A. COMMON LAW BAD FAITH LIABILITY CLAIM

With the 1966 decision in *Aetna v. Price*, 206 Va. 749, 146 SE 2d 220, the VSC confirmed that an insured does indeed have a common law legal remedy for its insurer's bad faith refusal to settle third party claims within the policy limits.

- Weldon Price M.D. was a pediatrician practicing in Arlington, Virginia
- Dr. Price was insured for malpractice by Aetna with limits of 50/150.
- Dr. Prince injured a child as a result of the failure to conduct blood testing.
- After an investigation, Aetna's counsel deemed the case one of "no liability".
- A judgment in the District Court for the District of Columbia was awarded in favor of the child and his father. The judgment for the father was in excess of the $50,000 policy limits. Aetna paid the judgments up to its 50k limits.
- Thereafter Dr. Price sued Aetna in Virginia, alleging wrongful failure to communicate, investigate and then settle the claims within the policy limits.
- Dr. Price's lawsuit sought to force Aetna to pay the excess judgment.
- Dr. Price was successful with a Virginia jury and a verdict was entered against Aetna for the unpaid judgment.
- The opinion sets forth in detail the medical evidence and investigation performed by counsel hired by Aetna in defense of Dr. Price.
- Prior to the med mal trial, settlement negotiations were sponsored by the DC court and during those negotiations Aetna's counsel advised he would recommend a $45,000 settlement.
- The Plaintiff agreed to accept $45,000, but Aetna/Dr. Price's counsel then advised "his client would not pay that much".
- Trial ensued.
- During trial, Dr. Price wrote a letter to counsel hired by Aetna stating that he was aware of the settlement demand within policy limits and Aetna's refusal to pay. The letter

continued that he would hold Aetna responsible for any verdict in excess of the policy limits.

- Aetna's attorney wrote back that he understood that Dr. Price denied liability and asked for evidence or information which established liability. Dr. Price did not respond to that letter.
- *Aetna v Price* addressed whether an insured could sue its liability insurer for conduct which resulted in an excess verdict.
- Question of first impression in Virginia.
- The *Price v Aetna* court surveyed common law throughout nation and concluded the rule is firmly established that "the insurer may, under proper circumstances, be held liable to the insured for the whole amount of a judgment exceeding the policy limits."
- The Court went on to explain why the reason for the rule is obvious.

(1) control of the defense of any claim covered by the contract is vested in the insurer.

(2) the insurer is permitted to make "such investigation, negotiation and settlement … as it deems expedient.

(3) in such a situation, 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.

Components of "Bad Faith Rule"

- The *Aetna v Price* Court defined actionable conduct by the insurer.
- The Court adopted the "bad faith rule" over the "negligence rule".
- In enunciating the "bad faith rule" the court set forth the following standards:

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

2. A decision not to settle must be an honest one; it must result from a weighing of probabilities in a fair manner.
3. To be a good faith decision, it must be an honest and intelligent one in light of the insurer's expertise in the field.
4. Where reasonable and probable cause exists for rejecting a settlement offer, the insurer will be vindicated.

Application of law to facts in *Aetna v Price*

- The Court then analyzed the evidence and found that even if Aetna could have settled the claim for an amount deemed appropriate by Dr. Price, Aetna was not guilty of bad faith.
- The factors deemed relevant to the Court's decision included:

1. Repudiation of the claim by Dr. Price of an inadequate investigation by Aetna. (Dr. Price admitted in his brief that no evidence was introduced of which he was unaware.
2. Repudiation of Dr. Price's claims that:
   a. Counsel hired by Aetna should have filed a motion *forum non conveniens* to move the underlying malpractice action from the District of Columbia to Virginia. (expert testimony in the bad faith action confirmed that such a motion would have failed), and

   b. Counsel hired by Aetna should have filed a third party complaint against another physician to reduce Dr. Price's exposure. VSC ruled there existed no evidence that such 3rd party physician could have been served with the Complaint. This is a curious response by the VSC given the ease with which parties outside the District of Columbia can be served with process. It might reflect an evidentiary mistake by Dr. Price's counsel in not introducing evidence on this point.
3. Repudiation of Dr. Price's claim that the lawyer hired by Aetna failed to advise him of the opportunity to settle within policy limits. (Dr. Price's letter to his counsel during the med-mal trial effectively establishes that he was aware of the previous discussion of a

$45,000.00 settlement).

