

# Negotiations for Claims Adjusters

Dale K. Forsythe, Esq.  
Gregory S. Knight, Esq.  
Wayman, Irvin & McAuley, LLC  
437 Grant Street, 1624 Frick Building  
Pittsburgh, PA 15219  
(412) 566-2970  
[www.waymanlaw.com](http://www.waymanlaw.com)

# Overview

- I. Adjusters' "secret tactics"
- II. Terms
- III. Negotiation Approaches
- IV. Negotiation Styles
- V. Importance of Information
- VI. Negotiation Strategies
- VII. Caution: Unfair Insurance Practices Act
- VIII. Caution: Bad Faith Statute
- IX. Negotiation and the Tripartite Relationship

# I. Adjuster “Secret Tactics”

- From [www.settlementcentral.com](http://www.settlementcentral.com) - a self-help site for injury claimants
  - Property damage check or release is a complete release of all personal injury claims
  - Early offer – get claimant to take offer and sign release before experience of a full season of pain, injury, re-injury through routine activities, renewed pain

# I. Adjuster “Secret Tactics” (continued)

- Intimidation through invocation of “review committee”
- Attack on medical/chiropractic course of treatment
  - Not reasonable/necessary
  - Palliative/diagnostic, not curative
  - Not related

## II. Terms

- Negotiation - process where two or more persons with different needs and goals strive to solve an issue in a mutually agreeable fashion
  - Dialogue intended to resolve disputes, produce an agreement on course of action, to bargain for individual or collective advantage, or craft outcomes to satisfy various interests

## II. Terms (continued)

- **“reservation point”** - drop dead point – where the best alternative to a negotiated agreement (e.g., trial, lawsuit) is preferable
- **“bargaining range”** – the difference between the reservation points of the parties to the negotiation
  - No settlement unless one or both sides change reservation point
- **“expanding the pie”** – adding elements to the negotiation to help one or both sides gain more
  - usually somewhat one-sided – one party gains little, gives up nothing, or suffers little, while other party receives great gain

## II. Terms (continued)

- “interest” driven

- negotiations focus on the “why”
- Interest is both object/need and reason for it – true value
- Lends itself to integrated approach

versus

- “position” driven

- negotiations focus on the “what”
- what you say you want or must have – not clear on the full value
- Lends itself to distributive/advocate approach

# III. Negotiation Approaches

- A. Advocates Approach / Distributive Negotiation
- B. Integrative / Win-Win Approach
- C. Mixed Approach

# III. Negotiation Approaches (continued)

## A. Advocates Approach / Distributive Negotiation

- Sometimes called “win/lose” because of assumption of fixed pie where one party’s gains is other party’s loss – only true in simplest, one issue situation, e.g., sales price
- Attempt to obtain most favorable outcome for the party
- Attempts to ascertain the other party’s reservation point and adjusts demands accordingly

# III. Negotiation Approaches (continued)

## B. Integrative / Win-Win Approach

- Look at underlying interests, rather than stated positions, to reach a decision that benefits both parties
- Mutual gains bargaining, or “problem solving” – differences in the parties’ preferences make this possible

# III. Negotiation Approaches (continued)

## C. Mixed Approach

- Expand the pie
- Meet parties' needs as much as possible
- Claim appropriate share

## IV. Negotiation Styles

- **Competitive**
- **Accommodative**
- **Avoiding**
- **Compromising**
- **Collaborative**

See, <http://web.mit.edu/negotiations/www/NBdefshtml>.

## V. Importance of Information

- allows greatest bargaining power
  - Can accurately set your reservation point / identify your interests
  - know if other party is accurate/truthful
  - know bargaining chips that you can offer (factors that affect other party's reservation point)
  - weigh value of chips that other side offers
  - allow full evaluation of the interests of other party, better assessment of their reservation point

# V. Importance of Information (continued)

## 1. Policy Analysis / Determinations

A. Is Defendant insured under the policy?

B. Is this a type of claim that is covered?

C. Are the damages alleged the type of damages that are covered?

D. Is Reservation of Rights letter to insured necessary?

# V. Importance of Information (continued)

## 2. Investigation of Factual Background

**A. Conduct a prompt and thorough conference with the insured to obtain the following information:**

1. Information regarding the incident
  - a. Who was involved
  - b. How it happened
  - c. Where it occurred/surroundings
  - d. Conditions – weather, traffic, lighting
  - e. Instrumentalities involved – products, equipment, etc.
  - f. Why it occurred

# V. Importance of Information (continued)

## 2. Witnesses

- a. Identify all the parties to the accident itself
- b. Identify passengers/relationships
- c. Identify any third party witnesses and/or disinterested witnesses
- d. Secure contact information

# V. Importance of Information (continued)

## B. Recorded Statements

- a. Insured
- b. Witnesses
- c. Conference with claimant/recorded statement
  1. determine if represented by counsel
  2. secure consent of counsel to take statement
  3. endeavor to take this statement in person, to assess claimant as a witness, credibility and sympathetic factors

# V. Importance of Information (continued)

## 3. Document Investigation

### A. Reports of incident

#### 1. Secure official reports of incident

- a. Police accident investigation report
- b. Governmental agency reports where applicable (OSHA, NTSA, etc.)

#### 2. Secure accident and/or incident reports prepared by store owner, property owner, employer, etc.

# V. Importance of Information (continued)

## B. Photos – Secure or take photos of:

1. accident scene / surroundings
2. vehicles involved in accident if motor vehicle accident
3. road / skid marks if motor vehicle accident
4. product or other instrumentalities involved
5. videotape if warranted

# V. Importance of Information (continued)

## C. Records

1. Medical Records / physician reports: secure authorizations (HIPAA approved) for all hospitals, physicians or other health care providers and secure records and itemized statements of medical bills incurred

# V. Importance of Information (continued)

2. If appropriate, secure authorizations for and obtain:
  - a. Workers compensation claim file
  - b. Social security disability claim file
  - c. First Party claim file
  - d. Employment records
  - e. Federal and state tax returns
  
3. Determine if claimant involved in other accidents or has pre-existing medical conditions – secure appropriate records for these

# V. Importance of Information (continued)

## 4. Surveillance

A. Determine if appropriate for case – where physical activities do not appear to correlate with injuries claimed

B. Investigate claimant information to determine if surveillance can be limited to most likely times / locations of physical activities

# VI. Negotiation Strategies

## A. Tasks that need to be accomplished

1. Establish and reinforce your own interests and reservation point
2. Determine opponent's interests/reservation point.
3. Shifting the reservation points
4. Divide the pie
5. Confirm mutual benefit of the result

# VI. Negotiation Strategies (continued)

## B. General Tips, Techniques, Strategies\*

1. Be willing to accept alternative result
2. Try not to negotiate until you have an agreement to try to resolve case
3. Aim for best outcome
4. Do not make first offer
5. See other side's complete "shopping list"

\* From <http://www.businessballs.com/negotiation.htm>

# VI. Negotiation Strategies (continued)

## B. General Tips, Techniques, Strategies (continued)

6. Don't give concessions away – trade them
7. Keep eye on big picture
8. Keep eyes open for tradable concessions (for both sides)
9. Keep accurate notes
10. Continually summarize/clarify negotiations as you go

# VI. Negotiation Strategies (continued)

## C. More General Tips, Techniques, Strategies \*

1. Have mindset of reluctant participant
2. Don't disclose the importance of the settlement to you
3. Start with largest concessions
4. Decide what is negotiable

\* From <http://trainingexpert.com/negtips.htm>

# VI. Negotiation Strategies (continued)

## D. Specific negotiation tips I\*

1. Solicit the other's perspective
2. State your needs
3. Prepare options before hand
4. Don't argue
5. Negotiation when the time is right

\* Bacal, Robert. Work911.com - Workplace, Business, Career Help, cited at <http://www.work911.com/articles/negotiate.htm>.

