." Seiniger Law Office, P.A. v. N. Pac. Ins. Co.,
20 145 Idaho 241, 249 (2008). The decision to allow a plaintiff to
21 amend a complaint to allege punitive damages rests in the sound
22 discretion of the trial court. See Saint Alphonsus Diversified
23 Care, Inc. v. MRI Assocs., LLP, 148 Idaho 479, 499 (2009); see
24 also Garnett v. Transamerica Ins. Servs., 118 Idaho 769, 781
25 (1990) (holding that the abuse-of-discretion standard "is
26 essentially a substantial evidence standard").

27 Punitive damages are governed by Idaho Code section 6-
28 1604(2), which states in part,

1 In all civil actions in which punitive damages are
2 permitted, no claim for damages shall be filed containing
3 a prayer for relief seeking punitive damages. However, a
4 party may, pursuant to a pretrial motion and after
5 hearing before the court, amend the pleadings to include
6 a prayer for relief seeking punitive damages. The court
shall allow the motion to amend the pleadings if, after
weighing the evidence presented, the court concludes
that, the moving party has established at such hearing a
reasonable likelihood of proving facts at trial
sufficient to support an award of punitive damages.

7 Idaho Code Ann. § 6-1604(2). A party seeking punitive damages at
8 trial "must prove, by clear and convincing evidence, oppressive,
9 fraudulent, malicious or outrageous conduct by the party against
10 whom the claim for punitive damages is asserted." Id. § 6-
11 1604(1). A plaintiff must therefore "establish a reasonable
12 likelihood she could prove by [clear and convincing evidence]¹
13 that [the defendant] acted oppressively, fraudulently, wantonly,
14 maliciously or outrageously." Vendelin v. Costco Wholesale
15 Corp., 140 Idaho 416, 423 (2004).

16 In Cheney v. Palos Verdes Investment Corp., 104 Idaho
17 897 (1983), the Idaho Supreme Court described the circumstances
18 necessary to justify punitive damages:

19 An award of punitive damages will be sustained on appeal
20 only when it is shown that the defendant acted in a
21 manner that was "an extreme deviation from reasonable
22 standards of conduct, and that the act was preformed by
23 the defendant with an understanding of or disregard for
24 its likely consequences." The justification for punitive
damages must be that the defendant acted with an
extremely harmful state of mind, whether that be termed
"malice, oppression, fraud or gross negligence"; "malice,
oppression, wantonness"; or simply "deliberate or
willful."

26 ¹ The applicable burden of proof that plaintiffs must
27 show for punitive damages under Idaho Code section 6-1604(1) was
28 amended in 2003. The amendment replaced the "preponderance of
the evidence" standard with the "clear and convincing evidence"
standard. Vendelin, 140 Idaho at 423 n.1.

1 Cheney, 104 Idaho at 905 (quoting Hatfield v. Max Rouse & Sons
2 Nw., 100 Idaho 840, 851 (1980) (abrogated on other grounds
3 recognized by Brown v. Matthews Mortuary, Inc., 118 Idaho 830,
4 834 n.3 (1990))). Punitive damages may not be awarded based on
5 simple negligence, Inland Grp. of Companies, Inc. v. Providence
6 Wash. Ins. Co., 133 Idaho 249, 259 (1999), but instead depend on
7 "whether the plaintiff is able to establish the requisite
8 intersection of two factors: a bad act and a bad state of mind."
9 Hall v. Farmers Alliance Mut. Ins. Co., 145 Idaho 313, 319
10 (2008).

11 B. Assignment of Punitive Damages Claim

12 In cases involving the assignment of causes of action,
13 Idaho generally follows a policy of free transferability. See
14 Purco Fleet Servs., Inc. v. Idaho State Dept. of Finance, 140
15 Idaho 121, 126 (2004). "When an insured assigns rights to
16 recover under an insurance policy, the assignee is in the same
17 position as the insured and takes only those rights and remedies
18 the insured had." Hartman v. United Heritage Prop. & Cas. Co.,
19 141 Idaho 193, 198 (2005). Defendant argues that Rentmaster's
20 claim for punitive damages cannot be assigned to United Heritage.
21 The Idaho courts have not squarely addressed the issue of the
22 assignability of punitive damages. The absence of Idaho
23 precedent leads this court to consider the assignability of
24 punitive damages in other states and the underlying purpose of
25 punitive damages in Idaho.

26 Defendant relies on the California Supreme Court
27 decision in Murphy v. Allstate Insurance Co., 17 Cal. 3d 937
28 (1976), for the proposition that punitive damages are not

1 assignable in California. (Opp'n to Mot. to Amend at 6.)
2 Defendant has taken the California Supreme Court's holding out of
3 context. The court first determined that the damages stemming
4 from the plaintiff's claim that the insurer violated its duty to
5 settle arose from the personal tort aspect of the bad faith cause
6 of action. Murphy, 17 Cal. 3d at 942. The court then noted
7 that, because the bad faith cause of action was a personal tort,
8 the underlying cause of action was not assignable. Id. The
9 court concluded that damages for emotional distress or punitive
10 damages based on the claim were not assignable because the cause
11 of action was not assignable. Id. The court's decision does not
12 stand for the general principle that punitive damages may not be
13 assigned under any circumstance.