4. Repudiation of the claim that Aetna was guilty of bad faith because it refused to accept the recommendation of its counsel to settle within the policy limits for $45,000.00. 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.

5. Dr. Price was unable to point to any evidence brought to light before or during trial which should have caused a reversal of Aetna's "no liability" position in the litigation, and throughout the case Dr. Price himself asserted he was not negligent.

Although Aetna was aware a verdict would exceed policy limits if liability was established:

a) Aetna conducted an accurate and complete investigation,

b) Aetna was heedful of its insured's interests as much as its own,

c) Aetna honestly and intelligently weighed the probabilities of success in a trial, and

d) Aetna was therefore not acting in bad faith in refusing to settle within policy limits.

Aetna v Price left several issues unresolved. The first issue was how to craft the jury instruction on what constitutes "bad faith" and second was whether bad faith must be established by a standard higher than a preponderance of the evidence. Both questions were answered in *State Farm Mutual Auto Insur. v. Floyd*, 235 Va. 136, 366 SE 2d 93 (1988).

1. *Floyd* Rejected both the plaintiff's definition based on "fairness" and State Farm's definition requiring fraud, deceit, dishonesty, malice or ill-will, *Floyd* held that bad faith required a showing that the "insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured." *Floyd*, 235 Va. 136,143-144.

2. *Floyd* states attorneys have a duty to convey settlement offers to the insured that may significantly affect settlement or resolution of the matter and the failure to do so is one important factor in evaluating for bad faith.

3. Standard of proof requires "clear and convincing evidence" of bad faith. *Floyd* 235 Va. 136, 144.

Although a statutory bad faith third party claim under Va. Code §8.01-66.1 is another option, such claims are limited to $3,500 or less. (see "B" below).

PRACTICE POINTER:

Bad Faith Letter. Prior to trial, counsel for plaintiff should always send a well-reasoned letter to defense counsel, with an extra copy for the defendant, setting forth a demand within the policy limits and explaining why the verdict or judgment will probably exceed the policy limits.

Assignment of Tortfeasor's Bad Faith Claim

An assignment is the mechanism enabling a plaintiff to collect on an excess verdict. The assignment calls for the insured tortfeasor to assign his bad faith claim to the plaintiff in exchange for a promise not to initiate post-judgment collection (garnishment, etc.) against the defendant. The assignment should recite that it does not operate as a release of the judgment. Instead, the amount collected pursuant to the assignment will be applied as a credit to reduce the excess verdict.

B. STATUTORY BAD FAITH CLAIMS - Virginia Code §8.01-66.1

1. Statutory Bad Faith Liability Claims

- Virginia Code §8.01-66.1(B) and (D)(2).
- Statutory bad faith liability claims are limited to a claim of $3,500 or less against a liability carrier.
- To be successful, a judge must find that such denial, refusal or failure to pay was not made in good faith.
- Damages include:

(I) The amount due.

(ii) Double the amount of the judgment awarded the third party claimant,

(iii) Reasonable attorney's fees, and

(iv) Expenses.

2. Statutory Bad Faith Failure to Pay Medical Expense Claim

- Virginia Code §8.01-66.1(A) and (D)(2) specifically mention medical expense claims.
- Subsection A refers to first party (including medical expense) claims of $3,500 or less.

Damages under subsection A include **double the amount due plus attorney fees and expenses**.

- Subsection (D)(2) refers to first party (including medical expense) claims in excess of $3500.

Damages under subsection (D)(2) include **the amount due (not double) plus attorney fees , expenses and interest at double the rate provided in §6.2-301.**

Claims under §8.01-66.1 must be heard by a judge and not a jury. The standard of proof is only a preponderance of the evidence. *Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 524 S.E.2d 649 (2000).