# VI. Negotiation Strategies (continued)

## E. Specific Negotiation Tips II

1. Thorough investigation of case
2. proper and realistic evaluation of case

*Open-minded assessment of liability and damages – analysis must include:*

- a. The likelihood that the insured will be found liable, and to what extent
- b. The claimant's comparative negligence
- c. The nature and extent of the claimant's injuries
- d. The claimant's past medical history

# VI. Negotiation Strategies (continued)

## E. Specific Negotiation Tips II (continued)

- e. Medical bills
- f. Lost wages / loss of earning capacity
- g. Non-economic factors
  - 1. pain and suffering
  - 2. disfigurement
  - 3. other sympathetic factors

**3. emphasis on strong points of case / recognition of weak points of case**

# VI. Negotiation Strategies (continued)

## E. Specific Negotiation Tips II (continued)

4. **Allow claimant to offer his / her own version of facts, then point out / discuss discrepancies**

5. **Willingness to bargain**

a. Be flexible where reasonable minds could differ

b. Be willing to forego bargaining if limited window of opportunity for favorable settlement will otherwise be lost

6. **Credibility**

If you say something is cast in stone, do not contradict position later unless new factors are brought to bear – leave room for flexibility

7. **Develop trust with claimant or his counsel**

# VI. Negotiation Strategies (continued)

## E. Specific Negotiation Tips II (continued)

Go in prepared and you will emerge  
successful

# VI. Negotiation Strategies (continued)

## F. Role of Emotion in Negotiation Process\*

### 1. Positive Affect

Positive mood leads to:

- a. More confidence
- b. Higher tendencies toward cooperative strategies
- c. Increase likelihood of reaching strategic goals
  - Better decision making
  - Flexible thinking
  - Creative problem solving

\*Cited at <http://en.wikipedia.org/wiki/Negotiation>.

# VI. Negotiation Strategies (continued)

## F. Role of Emotion in Negotiation Process (continued)

### 2. Negative Affect

**Anger – leads to more competitive strategies and less cooperation**

- reduces level of trust
- clouds the parties' judgment
- narrows the focus of attention
- central goal changed from agreement to retaliation

# VI. Negotiation Strategies (continued)

## 3. Impact of other side's emotions\*

Anger – opponents had lower demands, concede more; view negotiation less favorable; dominating and yielding behaviors were evoked

Pride – more integrative and compromise strategies by the partner

Guilt or Regret – better impression of you by opponent, but also higher demands; guilt also could mean just better personal achievement

Worry or Disappointment - bad impression, but lower demands

\*See study, Butt, et. al., 2005 “The effects of self-emotion, counterpart emotion, and counterpart behavior on negotiator behavior; a comparison of individual-level and dyad-level dynamics”. Journal of Organization Behavior, 26(6), 681-704. Cited at <http://en.wikipedia.org/wiki/Negotiation>.

# VI. Negotiation Strategies (continued)

- G. Barriers to Successful Negotiation\*
  - Viewing negotiation as confrontational
  - Trying to win at all costs
  - Becoming emotional
  - Not trying to understand the other person
  - Focusing on personalities, not issues
  - Blaming the other person

\* Bacal, Robert. Work911.com - Workplace, Business, Career Help, cited at <http://www.work911.com/articles/negotiate.htm>.

# VII. Caution: Unfair Insurance Practices Act

- **40 P.S. 1171.1 – Unfair Insurance Practices Act**
  - **Section 1171.5 defines “unfair methods of competition and unfair or deceptive acts or practices”**
    - **Subsection (10) provides that “any of the following acts if committed or performed with such frequency as to indicate a business practice shall constitute unfair claim settlement or compromise practices:**
      - (i) **misrepresenting pertinent facts or policy or contract provisions relating to coverages at issue;**
      - (ii) **failing to acknowledge and act promptly upon written or oral communications with respect to claims arising under insurance policies;**

## VII. Caution: Unfair Insurance Practices Act (continued)

- (iii) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- (iv) refusing to pay claims without conducting a reasonable investigation based upon all available information;
- (v) failure to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed and communicated to the company or its representative;
- (vi) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which the company's liability under the policy has become reasonably clear;

## VII. Caution: Unfair Insurance Practices Act (continued)

- (vii) compelling persons to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts due and ultimately recovered in actions brought by such persons;
- (viii) attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
- (ix) attempting to settle or compromise claims on the basis of an application which was altered without notice to or knowledge or consent of the insured of such alteration at the time such alteration was made;

# VII. Caution: Unfair Insurance Practices Act (continued)

- (x) making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;
- **(xi) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants to induce or compel them to accept settlements or compromises less than the amount awarded in arbitration;**
- (xii) delaying the investigation or payment of claims by requiring the insured, claimant or the physician of either to submit a preliminary claims report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

## VII. Caution: Unfair Insurance Practices Act (continued)

- (xiii) failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage or under other policies of insurance;
- (xiv) failure to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement;
- (xv) refusing payment of a claim solely on the basis of an insured's request to do so unless:
  - a) the insured claims sovereign, eleemosynary, diplomatic, military service, or other immunity from suit or liability with respect to such claim;

## VII. Caution: Unfair Insurance Practices Act (continued)

b) the insured is granted the right under the policy of insurance to consent to settlement of claims; or

c) the refusal of payment is based upon the insurer's independent evaluation of the insured's liability based upon all available information.

# VII. Caution: Unfair Insurance Practices Act (continued)

## Section 1171.11

**In addition to any penalties imposed pursuant to this act, the court may, in an action filed by the Commissioner, impose the following civil penalties:**

(1) For each method of competition, act or practice defined in Section 5 of this act and in violation of this act which the person knew or reasonably should have known was such a violation, a penalty of not more than five thousand dollars (\$5,000) for each violation but not to exceed an aggregate penalty of fifty thousand dollars (\$50,000) in any six month period:

## VII. Caution: Unfair Insurance Practices Act (continued)

(2) For each.....which the person did not know nor reasonably should have known was such a violation, a penalty of not more than one thousand dollars (\$1,000) for each violation but not to exceed an aggregate penalty of ten thousand dollars (\$10,000) in any six month period;

3) for each violation of an order issued by the Commissioner pursuant to section 9 of this act, while such order is in effect, a penalty of not more than ten thousand dollars (\$10,000).

## VIII. Caution: Bad Faith Statute

42 Pa. C.S. Section 8371 provides as follows:

### **Section 8371. Actions on insurance policies.**

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

1. award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%;
2. award punitive damages against the insurer;
3. assess court costs and attorney fees against the insurer.

## VIII. Caution: Bad Faith Statute (continued)

The purpose of Section 8371 is to provide a statutory remedy to an insured when an insurer acts in "bad faith" towards the insured in an action arising under an insurance policy. *Gen. Accident Ins. Co. v. Fed. Kern Ins. Co.*, 452 Pa. Super. 581, 682 A.2d 819 (1996). There is no common law *tort* cause of action for bad faith in Pennsylvania. *D' Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 494 Pa. 501, 431 A.2d 966 (1981).[\[1\]](#)

## VIII. Caution: Bad Faith Statute (continued)

"Bad faith" is not defined in the statute but has been identified by the courts of Pennsylvania as a "frivolous or unfounded refusal to pay proceeds of a policy." *Terletsky v. Prudential Prop. and Cas. Ins. Co.*, 437 Pa. Super. 108, 649 A.2d 680 (1994). To state a statutory "bad faith" claim, a plaintiff must present clear and convincing evidence that (1) an insurer denied benefits under a policy without any reasonable basis to do so and (2) the insurer knowingly or recklessly disregarded its lack of reasonable basis for denying the claim.

