

# How **Bad** Is Bad Faith?

## New York vs. Virginia Or Does It Even Matter?



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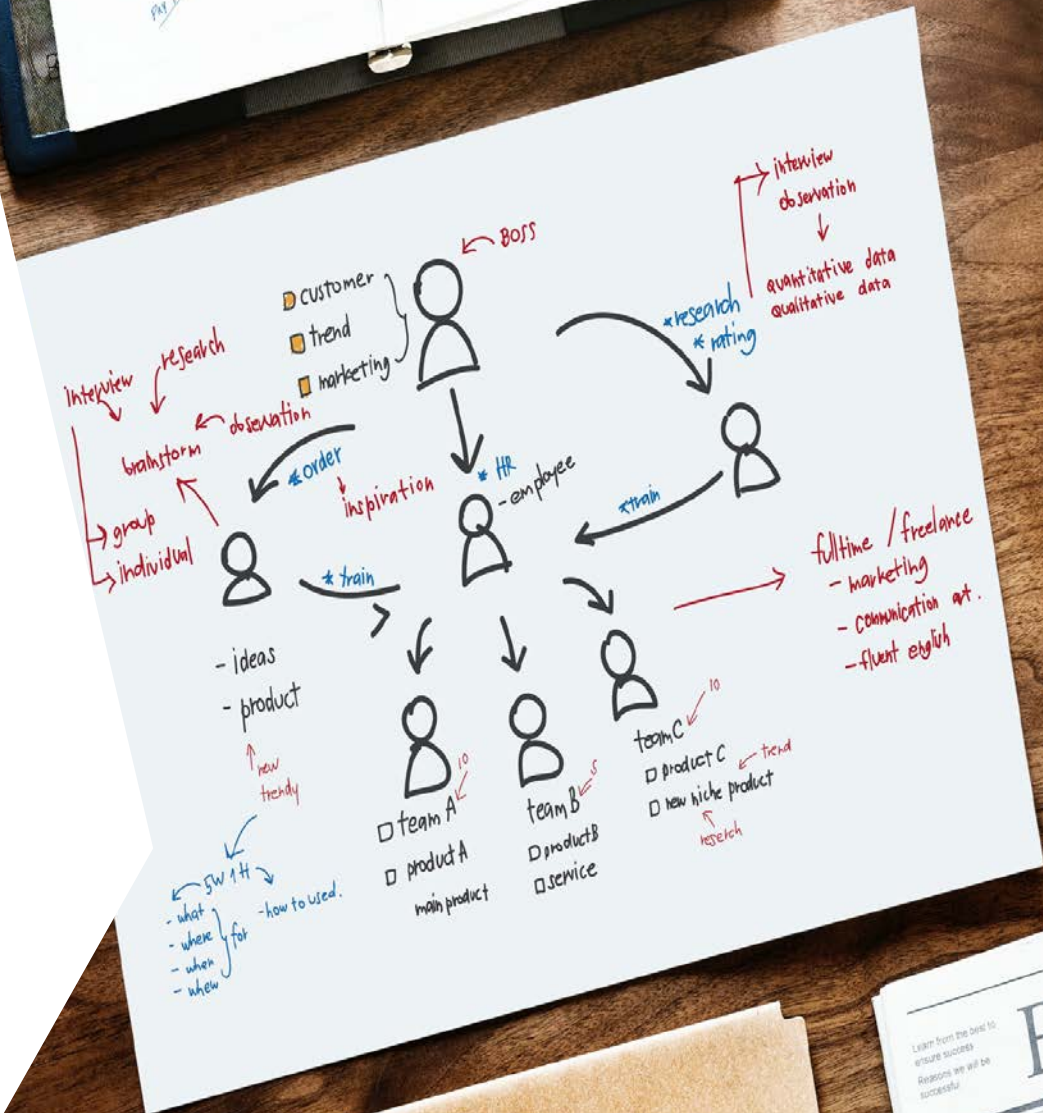
# What Is Bad Faith?

