



# **PART V**

**AUTO INSURANCE BAD FAITH CLAIMS IN VIRGINIA**



# 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?



## *AETNA V. PRICE, 206 VA. 749 (1966)*

- Doctor sued his malpractice insurer for failing to settle his claim within policy limits
- Court held that Dr. Price did not have a bad faith claim



## *AETNA V. PRICE*

- *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”
- See course materials pages 83-87 (commentary by VSC)
  - Aetna refused to accept recommendation of its counsel to settle within policy limits
  - Nevertheless, VSC announced that the failure of an insurer to follow settlement recommendation of its counsel, alone, is insufficient to sustain claim of bad faith
- 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 facts upon which a good faith judgment as to settlement can be made
- 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



## ***STATE FARM V. FLOYD, 235 VA. 136 (1988)***

- Auto crash resulting in head-on collision injuring Plaintiff
- Defendant (Floyd) told his attorney he was not at fault
- Floyd consulted private counsel, who stated that verdict would be within policy limits
- Defense firm conducted full and complete investigation
  - Concluded no offer due to no liability, and any verdict will be within policy limits
- Plaintiff offered to settle within policy limits
- Although State Farm's counsel didn't convey settlement offer to Floyd, Floyd later testified that he would have rejected State Farm's offer of 10-15k



# *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*

- Relationship of confidence and trust does exist between insurer and 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 likely 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

# *STATE FARM V. FLOYD*

- Bad faith requires showing that the “insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured”
  - Attorneys have duty to convey offers that may significantly affect settlement
  - But Floyd testified he would have rejected settlement offer



- Ruling: attorney’s failure to pass on settlement offer, by itself, is not bad faith

# STANDARD OF PROOF FOR COMMON LAW BAD FAITH

- 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” Jury Instruction 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 pursuing John Careless personally, Jane Perfect receives an assignment of John Careless’ claim against NeverPay Insurance



# COMMON LAW VS. STATUTORY LIABILITY (3<sup>RD</sup> 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 as well as 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 (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 standard
- Fact finder is the judge - no jury trial
- Standard of proof is preponderance of the evidence
  - No need to prove clear and convincing

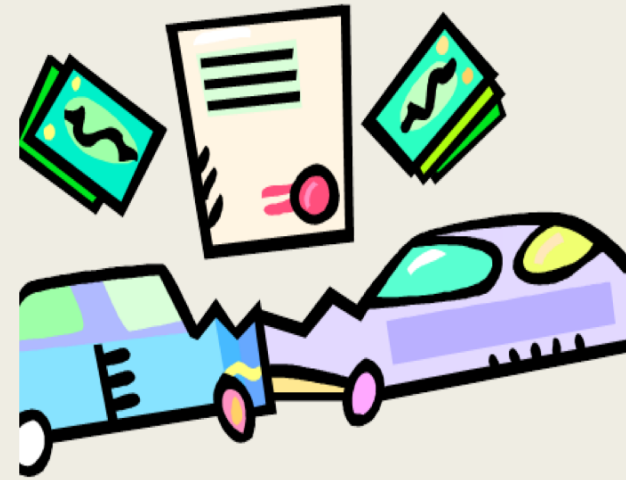


# REMEMBER JOHN CARELESS AND JANE PERFECT?

- Assume that John Careless runs a red light, causing a crash that 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 didn't 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 VA RECOGNIZE A BAD FAITH UM/UIM CLAIM? *MANU V. GEICO*, 293 VA. 371 (2017)

- Crash involving four vehicles, Manu was a passenger in car #4
- Crash caused by a John Doe vehicle cutting off the lead car
- Manu's driver 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 UM coverage, for the negligence of John Doe
- Despite serious injury to Manu, Geico only offered \$5,000



# *MANU V. GEICO*

- Geico defended on the grounds that:
  - (1) the injury was not serious;
  - (2) the negligence of Manu's driver was an intervening/superseding cause; and
  - (3) the evidence of a John Doe was not clearly established
- The jury returned an excess verdict for Manu against John Doe
- Geico paid its policy limits and Manu filed a "bad faith" action against Geico
- Geico appealed to the Virginia Supreme Court
- Manu argued Virginia Code 8.01-66.1(D)(1) unambiguously references first party claims, which include UM and UIM