## VIII. Caution: Bad Faith Statute (continued)

- Subsequent to *Terletsky*, the Pennsylvania Superior Court adopted the definition of “bad faith” from Black’s Law Dictionary as applicable to “bad faith” in the context of 42 Pa.C.S. 8371. Said definition reads:

“Bad Faith” on the part of an insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e. good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.
- *O’Donnell v. Allstate Ins. Co.*, 1999 Pa. Super. 161, 734 A.2d 901 (1999)(internal quote from Black’s Law Dictionary 139 (6th ed. 1990)).

## VIII. Caution: Bad Faith Statute (continued)

Since *O'Donnell*, there has been a challenge by insureds as to whether “motive of self-interest or ill will” is a third element required for a bad faith claim. The Western District Court of Pennsylvania predicted that the Supreme Court of Pennsylvania will rule consistently with the Superior Court concerning the level of culpability that needs to be associated with a finding of bad faith which is that the “motive of self interest or ill will” is not a third element required to establish bad faith, but it is probative of the second element identified in *Terletsky*, i.e. that the insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim.” *Employers Mutual Casualty Company v. James Loos et al.*, 476 F.Supp. 2d 478 (W.D. Pa. 2007); See also *Barry v. Ohio Casualty Group*, 2007 U.S. Dist. LEXIS 2684 \*23-24 (W.D. Pa. 2007).

## VIII. Caution: Bad Faith Statute (continued)

As to the level of culpability necessary, mere negligent conduct, however harmful to the interests of the insured, is not sufficient for a finding of bad faith. Also, allegations of negligence in the performance of obligations under an insurance policy is subject to dismissal, based on the gist of the action doctrine. If the requisite wrongful state of mind, i.e., that the insurer knew or recklessly disregarded the lack of reasonable basis to deny coverage, is not alleged, the claim is subject to dismissal. Kojeszewski v. Infinity Insurance Co., 2006 U.S. Dist. LEXIS 79306 (Mem. Op. M>D. Pa. Oct. 2006).

## VIII. Caution: Bad Faith Statute (continued)

- Common theories of Bad Faith which could impact negotiation process
  - Unreasonable construction of coverage
    1. Need finding that insurer did not have reasonable basis to deny benefits
    2. Defendant knew or recklessly disregarded the lack of reasonable basis

Claim defeated by reasonable basis – if carrier adopted a reasonable construction of the policy or an adequate investigation led to a reasonable basis for the denial.

## VIII. Caution: Bad Faith Statute (continued)

- Common theories of Bad Faith which could impact negotiation process

- Unreasonable construction of coverage

The determination by the carrier must be reasonable – it does not need to be ultimately correct. Otherwise the determination of bad faith wouldn't be necessary – it would just turn on the coverage decision.

Employers Mutual Cas. Co. v. James Loos, et. al., 476 F.Supp. 2d 478 (W.D.Pa., 2007). T.H.E. Insurance Co. V. Charles Boyer Children's Trust, 455 F.Supp. 2d 284 (M.D. Pa., 2006).

## VIII. Caution: Bad Faith Statute (continued)

- Miller v. First Liberty Ins. Corp., 2008 U.S. Dist . LEXIS 47550 (Judge Thomas O'Neill, E.D. Pa., June 17, 2008).

HO policy claim denied based on exclusion for insect damage and for insured's neglect to preserve property during and after a loss. Insured discovered remodeling effort that prior termite extermination effort failed, and contractors were compelled to tear down the structurally deficient walls. Insured argued coverage existed per a collapse provision in the policy which provided the policy would cover for direct physical loss to covered property involving a collapse of a building or part thereof cause by hidden insect damage. The policy unambiguously defined "collapse" as a "sudden and entire falling down or caving in of a building or part thereof." The court further held that construing the policy to cover voluntary tearing down due to substantial impairment of structural integrity would convert the policy into a maintenance agreement in contravention of the clear language of the policy.....

## VIII. Caution: Bad Faith Statute (continued)

- Miller, continued.....The court concluded that there was no evidence of a sudden and entire caving in of the building, and therefore, the collapse provision did not apply to afford coverage for insured's claim. The court did note that this policy was written more narrowly than others in that it was not written to apply to "risk of loss involving collapse"; I rather it was limited to actual collapse. Court also addressed the claim that the insurer acted in bad faith in its coverage interpretation and application. Court held negligence or bad judgment is not enough to establish bad faith. Insured needed to show that insurer acted with a dishonest purpose or meant to breach a known duty because of motive of self interest or ill. Insured could not establish these elements, thus court granted insurer's motion for summary judgment.

## VIII. Caution: Bad Faith Statute (continued)

- Bombar, intervenor, and Upright Materials Handling, Inc. v. The West American Ins. Co., 932 A.2d 78, 2007 Pa. Super. 222 (Pa.Super. July 26, 2007, Opinion by Judge Stevens), re-argument denied, 2007 Pa.Super. LEXIS 3118 (Oct. 2007). Plaintiff Upright was in the business of selling and servicing industrial equipment. Upright sold a forklift to Lord Label, Inc. Upright had a CGL insurance policy through West American, a subsidiary of Ohio Casualty (which was referred to as Ohio Casualty in trial court proceedings before caption was amended to reflect proper party's name). During the policy period, Plaintiff Bombar was an employee of Lord Label who sustained serious personal injuries when struck by the forklift sold by Upright while being operated by a co-employee. Bombar filed a personal injury suit against Upright sounding in strict liability and negligence. Upright sought coverage from the West American policy. The insurance agent communicated to the insured that coverage was not available on basis of "products and completed operations exclusion." When Bombar filed suit, she sent notice of her action to West American directly; however, no written demand for coverage was issued to West American and no denial letter was issued by West American. A verdict was returned in Bombar's action in her favor for \$1,800,000.00 on the negligence claim which was then molded to \$2,393,458.65 to reflect delay damages.....

## VIII. Caution: Bad Faith Statute (continued)

- Bombar, cont..... Plaintiffs brought suit for declaration of coverage in their favor, and related breach of contract and statutory bad faith claims, seeking cost of defense of underlying action, indemnity for verdict and exemplary damages for bad faith handling of the earlier claim for coverage. West American responded that the policy did not cover the accident based on the products and completed operations exclusion; that it was untimely notified of the accident; and that it did not act in bad faith. Upon cross motions for summary judgment, the trial court decided that West American acted in bad faith and held it liable for entire personal injury verdict with interest per Section 8371; compensatory damages to Upright; and punitive damages. Upon a hearing on damages, it was determined that the insurer was responsible for the \$2,393,458.64 personal injury verdict plus \$1,513.260.00 in interest; punitive damages at four times the compensatory damages awarded in the jury verdict, equaling \$7,200,000.00; \$91,212.50 in counsel fees incurred by Upright in defense of underlying action; \$700,000.00 in compensatory damages of Upright; and \$110,923.39 in attorney's fees and costs incurred by Bombar in prosecution of this action. The total verdict was \$12,008,854.54.

## VIII. Caution: Bad Faith Statute (continued)

Bombar, cont..... Insurer filed an appeal, charging trial court with error in declaring coverage existed. Insurer argued that Bombar's injury arose from Upright's product or completed operations and was therefore excluded from coverage. Upright and Bombar argued that the injury arose from co-employee's negligent disconnection of alarm on the forklift and the subject exclusion was not applicable to the claim of negligent failure to warn, inspect or install with regard to the alarm. The trial court found and appellate court affirmed that while the installation of an alarm system to the lift was a service provided by Upright, it was not completed at the time of the accident to fall within the completed operations exclusion when the installation was found to be faulty by way of a failure to warn.

## VIII. Caution: Bad Faith Statute (continued)

Bombar, cont..... Insurer also argued trial court erred in failing to enter summary judgment in its favor on the bad faith claim, claiming that its coverage interpretation was reasonably based on law that was at best in flux; and that its investigation and processing of the claim was reasonable. The Superior Court affirmed trial court's conclusions that there was ample evidence that the investigation and coverage position was not reasonable and affirmed the bad faith verdict.

# VIII. Caution: Bad Faith Statute (continued)

- Common theories of Bad Faith which could impact negotiation process

- Inadequate investigation - *Finding of Bad Faith*

In Scarpato v. Allstate Insurance Co., 2007 U.S. Dist. LEXIS 4585 (E.D. Pa. Jan. 2007), the complaint alleged that Allstate denied insured's claim "without conducting a reasonable investigation based upon all available information and asserted policy defenses without a reasonable basis in fact." The suit stemmed from a denial of a fire loss claim. The Insured averred he fully informed Allstate's agents that the property was commercial in nature; but only after the loss, learned that his agent placed the property on a homeowners rather than commercial property policy. Allstate refused coverage because the Insured did not reside in the property. The Insured filed suit for breach of contract and bad faith against Allstate and negligence against his agent. Allstate filed a Motion for Judgment on the Pleadings, seeking a declaration of coverage based on the face of the policy and admissions by the Insured that he did not reside in the property, and dismissal of bad faith count with a finding that no coverage was available. The Court denied the Motion on the basis that Allstate could be estopped from relying on any defect in the policy if the same was caused by the agent, and further that allegation that the claim was unreasonably investigated before denied could support a bad faith finding.

## VIII. Caution: Bad Faith Statute (continued)

- In Trunzo v. Allstate Insurance Co., 2006 U.S. Dist. LEXIS 87051 (W.D. Pa. Sept. 2006), the Court denied Allstate's summary judgment motion on plaintiff's bad faith claim based on improper and inadequate investigation. Plaintiff's counsel testified that he advised an Allstate representative that the basis for denying coverage was compromised by new information. Specifically, the subject denial was a denial of liability coverage on the basis that claimant was not an insured because she was operating a non-owned auto and was not a resident relative of the named policyholder. This denial was based on an initial statement taken by Allstate of the policyholder who denied claimant was a resident relative. Plaintiff's counsel spoke separately to the policyholder at which time policyholder relayed that his statement to Allstate was false and created out of fear related to his immigration status. Plaintiff's counsel informed Allstate of this information, but Allstate refused to do any further investigation and maintained the denial. In denying summary judgment, the Court held that "if evidence arises that discredits the insurer's reasonable basis, the insurer's duty of good faith and fair dealing requires it to reconsider its position and act accordingly."

# VIII. Caution: Bad Faith Statute (continued)

- Common theories of Bad Faith which could impact negotiation process

- Inadequate investigation - *Finding of No Bad Faith*

In Wedemeyer v. U.S. Life Insurance Company in the City of New York, et al., 2007 U.S. Dist. LEXIS 15742 (E.D. Pa March 2007), the plaintiff contends that defendant insurance company's investigation into her claim and the decision to stop paying long term disability benefits after more than three years of paying them was wrongful and unreasonable. Plaintiff alleges that she was only partially recovered cognitively and totally disabled by her physical injuries. Plaintiff brought a claim for breach of contract, bad faith, and for violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). The court held that an insurance company makes an adequate investigation where it considered multiple medical reports and medical review files, including two reports by independent consultants and two reports from IMEs done by independent doctors. Additionally, plaintiff's physician declined to respond to the insurance company's conclusion with any information other than an almost two-year-old report. The court noted that in reviewing a claim, an insurance company is not required to give greater weight to opinions of treating medical providers over any other available evidence. Such an investigation was deemed satisfactory in determining that plaintiff was no longer disabled within the meaning of the policy. Thus, the defendant conducted a thorough investigation and had a reasonable basis for determining plaintiff's benefits

## VIII. Caution: Bad Faith Statute (continued)

- In Estakhrian v. Continental General Insurance Co., 2006 U.S. Dist. LEXIS 95607 (Mem. Op. E.D. Pa. Dec. 2006), the Court granted summary judgment to the insurer on plaintiff-insured's bad faith claim based on a theory of inadequate or improper investigation into the medical claim. The Court acknowledged evidence that the insurer did not request additional information from a treating physician relevant to its position; however, declared that where there is an uncertainty as to diagnosis of a material medical claim, an insurer's failure to review all medical records or to follow up for additional information is not in itself bad faith. "Even assuming, *arguendo*, that Defendant doing things differently would have improved the handling of the claim from Plaintiff's standpoint, that Defendant's action *could have been* improved does not mean that its unimproved actions arose to bad faith." *Id.* at \*28.

## VIII. Caution: Bad Faith Statute (continued)

- In Smith v. Westfield Insurance Co., 2007 U.S. Dist. LEXIS 43996 (Mem.Op. E.D. Pa. June 2007), Plaintiffs made a bad faith and breach of contract claim based on defendant's denial of plaintiffs' homeowner's insurance claim for water penetrating the interior of plaintiffs' house. Three years after plaintiffs noticed water coming into the house they finally notified defendant by submitting a claim which was denied. The court granted defendant summary judgment on the bad faith claim, premised in large part on a theory of inadequate or improper investigation. The Court found that the defendant promptly investigated both inside and outside the house, took plaintiffs' statements, and received an expert report prepared on behalf of plaintiffs. Defendant's investigation was deemed thorough and that the same provided a reasonable basis for the coverage position. Thus, even if the coverage determination turns out to be incorrect, that does not denote the presence of a dishonest purpose or reckless disregard for the truth to state a claim for bad faith.

## VIII. Caution: Bad Faith Statute (continued)

- In Totty v. Chubb Corp., 455 F. Supp. 2d 376 (W.D.Pa. Aug. 2006), plaintiff sued Chubb seeking to recover under a homeowner's insurance policy for alleged structural damage to her property caused by vibrations from construction equipment used by the city to resurface her street and claiming that defendants acted in bad faith in violation of 42 Pa.C.S.A. § 8371. The court granted summary judgment on the bad faith claim based on the fact that after receiving the insured's claim, the insurer employed an expert, which determined that the property damage was related to foundation settlement. Thereafter, when the insured provided the insurer with evidence that vibrations from the road equipment deposited the soil, causing the house to "settle," the insurer employed two additional experts, both of whom rejected the insured's new theory of causation. The insured did not argue that she was entitled to coverage under any of the theories of the insurer's experts. Thus, the Court found that the insurer continued to have a reasonable basis to deny the insured's claim. "Even if the expert incorrectly assessed the cause of damage, this is not evidence that his conclusions were unreasonable or that Defendant acted unreasonably in relying upon them."

## VIII. Caution: Bad Faith Statute (continued)

- LEVIN v. TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY, et.al., 2008 U.S. Dist. LEXIS 66243 (Mem. Op. Judge Joyner, E.D. Pa. August 20, 2008.

Plaintiff claimed that its insurer acted in bad faith, in violation of 42 Pa. C.S.A. § 8371 by failing to properly provide Plaintiff with copies of relevant insurance documentation and withholding monies due Plaintiff pursuant to the insurance Policy based on an improper investigation. The court found that Plaintiff failed to raise material facts that suggest insurer acted in bad faith and entered summary judgment for insurer. The court declared that summary judgment was appropriate when insurer demonstrated a "reasonable basis" for its conduct, relying on *Horowitz v. Federal Kemper Life Assurance Co.*, 57 F.3d 300, 307-8 (3d Cir. 1995) and *U.S. Fire Ins. Co. v. Royal Ins. Co.*, 759 F.2d 306, 309 (3d Cir. 1985).....