- Also referred to as extra- contractual
- Black's Law Dictionary
  - Any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent
- Common Law
  - Implied duty of good faith and fair dealing is part of every contract
- Statutory Authority
  - PA (42 Pa.CSA §8371):
    - interest permitted on claim from date insured made claim at prime rate plus at 3%
    - punitives permitted against insurer
    - costs and attorney fees against insurer



# What Is Bad Faith?

- FL (§624.155):
  - Bad Faith means:
    - Failure to settle in good faith, failure to act fairly and honestly
    - Failure to set forth the coverage under which payments are being made
    - Failure to settle when obligation is clear
  - Damages permitted:
    - Recovery for Insured's damages
    - Attorneys' fees
    - Punitive damages
    - Upon trial or appeal adjudication, insurer is liable for damages, costs and plaintiff's attorney fees



# What Is Bad Faith?

- TX (Code 541):
  - Misrepresenting material facts or policy provisions
  - Failure to achieve a fair settlement
  - Failure to provide reasonable explanation
  - Delayed coverage position
  - Denying without investigation
- VA (Code 38.2-209, 8.01-66.1)
  - 38.2-209 allows recovery of costs and attorneys fees where court (judge, not jury) determines that insurer has denied or refused to make payment in bad faith (not defined in statute)
  - 8.01-66.1 applies only to motor vehicle insurance claims and allows recovery of attorneys fees, expenses and up to double damages where insurer denies in bad faith

# What Is Bad Faith?

- Third Party Bad Faith Claims
  - Claims by third parties (i.e., parties allegedly damaged by insured) directly against insurer
  - Typically not permitted under common law because third party is not a party to contract
  - Some states have modified this by statute
- States Permitting Third-Party Bad Faith Claims
  - AZ, AR, FL, GA, IL, IN, KY, LA, MD, MA, MO, NE, NH, NM, NY, ND, OH, OK, PA, SD, TN, UT, WA, WI, WY.



# What Is Not Bad Faith?



- Incorrectly Denying Coverage
  - Bad faith = breach of contract + something more
  - Reaching an incorrect coverage decision alone is not enough
  - Majority of courts apply a reasonableness standard that focuses on insurer's conduct
    - E.g., in Virginia:
      - Whether reasonable minds could differ in the interpretation of policy provisions defining coverage and exclusions
      - Whether the insurer made a reasonable investigation of the facts and circumstances underlying the insured's claim
      - Whether the evidence discovered reasonably supports a denial of liability
      - Whether it appears that the insurer's refusal to pay was used merely as a tool in settlement negotiations
      - Whether the defense the insurer asserts at trial raises an issue of first impression or a reasonably debatable question of law or fact

# What Is Not Bad Faith?

- Unfair Claims Settlement Practices Acts (“UCSPA”)
  - The majority of states have enacted a version of UCSPA, promulgated by the National Association of Insurance Commissioners, which specify prohibited claims practices:
    - Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue.
    - Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies.
    - Refusing to pay claims without conducting a reasonable investigation.

In most states these statutes do **not** provide a private cause of action and in some states may also not be admissible as evidence of bad faith.

# Where Do We See Bad Faith

- Insured vs. Insurer
- First Party Claims
  - Failure to properly investigate
- Third Party Claims
  - Settlement and indemnity issues
- Additional Insured vs. Insurer
- Insurer vs. Insurer



# Policyholder's Perspective



- Elements of Bad Faith Claims
  - Insurer lacked a reasonable basis for denying the benefits of the policy;
  - Insurer had knowledge or recklessly disregarded the lack of reasonable basis for denying benefits of the policy; and
  - Damages resulting therefrom

# Insurer's Perspective

- Must acknowledge claim promptly
- Investigate claims
- Issue coverage position
- Reasonable settlement
- Use leverage cautiously

A red rectangular stamp with a double-line border, tilted slightly clockwise. The text "BAD FAITH" is in a smaller font above the word "INSURANCE" in a larger, bold font. Both are in red capital letters.