C. DECLARATORY JUDGMENT TO DETERMINE COVERAGE

- The liability insurer has the option of filing a declaratory judgment action if it thinks the underlying facts are outside its coverage.
- In personal injury cases, this arises most frequently when it appears the insured engaged in intentional conduct which was excluded from coverage by the terms of the insurance policy.

Reison v Aetna Life & Casualty Co., 225 Va. 327,302 S.E 2d 529 (1983)

- Reison approached Goins on a street in Alexandria and claimed Goins owed him $33.00.
- After an argument Goins drove his truck over the sidewalk and injured Reison.
- Goins later pleaded guilty to hit and run and reckless driving.
- Reison filed suit against Goins and alleged both negligent and intentional conduct.
- Aetna was Goins' motor vehicle liability insurer.
- Aetna filed a declaratory judgment action alleging it had no duty to defend Goins because his actions were intentional and were excluded from coverage.
- The DJ action was heard two weeks before the personal injury trial, and a jury found that Goins did intend to injure Reison.
- The trial court entered an order declaring Aetna owed no duty to defend or afford coverage to Goins.
- Two weeks later a jury found Goins negligent and awarded $372k, an amount in excess of Aetna's liability policy.
- Prior to verdict Reison's counsel sent Aetna a letter offering to settle within the policy limits.
- An appeal followed.
- Reison argued that where the liability of Goins was a jury question in the tort action, it was improper to allow Aetna to make an end run around the tort trial with a DJ action.

- The VSC held that it was proper to hear the DJ action before the tort action.
- Aetna's duty to defend Goins and pay any judgment was dependent upon coverage under the policy.
- VSC held that "advance determination of the coverage question served to remove the clouds from the legal relations of the parties."
- Court decision left Reison without a claim against Aetna for bad faith failure to defend Goins and resulted in a mostly unpaid verdict (Reison had $25k in UM coverage).

VSC court, quoting from a 4th Circuit case, added the following:

> *Unless the insurer has this right (to file a DJ action prior to the tort action), it would be at the mercy of every unscrupulous litigant who, disregarding the facts, falsely alleges a claim on which the insurer would be liable, establishes another claim for which no insurance liability would attach, and then collects the judgment from the insurer because it could not show the true facts. Reison, 225 Va. 336, 302 SE2d 524.*

D. DOES VIRGINIA RECOGNIZE A BAD FAITH UM/UIM CLAIM?

This was decided in 2017 in ***Manu v. GEICO Cas. Co.*, 293 Va. 371 (2017).**

- Manu stemmed from a 4 car pile-up.
- Manu was a passenger in the 4th car.
- The crash was caused by a John Doe vehicle cutting off the lead car.
- Deposition testimony established that both cars #1 and #2 saw John Doe.
- Manu's driver was also negligent for rear-ending car #3, and his insurer, Allstate, paid its liability policy limits prior to trial.
- Geico was Manu's insurer and Manu demanded payment from Geico under the UM coverage for the negligence of John Doe.
- Manu demanded a sum within Geico's UM limits.

- Despite serious injury to Manu, Geico refused to offer more than $5,000.00.
- Geico defended on the ground the injury was not serious, the negligence of Manu's driver was an intervening and superseding cause, and that the evidence of a John Doe was not clearly established.
- Geico's defense (Manu's driver was an intervening and superseding cause of Manu's injury) was struck by the trial judge (Roush) before the case went to the jury.
- The jury returned an excess verdict for Mr. Manu against John Doe.
- Geico paid its policy limits and Manu filed a "bad faith" action against Geico. Manu relied on *Va. Code 8.01-66.1(D)(1)* and also cited to *Va. Code § 38.2-209.*
- Geico demurred and an appeal to the VSC followed.
- Manu argued Virginia *Code 8.01-66.1(D)(1)* is remedial and is to be broadly interpreted.
- Manu argued the legislative history included studies showing consumers were unhappy with their insurers.
- Manu argued that *8.01-66.1(D)(1)* unambiguously references first party claims, which include UM and UIM.