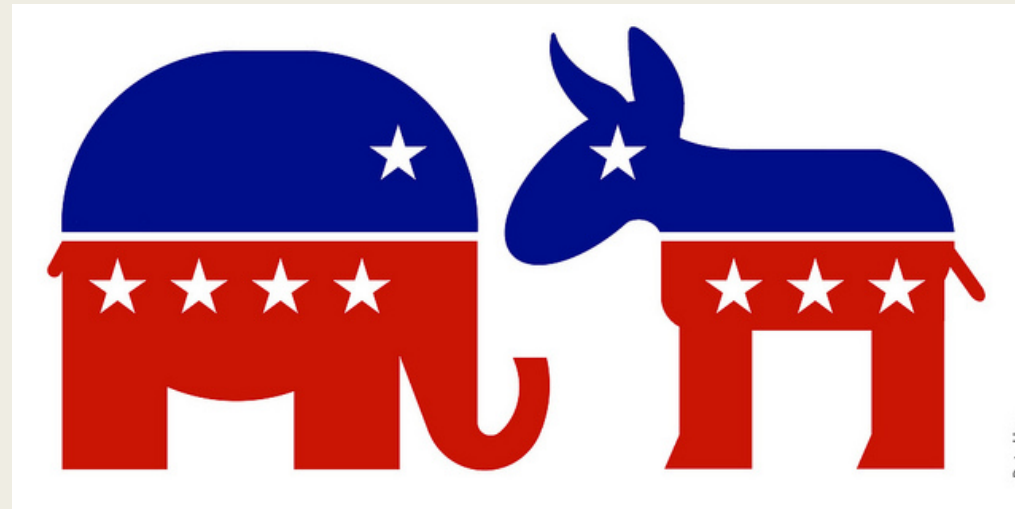
# *MANU v. GEICO*



- VSC ruling:
  - All liability insurance policies issued in Virginia shall include an endorsement undertaking to pay insured all sums insured "legally entitled to recover" from UM
  - UM carrier is under no duty to pay until a judgment
  - Geico cannot be sued for bad faith for pre-judgment UM claims handling
- *Connor v. Glasgow* (2017)
  - VSC ruled on *Connor* the same day as *Manu*, holding that there is no pre-judgment bad faith for UIM claims either

# IS THERE A SOLUTION TO *MANU* DECISION?

Because VSC held that the existing law will not support pre-judgment bad faith UM/UIM claims, the legislature must go back to the drawing board.



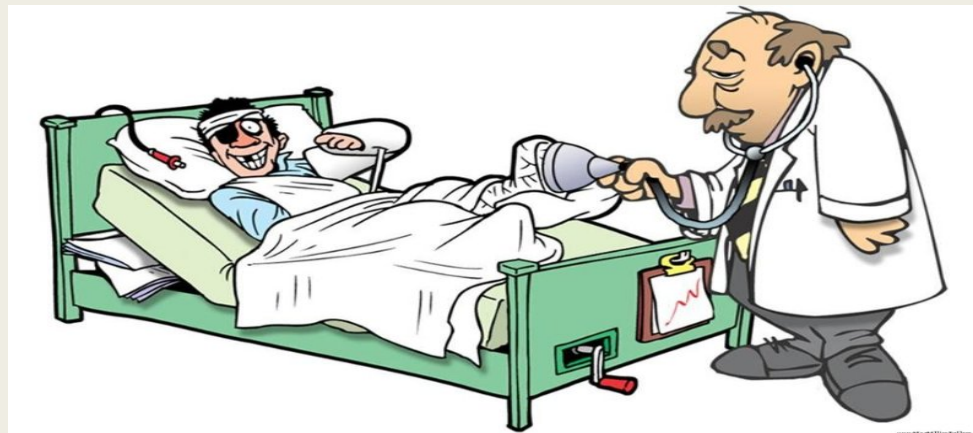
## VIRGINIA CODE § 8.01-66.1(D)

“Whenever a court of proper jurisdiction finds that an insurance company . . . 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 in the amount otherwise due and payable [plus interest, attorney’s fees and expenses.]”

# 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



# **BURDEN OF PROOF FOR STATUTORY BAD FAITH CLAIMS**

Preponderance of the evidence standard:

The evidence you find more persuasive





# 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
  - Only post-judgment UM and UIM claims
- Judge may award an amount **DOUBLE** the amount otherwise due & payable, plus reasonable attorney's fees and 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 counsel's advice to settle within limits
- Evidence must be "clear and convincing" that insurer acted in furtherance of its own interest with intentional disregard of the financial interest of the insured
- Pages 92-93 in course materials: evidentiary foundation of common law bad faith claims
- Unfair Claim Settlement Practices Act contains list of prohibited practices

# HOW TO PRESERVE A POTENTIAL BAD FAITH CLAIM

- Provide claims adjuster ample reason to settle within policy limits
  - Provide medical bills and records early and often
  - If liability 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 value of the case exceeds liability limits



**JEREMY FLACHS SAYS GOODBYE!**