## VIII. Caution: Bad Faith Statute (continued)

- Levin, continued..... The court held that in order to determine whether an insurer acted in bad faith in conducting an investigation into whether an insured was entitled to benefits, courts have looked to the following:

Judges of this court have held that an insurance company's substantial and thorough investigation of an insurance claim, forming the basis of a company's refusal to make or continue making benefit payments, establishes a reasonable basis that defeats a bad faith claim...To defeat a bad faith claim, the insurance company need not show that the process used to reach its conclusion was flawless or that its investigatory methods eliminated possibilities at odds with its conclusion. Rather, an insurance company simply must show that it conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its action.

- *Id* citing Mann v. UNUM Life Ins. Co. of America, 2003 U.S. Dist. LEXIS 23993, 2003 WL 22917545 at \*7 (E.D. Pa. 2003).

## VIII. Caution: Bad Faith Statute (continued)

- Blaylock v. Allstate Insurance Company, 2008 U.S. Dist. LEXIS 1098 (Mem. Op. Judge Caldwell, M.D. Pa. January 7, 2008). Plaintiffs carried a personal auto policy with Allstate which they aver included uninsured motorist (UM) coverage. Plaintiff-wife was involved in an accident with an uninsured driver and made a claim for her UM coverage from Allstate. Allstate denied the claim on the basis that UM was waived and produced a waiver purportedly signed by Plaintiff-wife. Plaintiffs contended that the signature on the waiver produced was forged. Both sides produced handwriting experts. Plaintiffs' expert opined the signature on the waiver was not that of either of Plaintiff-wife, and Allstate's expert opined that a definitive opinion could not be reached either way, based on the poor quality of the document. Allstate offered proof of bi-annual statements sent to Plaintiffs, identifying the coverage they had and that UM was not included nor was any premium for UM ever charged. The parties agreed to allow the UM arbitration panel resolve the factual dispute on signature to save cost of a trial on that issue. The panel entered an award for Plaintiffs and Allstate tendered its limit. Plaintiffs filed suit for bad faith in the handling of the UM claim, producing a bad faith expert, Sallyanne Donovan.....

## VIII. Caution: Bad Faith Statute (continued)

Blaylock, cont.... Donovan opined that Allstate acted in bad faith by (1) delay in investigating veracity of insured's statement that signature was forged for 6 months; (2) unreasonable denial based on attacking credibility of insured's position that they did not know there was no UM coverage on the policy in light of bi-annual service of declaration sheets on insured when the law mandates reformation of UM coverage absent a valid waiver regardless of outside documents or information; and (3) unreasonable reliance on its handwriting expert who admittedly could not a definitive opinion and disregard an expert opinion produced by Plaintiffs in their favor. Allstate countered that it had a reasonable basis to believe that that there was no coverage based on its possession of a signed waiver, the external evidence that Plaintiffs were aware they had no UM coverage which was supportive of discrediting Plaintiffs' denial of the signature, and their expert opinion which discredited the conclusions of Plaintiffs' expert.

## VIII. Caution: Bad Faith Statute (continued)

Blaylock, cont.... The court decided this coverage investigation and stance was reasonable and not supportive of a finding of bad faith. The court did offer a statement of concern that Allstate did not consult with the insurance agent during its investigation who could have offered information on the authenticity of the signature on the waiver as the agent was reportedly a witness to the signature, but since Plaintiffs offered no evidence that contacting the agent would or should have made Allstate respond differently to the claim, this was not fatal to entry of summary judgment in favor of insurer on the bad faith claim.

## VIII. Caution: Bad Faith Statute (continued)

- Easy Sportswear, Inc. v. American Economy Insurance Company, 2007 U.S. Dist. LEXIS 86114 (Mem. Op. Judge Fischer, W.D. Pa., November 1, 2007). Plaintiff submitted property damage claim to its insurer for damage to its roof with resulting damage to inventory from storm rains in connection with Hurricane Ivan. The insurer denied coverage on the basis that its third party claims adjuster inspected the site and reported that the damage was the result of wear and tear and not covered storm damage, and also claimed that Plaintiff failed to conform to its duties under the policy of giving prompt notice of the loss when it was reported to the insurer four months post loss and of safeguarding property to keep it protected from further damage by not emptying boxed inventory to arrest mold. Plaintiff filed suit for declaration of coverage in its favor, breach of contract and statutory bad faith. Cross motions for summary judgment were filed, included in which was the insurer's request that the bad faith claim be dismissed.....

## VIII. Caution: Bad Faith Statute (continued)

Easy Sportswear, cont.....The court concluded that there was an issue of fact as to whether the loss was a covered loss as well as issues of fact as to whether the exclusions proffered applied, and therefore, denied both parties' motion for summary judgment on coverage. Relative to the bad faith claim, the insurer advanced that its prompt notice to insured of potential disclaimer followed by use of claims and roof specialists to investigate the claim evidences its reasonable approach to investigation, and that its interpretation of the policy upon it based its denial was reasonable. The court addressed the high burden of opposing a summary judgment motion in a bad faith case due to the applicable clear and convincing evidentiary requirements, and held that Plaintiff offered no evidence that the investigation or denial was unreasonable, compelling dismissal of the bad faith claim. Note Plaintiff offered no response to the motion to dismiss the bad faith claim.

## VIII. Caution: Bad Faith Statute (continued)

- Common theories of Bad Faith which could impact negotiation process
  - Compelling litigation by unreasonable offer – unfavorable to carrier
  - In Barry v. Ohio Casualty Group, 2007 U.S. Dist. LEXIS 2684, the insured presented a stacked uninsured motorist benefits claim for \$75,000 that was ultimately settled for that amount with an exception carved in the release to allow for a related bad faith action. One of the insured's bad faith theories was that the insurer "low balled" her claim, particularly by making the initial offer below the value created by Colossus used by the claims representative to evaluate the value of injuries; and by increasing the offer with no new information. The Court denied the insurer's summary judgment concluding that a jury could find that insurer acted in bad faith with respect to its offering unreasonably low offers during negotiations of the underlying UIM claim.

## VIII. Caution: Bad Faith Statute (continued)

- Compelling litigation by unreasonable offer – favorable to carrier  
*See also, Zappile v. Amex Assurance Company, 2007 Pa.Super. 171 (June 8, 2007). In this case, the Superior Court reversed trial court judgment of bad faith. Plaintiff-insured filed a bad faith action, stemming from unreasonable offer and resultant delay in resolution of UIM claim. The UIM arbitration took place two years after demand by insured was made and three years after the date of loss. The demand for settlement was the policy limit of \$150,000, but the maximum offer made by Amex was \$32,000. The arbitration award was \$95,000 for injured claimant and \$10,000 for spouse. The Trial Court found Amex acted in bad faith in: failure to make partial payment for wage loss claim; and under-evaluating UIM claim. Amex appealed arguing in part that it was in error to conclude that taking adversarial position in defending against an UIM claim equated to bad faith and error to conclude that Amex owed duty to make partial payments.....*

## VIII. Caution: Bad Faith Statute (continued)

Zappile, continued.....The Superior Court reversed judgment and made following material conclusions: (1) "[A] UIM claim is not strictly a first party claim and it is 'inherently and unavoidably adversarial"; (2) "[W]e are unprepared to say that as a general rule the failure to cut out certain portions of a general damage claim, especially where the insurance contract makes no representation that such a procedure be followed constitutes bad faith"; and (3) an insurer has the right to investigate all parts of a claim and the fact that an arbitration hearing could have taken place earlier than it did does not alone warrant a finding of bad faith. In reversing the bad faith judgment, the Court explained relative to issue one that while it is apparent the insurer undervalued the UIM claim, it is not apparent it did so out of ill will or without reasonable basis. The Court further explained relative to issue two that it did not accept the notion that a partial payment is legally required, and assuming arguendo it is, there is an indication that a prerequisite for such payment is a formal demand for the same which was not present in this case. Finally, the Court explained relative to issue three that "delay" in arbitrating a UIM claim attributable to time needed to explore injuries sustained in a subsequent incident is not bad faith delay, but rather an exercise of an insurer's right to investigate all aspects of the claim.

## VIII. Caution: Bad Faith Statute (continued)

*See also, Heinlein v. Progressive Northern Ins. Co., 2007 U.S. Dist. LEXIS 51592 (W.D. Pa. 2007), wherein the court stated that the bad faith statute does not require an insurance company to submerge its own interests in favor of those of its insured, and investigating and litigating a claim does not constitute bad faith. The court further noted, relying on the *Condio* decision, that consistent with this concept, underinsured and uninsured motorist claims are “inherently and unavoidably adversarial.” However, the court expressly rejected any argument that the fact there is a genuine dispute over the value of a UIM damages claim does not mean that no attempts at settlement need be made, and arbitration is always the appropriate result.*

## VIII. Caution: Bad Faith Statute (continued)

- Common theories of Bad Faith which could impact negotiation process
  - Delay

*Delay in the investigation or payment of a claim without good reason can amount to a de facto denial of a claim without a reasonable basis, and therefore, supportive of a finding of bad faith. With that said, recent cases show a decline in bad faith actions founded on an insurer's alleged delay; and previous litigation has yielded well-settled theories in favor of insurers, consistently concluding delays must be unreasonable to support a finding of bad faith.*

## VIII. Caution: Bad Faith Statute (continued)

- In Pittas v. Hartford Life Ins. Co., 2007 U.S. Dist. LEXIS 36165 (W.D. Pa. May 2007), the plaintiff filed a claim for bad faith relating to a claim for benefits under group policy of accident insurance. Plaintiff alleged that Defendant acted in bad faith: 1) in failing to timely obtain records and failing to inform Plaintiff as to reasons for delay in payment; 2) in initially denying benefits based on intoxication; 3) in failing to pay \$ 600 daily benefits rather than \$ 300.00 daily benefits; and 4) in initially denying benefits for Plaintiff's stay at Healthsouth Harmarville. With regard to the first claim of bad faith, Plaintiff alleges that Defendant did not act in a timely manner in obtaining the records after receiving notice of the claim on March 13, 2004. Specifically, Plaintiff asserts that taking over seven months, until November 22, 2004, when it initially denied the claim, is bad faith. The Court, however, opined that the evidence showed efforts by Defendant to obtain the needed reports to complete the proof of loss, and once the report was obtained, Defendant issued its decision within 60 days. The Court held that a delay of seven months after receiving notice of the claim, without more, is not clear and convincing evidence of bad faith. The Court found there was no indication, evidence, or inference of conduct that imports a reckless disregard or bad faith.

## VIII. Caution: Bad Faith Statute (continued)

- See also, Clugston v. Nationwide Mut. Ins. Co., 2006 U.S. Dist. LEXIS 27898 (M.D. Pa. 2006), in which the court denied Nationwide's motion to dismiss the insured's claim of bad faith founded on an alleged delay in processing a claim. The relevant facts revealed that Nationwide did not conduct an evaluation of the damage to insured's automobile until sixteen days after the claim was presented, an evaluation of the automobile's interior was not performed for another three months, and a month after the final evaluation, the automobile still had not been repaired. The court found this evidence was sufficient to state a claim under bad faith and any assertion that Nationwide had a reasonable basis to delay the processing of insured's claim must await the outcome of discovery

## VIII. Caution: Bad Faith Statute (continued)

- Another very interesting decision in this area involving a theory of delay which failed is Daniel P. Fuss Builders-Contractors, Inc. v. Assurance Co. of America, 2006 U.S. Dist. LEXIS 56742 (E.D.Pa. 2007). In *Fuss*, the insured asserted claims for breach of contract, breach of fiduciary duty, and bad faith pursuant to 42 Pa.C.S.A. § 8371 alleging that the insurers delayed the settlement of a third party claim brought against the plaintiff insured. On a Motion to Dismiss, the Court was asked to determine whether Pennsylvania law recognized a bad faith cause of action against an insurer who ultimately settled a third-party insurance claim within policy limits before an excess verdict had been entered. With respect to actions arising from an insurer's refusal to settle that resulted in the entry of a verdict in excess of the insured's policy limits, numerous federal and state courts have recognized a cause of action for bad faith. The insured analogized its cause of action to these cases. However, the court found that under Pennsylvania law, there was no recognized cause of action against an insurer for delaying settlement of a *third-party* claim. While the insured painted a disturbing picture of improper conduct on the part of the insurers, the Pennsylvania legislature had not yet created a cause of action for the insurers' conduct, nor had the Pennsylvania Supreme Court found that one existed under current law. Accordingly, the instant court held that plaintiff failed to state a claim upon which relief could be granted and dismissed the bad faith claim.

## VIII. Caution: Bad Faith Statute (continued)

- Celebrations Caterers, Inc. v. The Netherlands Ins. Co., et.al., 2008 U.S. Dist. LEXIS 7477 (Mem. Op. Judge Tucker, E.D. Pa. Feb. 1, 2008). Loss occurred at commercial building resulting in claims for property damage and business income loss claims. Certain claims for rental income claimed as a covered business interruption loss were denied. Claimant brought suit for breach of the policy and related bad faith based on insurer's untimely payment where invoices were provided. Court entered summary judgment on bad faith claim in favor of insurer, holding there was no evidence that insurer acted unreasonably or with frivolous motivation in making payment (opinion unclear as to whether delay was due to waiting on appraisal process to be completed on value or on policy construction).

## VIII. Caution: Bad Faith Statute (continued)

- Common theories of Bad Faith which could impact negotiation process
  - Common Law Bad Faith Breach of Conduct

There is still no common law tort remedy available in Pennsylvania. Those claims are governed by 42 Pa.C.S.A. § 8371. However, the court in Birth Center v. St. Paul Co. Inc., 567 Pa. 386 (2001), paved the way for an insured in Pennsylvania to bring a common law bad faith breach of contract claim to recover those types of damages available in contract actions generally. *Id.* at 386. Federal courts have very recently jumped on this bandwagon to allow for more recovery.

## VIII. Caution: Bad Faith Statute (continued)

- In Kakule v. Progressive Cas. Ins. Co., 2007 U.S. Dist. LEXIS 44942 (E.D. Pa. June 20, 2007), the plaintiff brought a breach of contract bad faith suit against his insurer relative to an underlying uninsured motorist claim. The UIM claim was tried at an arbitration which resulted in an award in excess of the limit. Defendant paid the limit and plaintiff sought damages consequential to the breach. The Trial Court initially dismissed plaintiff's bad faith breach of contract claim, concluding Pennsylvania did not recognize a common law theory of bad faith. However, the Court reversed this dismissal and held that he too narrowly construed the law, and opined that the Pennsylvania Supreme Court chose to recognize a contractual common law remedy for the bad faith conduct of insurers in *Birth Center*, just not a common law tort action; and further held that the *Birth Center* holding applies to first party insurance situations as well as third party insurance claims.

## VIII. Caution: Bad Faith Statute (continued)

- In McPeek v. Travelers Casualty and Surety Co., 2007 U.S. Dist. LEXIS 46628 (Mem. OP. W.D. Pa. June 2007), the insured filed a civil action sounding in statutory and common law bad faith, stemming from an alleged wrongful denial of liability coverage. The insurer challenged the claim of common law bad faith. The Court characterized the breach of contract claim as a common law bad faith claim by way of the contract carrying an implied duty of good faith. The Court further recognized the position taken in *DeWalt v. The Ohio Cas. Ins. Co.*, 2007 U.S. Dist. LEXIS 26901 \*28 (Mem. Op, E.D. Pa. April 2007), as the best articulation of a common law bad faith claim, namely that an insured may establish bad faith based on an insurer's negligence or unreasonableness, but such a showing must be by clear and convincing evidence. The Court in *DeWalt* ruled that there is a contract claim for bad faith and the same requires evidence that an insurer acted negligently or unreasonably in handling the potential settlement of claims against its insured.

## VIII. Caution: Bad Faith Statute (continued)

- In McCrary v. State Farm Mutual Automobile Insurance Company, 2007 U.S. Dist. LEXIS 20981 (W.D. Pa. March 2007), plaintiff filed an action for breach of an insurance contract and bad faith evolving out of alleged wrongful denial of an uninsured motorist claim. Insurer moved for dismissal of the contract claim. The court held that the contract claim was actionable because a breach of contract claim stemming from the bad faith handling of the insurance claim is viable, even when combined with a claim under Section 8371. The court also recognized that compensatory damages, to return the parties to the position they would have been in but for the breach, are appropriate damages in this type of case; however recognized that counsel fees and costs do not qualify as compensatory damages under the American Rule.

## VIII. Caution: Bad Faith Statute (continued)

- Common theories of Bad Faith which could impact negotiation process

- Lack of communication with insured

Hanover Insurance Company v. Ryan, 2007 U.S. Dist. LEXIS 92646 (Mem. Op. Judge Stengel, E.D. Pa. December 17, 2007). Hanover sought a declaration from the court that it did not owe a defense or indemnity to Plaintiff in connection with an underlying tort action arising from a motor vehicle accident. Hanover issued a personal umbrella policy to its insured but which contained an exclusion for any liability arising from the provision of home day care services, a business operated by insured-wife. The accident occurred when insured-wife was operating her vehicle to pick up a student enrolled in her class. Hanover disclaimed liability coverage for the accident on the basis of the accident fell within the home day care services exclusion. Plaintiff filed a counterclaim requesting a declaration of coverage in his favor and asserting breach of contract and statutory bad faith which Hanover moved to dismiss.....

## VIII. Caution: Bad Faith Statute (continued)

Hanover, cont.....The bad faith counterclaim was predicate on facts that (1) Hanover entered a default judgment against its own insured without notice to insured's counsel and that (2) Hanover failed to investigate the factual and legal basis for the denial of coverage. The court acknowledged that Section 8371 does not define the specific acts that would establish bad faith, but noted that courts have determined several actions which may constitute bad faith, including (1) a frivolous or unfounded refusal to pay; (2) a failure to investigate into the facts; or (3) a failure to communicate with the insured. The court ruled that the actions alleged of Hanover constitute bad faith, and therefore, denied the motion to dismiss.

## VIII. Caution: Bad Faith Statute (continued)

Greene v. United Services Automobile Association, 2007 Pa.Super. 344 (November 20, 2007, Judge Colville Opinion).

Plaintiffs filed an action for breach of contract and statutory bad faith against their Homeowner's insurer for failure to cover two claims involving damage to their bathroom and roof. The jury entered a verdict of less than \$4,000.00 for the repairs on the contract claim and the court denied the claim for bad faith. Post trial motion for relief was filed and denied. Plaintiffs argued that the trial court erred in concluding that Plaintiffs were not entitled to replacement cost of entire roof to their home when the damaged shingles were no longer produced, and therefore, a new roof was required to avoid mismatched shingles. The Superior Court rejected this contention and affirmed the lower court on this issue. Plaintiffs argued that the trial court erred in finding that USAA's conduct did not constitute bad faith, with focus on undisputed facts that claims adjuster failed to respond to one letter by Plaintiffs, failed to return a few phone calls of Plaintiffs and failed to issue the final coverage check for eight months. Plaintiffs argued that the trial court misinterpreted the law to require intentional conduct such as a dishonest purpose, motive of self-interest or ill will to support a bad faith claim.....

## VIII. Caution: Bad Faith Statute (continued)

Greene, cont.....The court held that “[w]hile it is true that there is no ‘third element’ of ‘self-interest or ill-will’ applicable to a bad faith claim, motive of self-interest or ill will does reflect upon whether a refusal to pay benefits is frivolous or unfounded, and is probative of the second element required for a finding of bad faith, i.e. the insurer knew or recklessly disregarded its lack of reasonable basis in denying a claim. *Id.* at \*18. Using this analysis, the Superior Court affirmed the lower court’s ruling that there was insufficient evidence that USAA acted in bad faith in the investigation and settlement of Plaintiffs’ insurance claims.

## VIII. Caution: Bad Faith Statute (continued)

- Common theories of Bad Faith which could impact negotiation process
  - First Party Medical Benefits

The Third Circuit Court of Appeals and Pennsylvania's District Courts have held for some years that an insured can maintain a bad faith action with regard to denial of first party *wage loss* benefits pursuant to § 8371 because 75 Pa. Cons. Stat. Ann. § 1716 does not provide the exclusive remedy for such a claim, but that 75 Pa. Cons. Stat. Ann § 1797 does provide for the exclusive remedy (including punitive damages) in an auto insurance *medical* benefits claim, which preempts a claim under § 8371. Harris v. Lumberman's Mut. Cas. Co., 2006 U.S. Dist. LEXIS 2432 (E.D. Pa. 2006). Thus, a count for statutory bad faith stemming from denial of first party medical benefits in most instances may be dismissed.

## VIII. Caution: Bad Faith Statute (continued)

- This position was restated *in Cronin v. State Farm Mutual Automobile Insurance Co.*, 2006 U.S. Dist. LEXIS 82139 (Mem. Op. M.D. Pa. Oct. 2006). In *Cronin*, the court dismissed the plaintiff's claim that he was denied medical benefits in bad faith after being injured in a motor vehicle accident. Plaintiff alleged that he was denied first party medical and wage loss benefits in bad faith by Defendant. The Court held that section 1797 of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") provides "the exclusive first party remedy for bad faith denials by insurance companies with respect to claims arising out of automobile accidents." The Court held that Section 1797 preempts Pennsylvania's Bad Faith Statute, 42 Pa.C.S.A. § 8371 insofar as it relates to the refusal to pay medical loss benefits

## VIII. Caution: Bad Faith Statute (continued)

- Furthermore, in Barry v. Ohio Casualty Group, 2007 U.S. Dist. LEXIS 2684, the Court addressed whether an inconsistent position taken by a first party medical claims unit and underinsured motorist claims unit is prima facie evidence of bad faith, and declared it was not. The insured argued that it was bad faith for its insurer to pay first party medical benefits for years post accident, and then challenge causation between the accident and injuries claimed when adjusting a related underinsured motorist claim. The Court ruled that the insurer's prior acceptance of its obligation to provide coverage to its insured under first party portions of the policy did not operate as a bar preventing insurer from later raising the issue of causation with respect to UIM benefits. *Id.* at \*34. However, it may still be bad faith if the challenge to causation was unreasonable. *Id.* at \*35.

## VIII. Caution: Bad Faith Statute (continued)

- However, there is a recognized exception to this rule when the claim for bad faith involves a theory that first party medical benefits were denied pursuant to a peer review process that was abused or implemented improperly, i.e. conspiracy with vendor to secure sham reports to deny benefits and/or use of a peer review report to challenge causation which is beyond the scope of the peer review process. Schwartz v. State Farm Ins. Co., 1996 WL 189839 (E.D. Pa. 1996); Neun v. State Farm Ins. Co., 1996 WL 220980 (E.D. Pa. 1996); DeFazio v. Nationwide, 35 Pa. D & C 4th 221 (Lackawanna Co. 1997); Hice v. Prudential Ins. Co., 34 Pa. D & C 4th 97 (Westmoreland Co. 1997); Olsofsky v. Progressive, 52 Pa. D & C 4th 449 (Lackawanna Co. 2001).