14 This court is aware of several cases applying
15 California law that have cited Murphy for the proposition that
16 punitive damages are not assignable; however those cases are not
17 persuasive because they have largely done so in dicta or without
18 analyzing the context of the Murphy decision. See, e.g.,
19 GATX/Airlog Co. v. Evergreen Int'l Airlines Inc., 52 Fed. Appx.
20 940, 941-42 (9th Cir. 2002) (stating that punitive damages are
21 not assignable with no further analysis); Drazan v. Atl. Mut.
22 Ins. Co., No. C 10-01371, 2010 WL 2629576, at *4 (N.D. Cal. June
23 29, 2010) (same); Essex Ins. Co. v. Fire Star Dye House, Inc., 38
24 Cal. 4th 1252, 1263 (2006) (dicta because punitive damages were
25 not requested); Smith v. State Farm Mut. Auto. Ins. Co., 5 Cal.
26 App. 4th 1104, 1111 (1st Dist. 1992) (dicta with no additional
27 discussion of punitive damages).

28 On the other hand, in Nelson v. Exxon Mobile Corp., 102

1 Cal. Rptr. 3d 311 (3d Dist. 2009), the appeals court
2 distinguished Murphy and held that punitive damages were
3 assignable for the claim of bad faith breach of insurance policy.
4 Id. at 318-22. The Nelson court explained that "it is not the
5 nature of the relief that prohibits a claim for emotional
6 distress or punitive damages from being assigned. It is the
7 nature of the underlying cause of action giving rise to that
8 relief." Id. at 319. This finding is consistent with
9 California's treatment of punitive damages as being merely a
10 remedy that may attach to a particular cause of action, not a
11 separate cause of action. See Hilliard v. A.H. Robins Co., 148
12 Cal. App. 3d 374, 391 (2d Dist. 1983). "As long as the causes of
13 action themselves are assignable . . . any punitive damages
14 claims associated with those causes of action are also
15 assignable." Nelson, 102 Cal. Rptr. 3d at 322. Regardless of
16 the assignability of punitive damages in California, this court
17 is not bound by California law, which defendant conceded in oral
18 arguments is the only state to have suggested that punitive
19 damages are not assignable.

20 Authority from outside of California strongly supports
21 the assignability of punitive damages. In Clearwater v. State
22 Farm Mutual Automobile Insurance Co., 161 Ariz. 590 (App. Ct.
23 1989), the Arizona Court of Appeals rejected Murphy and upheld
24 the assignment of punitive damages arising from a bad faith
25 breach of an insurance contract. Id. at 594-95. The court
26 recognized that personal tort claims may not be assigned to a
27 third party, but found nothing in law or public policy that would
28 prohibit the assignment of punitive damages relating to a bad

1 faith breach of an insurance contract. Id. The court further
2 emphasized that an insurer should not be able to escape liability
3 through assignment where the principle purpose of punitive
4 damages is deterrence. Id.

5 Other states to have addressed this question have
6 similarly held that claims for punitive damages can be assigned
7 when they are based on otherwise assignable causes of action.
8 See, e.g., Cuson v. Md. Cas. Co., 735 F. Supp. 966, 970-71 (D.
9 Haw. 1990) (holding that punitive damages based on breach of
10 contract claim was assignable); Oppel v. Empire Mut. Ins., 517 F.
11 Supp. 1305, 1307 (S.D.N.Y. 1981) (finding that "there is no
12 reason why this cause of action [for punitive damages in a bad
13 faith case] also cannot be assigned"); F.D.I.C. v. W.R. Grace &
14 Co., 691 F. Supp. 87, 92 (N.D. Ill. 1988) (finding punitive
15 damages assignable because "punitive damages are a type of relief
16 which is part and parcel of the underlying cause of action and do
17 not constitute an independent basis for recovery"), rev'd on
18 other grounds by 877 F.2d 614 (7th Cir. 1989); Kaplan v. Harco
19 Nat'l Ins. Co., 716 So.2d 673, 666 (Miss. App. Ct. 1998)
20 (approving of assignment of punitive damages for breach of duties
21 owed by insurance company); Allstate Ins. Co. v. Axsom, 696
22 N.E.2d 482, 487 (Ind. App. Ct. 1998) ("If the excess judgment and
23 resulting injury to Link's property is the consequence of
24 oppressive, i.e. tortious conduct by Allstate, then punitive
25 damages, the remedy for such conduct, should also be
26 assignable.").

27 The public policy motivation behind the use of punitive
28 damages in Idaho is consistent with the assignability of punitive

1 damages because it is not personal or victim-specific.
2 "'Punitive damages' means damages awarded to a claimant, over and
3 above what will compensate for actual personal injury and
4 property damage, to serve the public policies of punishing
5 defendant for outrageous conduct and of deterring future like
6 conduct."² Idaho Code Ann. § 6-1601(9). The purpose of punitive
7 damages "is not to compensate the plaintiff, but to express the
8 outrage of society at certain actions of the defendant."
9 Linscott v. Rainier Nat'l Life Ins. Co., 100 Idaho 854, 857
10 (1980). The amount awarded as punitive damages "should be
11 prompted by the court's or jury's desire to assure, to the extent
12 possible via the imposition of a monetary penalty, that similar
13 conduct does not occur in the future." Id.

14 In Hall v. Farmers Alliance Mutual Insurance Co., the
15 Idaho Supreme Court recognized that "Idaho has a legitimate
16 interest in preventing the exploitation of its citizens by
17 punishing insurance companies that exploit the vulnerability of
18 their insureds." Hall, 145 Idaho at 322. "[I]f an insurance
19 company could delay payment of a claim without repercussions
20 extending beyond the amount it owed in the first place, an
21 incentive to delay would exist." Id. at 322-23 (emphasis in
22 original). "An occasional award of compensatory damages against
23 such parties would have little deterrent effect. A judgment
24 simply for compensatory damages would require the offender to do
25 no more than return the money which he had taken from the

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27 ² Any suggestion that the purpose of punitive damages is
28 not to punish the defendant is a mischaracterization of Idaho
law. Schaefer v. Ready, 134 Idaho 378, 382 (Ct. App. 2000).

1 plaintiff." Cheney, 104 Idaho at 905 (quoting Boise Dodge, Inc.
2 v. Clark, 92 Idaho 902, 909 (1969)). Prohibiting the assignment
3 of punitive damages would thus result in an unjustified windfall
4 for defendants.

5 The Idaho Supreme Court has recognized the difference
6 between emotional damages, which may not be assigned, and
7 punitive damages, which may be assigned. "The emotional distress
8 damages are awardable for a condition particular to the aggrieved
9 party. Punitive damages are awardable primarily to deter future
10 bad conduct. There need be no overlap between the two." Walston
11 v. Monumental Life Ins. Co., 129 Idaho 211, 220 (1996). This
12 distinction further suggests that punitive damages are not
13 necessarily personal to the plaintiff and therefore may be
14 assigned along with the assignable underlying cause of action.

15 C. Substantial Evidence Supporting Punitive Damages

16 The totality of the evidence presented by United
17 Heritage in its motion to amend would support a jury verdict for
18 punitive damages. Specifically, United Heritage presents
19 evidence that: Rentmaster was clearly identified in the Beddes'
20 policy as an insured; FAMI knew that Rentmaster was a covered
21 insured at the commencement of the claims litigation; FAMI
22 prevented Rentmaster from learning that it was an insured by
23 withholding the Beddes' policy throughout the litigation; FAMI
24 settled the Beddes' claims at the expense of settling claims
25 against Rentmaster; and FAMI did not adequately respond to
26 plaintiff's tender of defense. In addition to the evidence
27 presented, United Heritage's expert, Irving "Buddy" Paul, has
28 opined that FAMI's conduct was an extreme violation of insurance


1 industry standards in Idaho for numerous reasons. (Paul Aff.
2 ¶ 9.) This testimony is similar to evidence that the Idaho
3 Supreme Court has previously held sufficient to meet the
4 substantial evidence standard. See Gannett v. Transamerica Ins.
5 Serv., 118 Idaho 769, 781 (1990) (noting the testimony of
6 plaintiff's expert insurance witness that defendant's claims
7 handling was "an extreme deviation of the standard of care in
8 claims handling in this part of the country at this time");
9 Sliman v. Aluminum Co. of Am., 112 Idaho 277, 285 (1986) (expert
10 described defendant's conduct as "an extreme deviation from the
11 customary practice in the industry"). United Heritage thus
12 provides substantial evidence supporting its claim that
13 defendant's behavior was malicious, deliberate, willfull,
14 fraudulent, or grossly negligent.

15 FAMI's opposition to this motion to amend puts forth an
16 alternate interpretation of the evidence that United Heritage
17 relies upon to prove punitive damages. This interpretation
18 suggests that there are material facts in dispute that need to be
19 resolved by the jury, but does not sufficiently establish that
20 United Heritage lacks a reasonable likelihood of convincing the
21 jury of its interpretation of the facts. Even if the court were
22 to accept FAMI's position that its initial failure to identify
23 Rentmaster as an insured was unintentional, United Heritage has
24 presented evidence supporting punitive damages based on FAMI's
25 conduct after Rentmaster tendered. In particular, United
26 Heritage has presented evidence that: FAMI did not adequately
27 respond to United Heritage's and Rentmaster's tender; FAMI
28 provided counsel with a conflict of interest; FAMI's appointed

1 counsel did not represent Rentmaster's interests; and that FAMI
2 did not timely or adequately reimburse Rentmaster for its
3 expenses stemming from the Zarate litigation. These facts
4 constitute substantial evidence supporting plaintiff's claim for
5 punitive damages.

6 IT IS THEREFORE ORDERED that United Heritage's motion
7 to amend the Complaint to include a claim for punitive damages
8 be, and the same hereby is, GRANTED.

9 DATED: February 9, 2012

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12 WILLIAM B. SHUBB
13 UNITED STATES DISTRICT JUDGE
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