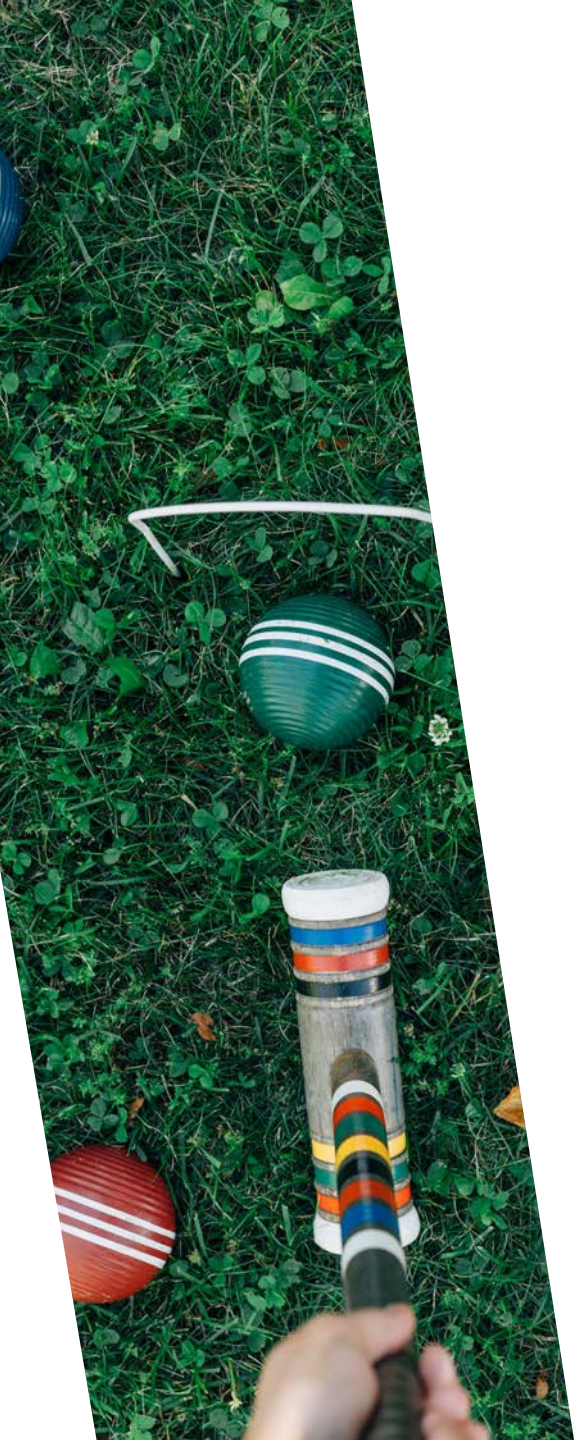
# Settlement Demands

- Demands within limits
- Demands when there is no excess insurance
- Ignoring demands that expose the insured's personal liability
  - Keep the insured apprised of settlement
  - Keep good claim notes
  - Realize when its time to stop posturing and tender limits

# Understanding the Bad Faith Playing Field – First Party

- *Bi-Economy and Panansia*
  - Pattern of Behavior
  - Knowing Indifference
  - Reasonably Foreseeable Consequential Damages
- *D.K. Property*
  - Lessened Pleading Standard
  - Attorneys Fees



A photograph showing a hand holding a croquet mallet on a grassy field. The mallet has a wooden head with colorful rings (blue, red, yellow, green) and a black handle. Several croquet balls, some green and some red with white stripes, are scattered on the grass. A white line is drawn on the grass, possibly a boundary or a path.

# Understanding the Bad Faith Playing Field – Third-Party



- Pavia
  - Demand Within Policy Limits
  - Liability Reasonable Certain
  - Insurer Interest Over Insured



# **Example: Failure To Control Defense Amounting To Large Verdict**



# When No One Counsels The Insured...

- Infamous movie quote, 58 page published decision!!! 
- Kings County, New York
- Problems During Underlying Action:
  - Insurer not paying attention to claim
  - Ignoring settlement demands during litigation, after liability and before damages trial
  - Failed to inform insured of possible excess verdict
  - \$100,000 policy limit became \$9.2 million verdict 
- Problems After Verdict
  - Claim notes made terrible admissions
  - Insurer was not prepared for deposition
  - Devastating admissions

# Latest Cases: Lack of Communication Led To Bad Faith

**Healthcare Prof. Ins. Co. v. Parentis**, 2018 NY Slip Op 07224 (3<sup>rd</sup> Dept. Oct. 25, 2018)

- Emails between field representative and claims
- Internal emails within claims department
- Claim notes
- Jury asked for a breakdown of the life care plan expenses; readback of testimony
  - Pivotal moment
  - Claim note characterized jury inquiry as “it is as bad as it seems”. Still not offer
- Bad faith upheld



# Latest Cases: Lack of Communication Led To Bad Faith

Harvey v. GEICO General Ins. Co., SC17-85, 2018 WL 4496566 (Sept. 20, 2018)

- 8-6-06: DOA
- 8-10-06: Geico determined insured was liable
- 8-11-06: Geico sends letter to insured regarding potential excess liability
- 8-14-06: Claimant requests statement from insured on available assets. Claims sat on request
- 8-17-06: Geico tendered limits and sent release with affidavit of coverage
- 8-31-06: Claimant acknowledges check and Geico's refusal for access to insured
- 8-31-06: Geico sends letter to insured, for the first time
- 9-1-06: Insured told Geico he is meeting with his attorney on 9-5-06
- Claims supervisor instructed adjuster to tell Claimant. She did not.
- 9-13-06: check returned, suit filed

\$100,000= \$8.47million

# Checklist For Claims Handling

- Retain Competent Counsel
- Examine Claim Fairly
- Investigate
- Protect Insured's Interests Equally
- Communicate with Insured
- Consider Potential Excess Exposure And Develop A Plan
- Remember That A Claims File Is Discoverable In A Bad Faith Action



**YIKES!**

# Example: Adjuster Liability

- Insured driver, Mr. K, struck and injured by uninsured motorcyclist
- Police and experts hired by insurer determine that motorcyclist was at fault
- Mr. K demands his insurer, EveryCity (EC), pay full \$25k uninsured motorist policy limits
- Despite police and expert evaluation, EC asserts that Mr. K was 70% at fault – offers only \$1,600 to settle claim
- After Mr. K asks EC to explain its evaluation, EC increases offer to \$5k
- Mr. K sues to recover full UM benefits
- EC designates claim adjuster employee, Jones, as its 30(b)(6) representative
- During depo, Jones claims – contrary to police report and expert opinion – that Mr. K ran a stop sign and was on his cell phone at the time of the accident
- Jury ultimately finds that motorcyclist was 100% at fault and awards over \$100k to Mr. K
- Mr. K files lawsuit asserting bad faith and consumer protection act claims against both EC and Jones, personally



## Example: Adjuster Liability

- *Keodalah v. Allstate Ins. Co.*, 413 P.3d 1059 (Wn. App. 2018), review granted 191 Wn.2d 1004 (2018)
- Court of Appeals of Washington held that adjuster could be held personally liable under Washington's bad faith and consumer protection statutes, even in the absence of a contractual relationship between the insured and the adjuster
- Arguably specific to language of statutes ("person" defined to include individuals)
- Currently on appeal to Supreme Court of Washington
- While still the minority view, courts in Montana, Texas, West Virginia, South Carolina, New Hampshire, and Alaska have reached similar conclusions



# Example: Bad Faith Set Ups

- Insured driver, Wreck-It Ralph, negligently crashes his car into claimant Vanellope while she is riding her bike
- Ralph has a liability policy issued by InsureCo with minimum limits of \$25k
- Vanellope's injuries are significant and damages are likely to exceed \$100k
- Shortly after the accident, Vanellope's attorney sends a letter to InsureCo offering to settle for \$25k – but offer expires in 30 days
- InsureCo requests medical records to substantiate claim, but attorney for Vanellope provides only an authorization form
- InsureCo is unable to obtain the medical records during the 30 day window and does not respond to the settlement offer within the 30 day window
- Vanellope files suit against Ralph and obtains a judgment for \$150k
- Ralph brings a bad faith suit against InsureCo for failure to settle within policy limits

# Example: Bad Faith Set Ups

- *Gutierrez v. Yochim*, 23 So. 3d 1221 (Fl. App. 2009)
- Appellate court reversed grant of summary judgment to insurer on bad faith claim
- Insurer argued that its delay in tendering policy limits was caused by plaintiff's attorney, who refused to provide medical records to substantiate claim
- Court rejected argument and held that insurer's "fiduciary duty to timely and properly investigate the claim against the insured was not relieved simply because it was waiting to receive information from the claimant's attorney"
- Insurer also argued that (unlike example) there was never a formal offer to settle the case
- Court recognized that lack of a formal offer was a factor to be considered, but alone did not warrant summary judgment (i.e., insurer could have some duty to initiate settlement discussions)

## Example: Additional Insured/Contractual Indemnification

- General Contractor, Inc. enters into a contract with Subcontractor, LLC for soil work on a construction project
- Contract requires Sub to indemnify GC for claims arising out of Sub's work and also to name GC as additional insured on Sub's insurance policies (issued by URAssured)
- Clyde Claimant is injured when he falls into hole on construction site – GC and Sub dispute who is responsible
- GC sends letter to Sub and URAssured demanding contractual indemnification from Sub and defense and indemnification from URAssured as additional insured
- URAssured assigns defense counsel to represent Sub and to respond to letter from GC
- Defense counsel responds, denying contractual indemnification obligation, but does not address additional insured tender
- URAssured does not respond to additional insured tender until 8 months later



WHAT  
DO YOU  
MEAN  
?

Questions and  
Discussion?