Decision in *Manu v. GEICO Cas. Co.*, 293 Va. 371 (2017).

- Va. Code *§ 38.2-2206(A)* is the Uninsured Motorist Statute.
- All liability insurance policies issued in Virginia shall include an endorsement undertaking to pay its insured all sums the insured is "legally entitled to recover" from an uninsured motorist.
- UM carrier is under no duty to pay until a judgment.
- Judgment is what triggers “legal entitlement to recover” from UM/UIM carrier.
- Geico cannot be sued bad faith for pre-judgment UM claims handling.
- *Manu* was a UM claim.
- Argued jointly with *Manu* was a claim against Liberty Mutual for failure to settle a UIM in good faith. *See: Conner v. Glasgow*, 2017 Va. Unpub. LEXIS 10 (decided April

27, 2017).

- *Conner* is an unpublished opinion issued the same day as *Manu*
- *Conner's* holding was identical to *Manu.*
- *Connor says* no claim for bad faith adjusting of a UIM claim prior to a judgment.

Remedy: New legislation to establish cause of action for bad faith handling of UM/UIM claims.

E. WHAT IS NECESSARY TO PROVE BAD FAITH IN VIRGINIA?

- A common law bad faith claim by a defendant against his **liability insurer** must be founded on more than a refusal of the insurer to follow counsel's advice to settle within the policy limits.
- A common law bad faith claim must establish by clear and convincing evidence that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured.

This will require evidence of at least some of the following:

1. Sloppy investigation, such as incomplete or inadequate witness interviews.
2. Inadequate discovery, such as the failure to depose relevant witnesses.
3. Ignoring expert testimony and failing to hire experts of its own.
4. Ignoring lay testimony.
5. Rolling the dice on either damages or liability determinations when a settlement demand was made within policy limits and the damages likely would result in an excess verdict.
6. Failing to communicate a settlement offer within policy limits.
7. Procedural mistakes concentrating liability where it could be diluted by bringing in other potentially liable defendants. See, *Aetna v. Price*, 206 Va. 749, 146 SE 2d 220 (1966) and *State Farm Mutual Auto Insur. v. Floyd*, 235 Va. 136, 366 SE 2d 93 (1988).

Unfair Claim Settlement Practices Act - Va Code § 38.2-510.

- Contains a list of prohibited practices.
- May be relevant to a bad faith claim against an auto insurer.
- Unfortunately, subsection B of the act eliminates a private cause of action.
- The Act assigns enforcement to the State Corporation Commission.
- The predicate for sanctioning an insurer under this statute is showing that violations were committed with such frequency as to indicate a general business practice.

For Bad Faith Liability Claim, Go Statutory or Common Law?

With the lower burden of proof for statutory bad faith claims under 8.01-66.1(preponderance of the evidence), chances of success are greater than a common law action. Unfortunately, the jurisdictional limit for third party (liability) bad faith claims under 8.01-66.1 is capped at only $3,500.00.

F. ADJUSTER CASE EVALUATION STRATEGIES: EXCESS VERDICT

- Most claims adjusters are averse to being hit with an excess verdict.
- Should excess verdicts occur too often, the adjuster's employment could be in jeopardy.

- For that reason, while the adjuster will strive to settle the case for as little as possible, eventually an offer that could meet the definition of fair" should be forthcoming. Unfortunately, that offer may not be forthcoming until the Plaintiff files suit.
- Plaintiff's counsel should always set the stage for a possible bad faith suit.
- But given the burden of proof for a common law bad faith liability claim (clear and convincing) and the fact that common law bad faith requires a finding that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured, such claims will frequently be difficult to win.

APPENDIX

EXHIBIT A - PERSONAL INJURY SAMPLE COMPLAINT

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF _____

	:	
Plaintiff,	:	
	:	
v.	:	Case #: