AUTO INSURACE BAD FAITH CLAIMS IN VIRGINIA

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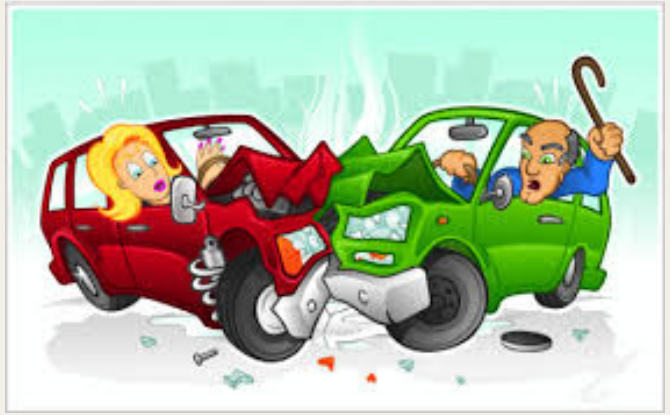
BAD FAITH-AUTO INSURANCE

- John Careless runs a red light and collides with Jane Perfect.
- Jane Perfect suffers two broken legs
  * John Careless is insured with NeverPay Insurance Company
  * *NeverPay refuses to make any offer to settle with Jane*
- Jane Perfect files suit against John Careless
  * NeverPay still refuses to make any offer and hires Dr. Quack



BAD FAITH CLAMS HANDLING

- Dr. Quack testifies that Jane really didn't break any legs and if they were broken she did not suffer any pain.
- Jane's lawyer writes to John's lawyer explaining that Jane's injuries were severe and her damages far exceed NeverPay's 50k liability policy

    * Jane offers to settle for 49k, within the policy limits

    * NeverPay still refuses to make any offer

- Jane receives a jury verdict for 150K

    * Can Jane sue anyone for bad faith?

1966 *Aetna v. Price*, 206 Va. 749, 146 SE 2d 220

- Not an Auto Case
- Doctor Sued His Malpractice Insurer For Failing To Settle His Claim Within The Policy Limits

AETNA v. PRICE

- Interesting facts - doctor was his own worst enemy

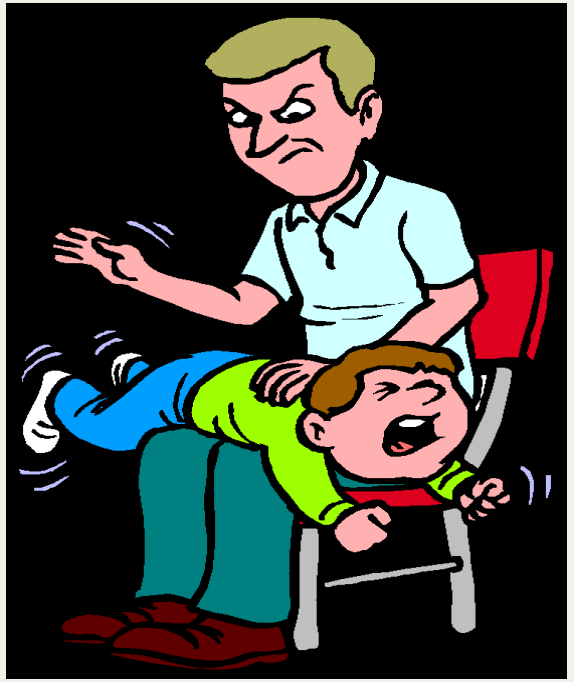
  *Court held that Dr. Price did not have a bad faith claim

- See Course Materials pages 245-247

  * Interesting commentary by VSC

  - Aetna refused to accept the recommendation of its counsel to settle within policy limits.
  - Nevertheless, the VSC announced that the failure of an insurer to follow the settlement recommendation of its counsel, standing alone, is insufficient to sustain a claim of bad faith.

COMMON LAW DAMAGES FOR BAD FAITH



- *Aetna v. Price* held "the insurer may, under proper circumstances, be held liable to the insured for the whole amount of a judgment exceeding the policy limits."
- Damages equal amount of verdict which exceeds liability limits

REASON FOR RULE ALLOWING BAD FAITH

* Control of the defense is vested in the insurer.
* The insurer is permitted to make "such investigation, negotiation and settlement as it deems expedient".

- A relationship of **confidence and trust** is created between the insurer and insured which imposes upon the insurer the duty to deal fairly with the insured….

- Query: Is confidence and trust the equivalent of a FIDUCIARY relationship?

HOW TO EVALUATE LIABILITY COMMON LAW BAD FAITH

* A reasonably diligent effort must be made to ascertain the facts upon which a good faith judgment as to settlement can be formulated

* A decision not to settle must be an honest one; it must result from a weighing of probabilities in a fair manner

: A good faith decision, must be honest and intelligent in light of the insurer's expertise in the field;

: Where reasonable and probable cause exists for rejecting a settlement offer, the insurer will be vindicated.

1988 *STATE FARM v. FLOYD,* 235 Va. 136, 366 SE 2d 93

- Auto crash resulting in head on collision injuring Plaintiff
- Defendant (Floyd) told his attorney he was not at fault
- Defendant consulted private counsel who advised any verdict would be within policy limits
- Defense firm conducted full and complete investigation
  - ❖ *Concluded no offer due to no liability*
  - ❖ *Concluded any verdict will be within policy limits*

    * Plaintiff offered to settle for 49k
    * Defense Attorney never informed Floyd of Plaintiff's Offer

1988 *State Farm v Floyd*

- Trial Resulted In Verdict Of 100k, But Only 50k In Coverage
  - Defendant Paid Plaintiff 50k And Then Sued State Farm

- Jury Awarded Floyd 50k Against State Farm.
  - VSC reversed.

STATE FARM v FLOYD - RULINGS

- Relationship Of Confidence And Trust Does Exist Between Insurer & Insured
  - *The Interests Of The Parties Are Parallel And To Some Extent Overlapping
  - * But It Is Not A Fiduciary Relationship
  - * Interests Of Parties May Diverge When Likelihood That Policy Limits May Be Exceeded
- The Insurer Has The Right To Protect Its Own Interest Along With That Of The Insured.
  - * This Means There Is Never A True Fiduciary Relationship

1988: *STATE FARM V FLOYD*

- Bad Faith Requires A Showing That The "Insurer Acted In Furtherance Of Its Own Interest, With Intentional Disregard Of The Financial Interest Of The Insured."

  * Attorneys have a duty to convey settlement offers to the insured that may significantly affect settlement

  * But Floyd testified he would have rejected settlement offer

STANDARD OF PROOF FOR COMMON LAW BAD FAITH

- Standard of proof : **clear and convincing** evidence of bad faith. (*State Farm v. Floyd*, 235 Va. 136, 144)

- Jury Instruction 3.110 (Definition of "Clear and Convincing")
  - *must produce evidence that creates in your minds a firm belief or conviction that he has proved the issue*

- Contrast with Greater Weight of Evidence Instr. 3.100
  * *The greater weight (preponderance) is evidence you find more persuasive*

WHO OWNS COMMON LAW BAD FAITH CLAIM– Jane or John or Someone Else?

- NeverPay Insurance Co. Has A Contractual Duty / **Confidence & Trust**
  - * NeverPay Must Attempt To Settle Jane's Claim Within Policy Limits
  - * But NeverPay Is **Not A "Fiduciary"** to John Careless
- John Careless "Owns" Any Bad Faith Claim Against NeverPay
  - * Can John Careless "Sell" The Bad Faith Claim He "Owns" ?

HOW DOES THE PLAINTIFF COLLECT?

- Jane Provides Defense Attorney and John Careless With Pre-Trial Letter Documenting Clear Liability & Damages
- If Verdict Exceeds Coverage, Jane Perfect Contacts John Careless and Requests Assignment of His “Bad Faith” Claim
- In Exchange For Not Pursing John Careless Personally, Jane Perfect Receives An Assignment Of John Careless’ Claim Against NeverPay Insurance

COMMON LAW vs. STATUTORY LIABILITY (3RD PARTY) BAD FAITH CLAIM

- Common law: *Aetna v. Price* and *State Farm v. Floyd*
- Statutory VA Code 8.01-66.1(B)
  - **Limited to Liability Claims of $3,500 or Less**

❖ STATUTE DOES NOT AWARD THE EXCESS VERDICT

- DAMAGES:
  * Double the amount of the judgment **AND**
  * Reasonable attorney's fees and expenses

INCIDENTS OF TRIAL FOR STATUTORY CLAIM UNDER 8.01-66.1

- *Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 524 S.E.2d 649, 651(2000).*

: *The higher evidentiary standard of clear and convincing evidence applied in Floyd is* ***inconsistent with the remedial purpose of § 8.01-66.1(A)***

: *evidentiary burden under this remedial statute is the* ***preponderance of the evidence***

- Fact Finder is Judge - No Jury Trial
- Standard Of Proof Is Preponderance Of Evidence
  * <u>No Need to Prove</u> Clear And Convincing

REMEMBER JOHN CARELESS AND JANE PERFECT?

- Assume again that John Careless runs a red light causing a crash which breaks Jane's legs
- But also assume that John Careless was UNINSURED
  - * Jane is insured with SometimesPay insurance company
  - * Jane presents her claim for damages to SometimesPay through her UM coverage
- Assume Jane has 50k of UM coverage
  - * SometimesPay refuses to offer more than 5K –hires Quack
  - * Quack testifies that Jane did not break her legs, and even if she did, she had no pain
- Jane gets a verdict of 150K : Can she sue anyone for bad faith?

DOES VIRGINIA RECOGNIZE A BAD FAITH UM/UIM CLAIM?

- Open Question
- Two cases currently on full appeal
  - *Conner v. Glasgow*
  - *Manu v. Geico*
  - Briefs due at end of October

VA Code 8.01-66.1 (D)(1)

- Circuit Courts have split on whether this statute includes uninsured and underinsured "bad faith" claims
  - In both cases on appeal, liability carriers paid their limits and the cases were tried against the UM carriers
  - In both cases the plaintiffs secured a verdict against the UM carriers in excess of the UM coverage
  - In both cases the plaintiffs believe that the UM carriers put their own interests ahead of those of their insureds

What Does 8.01-66.1 Say?

Whenever a court of proper jurisdiction finds that an insurance company licensed in this Commonwealth to write insurance as defined in § 38.2-124 denies, refuses or fails to pay to **its insured** a claim of more than $3,500 in excess of the deductible, if any, under the provisions of a policy of motor vehicle insurance issued by such company to **the insured** and it is subsequently found by the judge of a court of proper jurisdiction that such denial, refusal or failure to pay was not made in good faith, the company shall be liable **to the insured** .

NO AMBIGUITY

- Statute Does Not Exclude UM/UIM Coverage
- Statute Clearly References Claims Made By The Insured
  - * A UM or UIM Claim is One Made By The Insured
- Statute Cross References Va. Code §38.2-124.

* Section 38.2-124(A)(2) Expressly Defines Motor Vehicle Insurance To Include Coverage Under Va. Code §38.2-2206, the UM statute.

8.01-66.1(D) Distinguishes First Party From Third Party Claims

- While subsection (D)(1) uses the phrase “its insured” after “denies, refuses or fails to pay”, subsection (B) uses the phrase “third party claimant.”

- The only plausible interpretation of §8.01-66.1(D)(1) is one which applies a duty of good faith to UM insurers.

INSURANCE COMPANY'S DEFENSE TO BAD FAITH UM/UIM CLAIMS

- Va. Code § 38.2-2206(A), the Uninsured Motorist Statute.
- UM endorsement requires UM Insurer to pay its insured all sums the insured is "legally entitled to recover" from an uninsured motorist.
- Geico argues that this means that the UM carrier is under no duty to pay until a judgment, which Geico argues is what triggers payment.
- Therefore, Geico argues it cannot be accused of bad faith for its pre-judgment handling of the claim.
- Geico also argues that § 38.2-2206(A) imposes liability only after the insurer denies, refuses or fails to pay, which means AFTER Judgment
- Geico Notes the terms "negotiate" and "settle" are not in the statute

Questions

- Does the insurance company argument conflate a legal duty to pay a judgment with a legal duty to engage in good faith pre-trial dealings?
- Does the fact that Va. Code §38.2-2206(A) creates the trigger for when an insured must collect on the benefits under her UM policy mean that the legislature could not impose a duty of good faith before judgment?
- Is the use of the word “Claim” instead of “Judgment” fatal to Geico?

Possible Answer

- Even if the Code §38.2-2206(A) does conflict with 8.01-66.1(D)(1) , rules of statutory interpretation dictate that the specific language of Code §8.01-66.1(D)(1) will control.

8.01-66.1(A)&(D)
MEDICAL EXPENSE COVERAGE

- *Nationwide Mut. Ins. Co. v. St. John,* 259 Va. 71, 524 S.E. 2d 649 (2000)
- Subsection (A) References Claims Of $3,500 Or Less
- Subsection (D) References Claims Of More Than $3,500
- Both Subsections Specifically Include Medical Expense Coverage

OVERVIEW: STATUTORY BAD FAITH CLAIMS

- Whether a bad faith UM/UIM claim is viable under 8.01-66.1(A)&(D) will soon be decided

* 8.01-66.1(B): Authorizes direct action by third party claimant so long as the alleged bad faith claim does not exceed $3,500

* 8.01-66.1(A)&(D): Authorizes insured to file alleged bad faith action for failure to pay medical expense coverage

? 8.01-66.1(A)&(D): Hopefully authorizes insured to file alleged bad faith claim under uninsured and underinsured coverage – probably does include collision coverage

- Burden of proof for statutory bad faith claims is only preponderance of the evidence but, limit on third party liability claims is $3,500

DAMAGES AVAILABLE UNDER 8.01-66.1 (A & D) (CLAIMS MADE BY THE INSURED)

- ➢ THIS PERTAINS TO FIRST PARTY CLAIMS
- Medical Expense Claims
- Collision/Comprehensive Coverage Claims
- Hopefully Uninsured and Underinsured Motorist Claims

- ❑ Judge May Award AN AMOUNT DOUBLE THE AMOUNT OTHERWISE DUE & PAYABLE
- ❑ REASONABLE ATTORNEY'S FEE & EXPENSES

HOW TO PROVE COMMON LAW BAD FAITH

- Must have judgment in excess of defendant's policy limits
- Must have evidence of more than insurer's refusal to follow counsels advice to settle within policy limits.
- Evidence must be "clear and convincing" that insurer acted in furtherance of its with intentional disregard of the financial interest of the insured
- See page 255 In Course Materials for evidentiary foundation for common law bad faith.
- See Pages 267-268 for List of Unfair Claim Settlement Practices

HOW TO PRESERVE A POTENTIAL BAD FAITH CLAIM

- Provide the claims adjuster ample reason to settle within policy limits

  * Provide medical bills and records early and often

  * If liability is not conceded take depositions of all witnesses

  * File detailed expert witness designations using qualified experts

- Write to claims adjuster
  : Lay out liability and damages
  : Explain why the probable value of the case exceeds the liability limits

- Enclose copy of this letter for the adjuster to provide the insured