## VIII. Caution: Bad Faith Statute (continued)

- But see recent decision, Stephano v. Tri-Arc Financial Services, Inc. Frontier Adjusters and Lexington, Ins. Co., 2008 U.S. Dist. LEXIS 16673 (Mem. Op. march 3, 2008 Judge Vanaskie, M.D. Pa. 2008).

Third party beneficiary insured to auto policy issued by Lexington to Bama Leasing Auto Trakk sued for medical benefits refused. Insured included bad faith claim against Lexington which was the subject of motion to dismiss. Lexington's motion to dismiss the bad faith claim was premised on argument of preemption. Lexington asserted the argument that the more general bad faith statute at 42 Pa. C.S. 8371 and the more specific MVFRL provision at 75 Pa. C.S. 1797 conflicted on the penalty for overdue medical benefits, thus barring any recovery under Section 8371 and making Section 1797 the exclusive avenue of relief. ....

## VIII. Caution: Bad Faith Statute (continued)

Stephano, continued..... The court reviewed how the Pennsylvania legislature substantially amended the MVFRL in passing Act 6 in 1990 which included modifications to the statutory requirements for coverage and provided a detailed procedure for review and payment of claims, including when and how an insurer could challenge a medical benefit claim through a peer review process by way of Section 1797. If a PRO is used and finds in favor of the insured, then the insurer owes the benefits plus interest at 12% per year. If the insured brings a court action to recover the benefits and prevails, the insurer owes the benefits plus interest, attorney fees and cost of the challenge. If the denial is made without the use of a PRO, and there is a court determination that coverage is owed and that there was a wanton conduct on behalf of the insurer in denying benefits, the insurer will owe all of the above damages plus treble damages. The exposure to treble damages being inserted to encourage the use of PRO reviews. This same Act included Section 8371 which provides for a much broader penalty for conduct of insurers in responding to insurance claims.....

## VIII. Caution: Bad Faith Statute (continued)

Stephano, continued.... The court declared that since the Pa Supreme Court had not addressed the issue of whether Section 1797 preempted Section 8371, it must predict how the Court would decide the issue. The court recognized the general rule as noted by federal courts was that a plaintiff may not seek punitive damages under Section 8371 where he is complaining of the denial of first party benefits determined through the process outlined in Section 1797. But, the court went on to note support for statement that Section 8371 is not preempted when an insurer's alleged malfeasance goes beyond the scope of Section 1797 such as a claim concerning coverage interpretation, abuse of process, or causation. In these situations, the statutes are reconciled and Section 8371 is deemed to supplement Section 1797.....

## VIII. Caution: Bad Faith Statute (continued)

Stephano, continued..... The court concluded that since the allegations of insurer misconduct in the instant complaint were that of wrongful refusal of coverage based on priority of insurance rather than denial based on results of a PRO review, Section 8371 applied. “Section 8371 claims are not categorically foreclosed when medial benefits are at issue” and “nothing in Barnum or Gemini suggests that Section 179 preempts Section 8371 when the PRO process has not been initiated, followed or implicated.” *Id* at 23, citing and referencing Barnum v. State Farm Mut. Ins. Co., 635 A.2d 155 (Pa.Super.1993), *rev'd* 652 A.2d 1319 (Pa.1994) and Gemini Physical Therapy and Rehab., Inc. v. State Farm Mut. Auto Ins. Co., 40 F.3d 63 (3rd Cir.1994).

## VIII. Caution: Bad Faith Statute (continued)

- Furthermore, the general rule of preemption recognized by federal courts has not been so quickly applied by state courts. For a time, the Pennsylvania Superior Court decision in Barnum v. State Farm, 430 Pa. Super. 488, rev'd on other grounds, 539 Pa. 673 (1994) was applied as binding authority for this general rule in state courts, but the value of that decision has been disputed because of the reversal, albeit on different and unrelated grounds. Insured argues that the reversal did apply to this issue, and insurers argue the reversal was limited to the issue of exhaustion of remedies and did not change the law that 1797 preempts 8371.

# VIII. Caution: Bad Faith Statute (continued)

## Good Faith Audit Checklist

### A. Claims Handler Level

1. Did you undertake a thorough investigation?
2. Did you avoid lulls or passive handling of the claim?
3. Does the file reflect consideration and reconsideration of key facts as they develop and change during the investigation?
4. If a liability claim, did you report timely developments to both the insurance company and the insured?

# VIII. Caution: Bad Faith Statute (continued)

## Good Faith Audit Checklist

### A. Claims Handler Level (continued)

5. If a liability claim, did you advise the insured of all settlement negotiations?

6. Did you obtain a second opinion to help evaluate the case for liability and damages? Possible second opinion from:

- experienced lawyers
- retired judges and mediators; or
- focus groups and /or a mock trial

7. Did you take the initiative in mediation and / or settlement?

# VIII. Caution: Bad Faith Statute (continued)

## Good Faith Audit Checklist

### A. Claims Handler Level (continued)

8. Did you consider the best time to try for settlement? Possible times include:

- before filing
- right after filing and service and before answering the discovery;
- after or during discovery;
- after or before mediation;
- during scheduling conference with the judge;
- during any motion *in limine* or motion for summary judgment; or
- during trial

# VIII. Caution: Bad Faith Statute (continued)

## Good Faith Audit Checklist

### A. Claims Handler Level (continued)

9. Did you check as needed with local claims-handling guidelines?

10. Did you make an effort to ensure that any coverage positions were consistent with other positions taken by the company on that issue?

# VIII. Caution: Bad Faith Statute (continued)

## Good Faith Audit Checklist

### **B. Supervisor's Level**

1. Did you ensure that the claims handler had the appropriate amount of experience for the claim involved?
2. Did you ensure that the claims handler was aware of internal company procedures and policies that might be applicable to the claim?
3. Did you maintain a level of oversight that would permit you to describe, at least generally, the status of the claim at any particular time?
4. Did you consider whether the claims handler's procedures and coverage positions were consistent with other positions taken by the company that you are aware of?

# VIII. Caution: Bad Faith Statute (continued)

## Good Faith Audit Checklist

### C. Company Level

1. Does the company maintain appropriate “best practices” procedures for claims handling?
2. Do the “best practices” procedures require the claims handler to be aware of, and conform to, all local claims handling statutes and regulations?
3. Does the company maintain an archive of any changes to policy forms, “best practices” guidelines, and training?
4. Does the company have a means of retaining important historical information (“institutional memory”) beyond the retirement of key individuals?
5. Has the company identified someone to oversee department production and provide uniform responses to document requests and electronic information requests?

## IX. Negotiation and the Tripartite Relationship

- When carrier hires defense counsel to defend the interests of its insured, a three-way “tripartite” relationship is created
- The duties and obligations between the insured, defense counsel and the carrier create numerous areas for potential conflict of interest

# IX. Negotiation and the Tripartite Relationship (continued)

- Potential Areas for Conflict
  - Insured's breach of cooperation clause
  - Consent to settle clause
  - Deductibles
  - Defending non-covered claims'
  - Defending under reservation of rights
  - Confidential communications affecting coverage
  - Declining limits
  - Punitive damages

## IX. Negotiation and the Tripartite Relationship (continued)

- Be careful, in negotiations, not to:
  - Divulge confidential communications to the other party
  - Threaten a lack of coverage
  - Indicate lack of concern re: punitive damages, since they are not covered
- Always communicate with defense counsel, if applicable, re: strategy and history of discussions – make sure you are not undoing what counsel has been trying to accomplish, and make sure counsel is aware of your goals

Wayman, Irvin & McAuley, LLC  
437 Grant Street, Suite 1624  
Pittsburgh, PA 15219  
(412) 566-2970  
Fax: (412) 391-1464  
[www.waymanlaw.com](http://www.waymanlaw.com)  
[dforsythe@waymanlaw.com](mailto:dforsythe@waymanlaw.com)