

***INSURANCE BAD FAITH
IN PENNSYLVANIA
19TH EDITION***

**CASE LAW ARCHIVE – ONLINE
ADDITIONAL LEGAL AUTHORITY**

Author's Note

In the eighteen years since *Insurance Bad Faith in Pennsylvania* was first published in 2000, it has grown from 454 pages in the first edition to a whopping 1700+ pages in the 19th Edition. In order to keep the length of *Insurance Bad Faith in Pennsylvania* manageable, and to keep it affordable for the reader, my editors and I jointly decided to reduce the length of the book itself by omitting some of the case summaries which were older or largely redundant of established principles. **Rather than delete forever these summaries, however, the decision was made to include ALL of them online in what is called the “CASE LAW ARCHIVE.”**

It is our sincere hope that you will find this a practical and convenient solution to our continuing efforts to keep you informed and up-to-date on this growing area of Pennsylvania jurisprudence.

Rich McMonigle
December 2018

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CHAPTER 3

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§3:03 Common Law Bad Faith Liability for Failure to Settle Claim Within Policy Limits

§3:04 Cases

(1) *Clunie-Haskins v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 28695 (E.D. Pa. Mar. 5, 2012) (Schiller, J.)

Two boys sexually assaulted plaintiff's daughter. The parents of both boys had homeowner's policies with State Farm, which initially provided a defense, subject to a reservation of rights, in the underlying personal injury action. State Farm informed them that they should obtain personal counsel. State Farm filed a declaratory judgment action seeking a declaration that it owed no defense or indemnification under its policies, and eventually received a default judgment. State Farm, however, continued to provide a defense in the underlying action, but notified the boys that it would not indemnify them for any possible liability. After the jury returned a verdict for the boys, plaintiffs appealed. State Farm indicated that it would provide a defense through any appeals, but would not defend against any new trial. The appellate court affirmed the issue presented on appeal; the Supreme Court reversed and remanded for a new trial. State Farm's petition for reargument was denied, and the insurer then refused any continued defense. Plaintiffs demanded the policy limits of \$100,000 to settle, which State Farm rejected. After binding arbitration awarded \$2 million in damages, the boys assigned plaintiffs their rights under the policies. Plaintiffs filed suit against State Farm for, *inter alia*, bad faith. State Farm moved for summary judgment, which Judge Schiller of the Eastern District granted.

The court noted that "[w]hile Pennsylvania also provides a statutory remedy for an insurer's bad faith conduct, the statute does not alter an insured's common law contract rights."¹ Because the alleged breach of the duty of good faith and fair dealing addressed State Farm's conduct after entry of the default judgment, in continuing a defense but withdrawing it after the conclusion of appeals, it stood apart from the breach of contract claim. The court rejected plaintiffs' argument that the continued defense throughout the appeals, and then withdrawal of the defense after that time constituted a breach of the duty of good faith and fair dealing. According to the court, State Farm had clearly notified the boys that the defense was subject to a reservation of rights, and State Farm had informed them that they should obtain personal counsel. Furthermore, the court indicated that because State Farm had been adjudged not liable for any defense or indemnification, and not liable for any breach of contract for withdrawing its defense and indemnification, State Farm could not be liable for bad faith in failing to provide such.

Plaintiffs claimed also that State Farm acted in bad faith for refusing to settle for the policy limits after the appeals concluded. The court rejected that argument because State Farm was not responsible for any defense or indemnification: "At the time of the plaintiff's [sic] demand, State Farm was not obligated to indemnify Scaruzzi and Fabrizzio, a fact made clear to Scaruzzi, Fabrizzio, and the plaintiff in the underlying action. . . . Similarly, and contrary to Plaintiffs' contentions, without a duty to indemnify, State Farm did not act in bad faith by refusing to indemnify Scaruzzi and Fabrizzio for the judgment awarded against them at arbitration or by its statements in the second and third ROR letters refusing to indemnify them."²

The court rejected plaintiffs' claim that State Farm acted in bad faith by controlling the defense, because the boys had not obtained personal counsel, despite being advised by State Farm that they should, and because appointed counsel had provided a "solid defense."

Finally, the court rejected plaintiffs' claim that State Farm had acted in bad faith by filing the petition for reargument, because that filing had hindered the possibility of settlement. Rather, the court found that such an argument was opinion only, and the fact that the policy limits demand had been rejected undermined the argument.

(2) *McPeek v. Travelers Cas. & Sur. Co.*, 2007 U.S. Dist. LEXIS 46628 (W.D. Pa. June 27, 2007) (McVerry, M.J.)

Magistrate Judge McVerry of the Western District, although denying cross-motions for summary judgment, addressed the nature of the third party bad faith claim. According to the court, "The common law bad faith claim is, in actuality, a claim for breach of contract. . . . This claim is separate and distinct from the statutory bad faith claim."³ The court found the analysis of *DeWalt v. Ohio Casualty Insurance Company*, addressed in this section, as persuasive.

(3) *Schoffstall v. Nationwide Ins. Co.*, 58 Pa. D. & C.4th 14 (York June 28, 2002) (Thompson, J.)

In this case, discussed in §§10:19 and 10:21, the plaintiff Schoffstall filed a §8371 action against Nationwide challenging the company's handling, through its staff counsel, of settlement negotiations in a third party case. Judge Thompson of York County held that the plaintiff would not be able to establish bad faith, as a matter of law:

Here, examining the record in a light most favorable to Mr. Schoffstall, it may be that [Nationwide's staff counsel] and Nationwide misevaluated the case, but it cannot be said that this

¹ *Clunie-Haskins v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 28695, at *17 (E.D. Pa. Mar. 5, 2012) (citing *Birth Center*, 787 A.2d at 386-88).

² *Id.* at *20-21.

³ *McPeek v. Travelers Cas. & Sur. Co.*, 2007 U.S. Dist. LEXIS 46628, *4-5. (W.D. Pa. June 27, 2007).

fact would amount to bad faith. . . . Mr. Schoffstall does not set forth any fact in the record from which a jury may infer that the refusal to settle this case was for a dishonest purpose or even that [staff counsel's] evaluation was unreasonable. The court is not prepared to say that the "misevaluation" of a case would prima facie give rise to a bad faith claim against the insurance company. There are no facts presented on the record that indicate Nationwide was presented with a likelihood of a verdict in excess of policy limits other than the original demand that was almost three times the amount of Mrs. Hannigan's award. In addition, there are no facts that even hint, much less establish, a factual question that Nationwide did anything but engage in good faith negotiations as indicated by the increases in Nationwide's offers before trial.⁴

(4) *Builders Square, Inc. v. Saraco*, 1996 U.S. Dist. LEXIS 1944 (E.D. Pa. Dec. 27, 1996) (Waldman, J.)

In this case, the insured sued its liability insurer and retained defense attorney, alleging the mishandling of an underlying products liability action. The plaintiff's limit of liability under the applicable policy was \$1 million, and the plaintiff alleged that his insurer, as well as the company's retained defense counsel, improperly failed to settle the underlying lawsuit within the \$1 million policy limits. However, there was no evidence that the plaintiff in the underlying case would have accepted \$1 million or less, and in fact the underlying case settled for \$4.25 million.

The late Judge Waldman of the Eastern District granted summary judgment in favor of the insurer, finding that the record did not show any dereliction on the part of the defense attorney or any breach of duty owed to the plaintiff on the part of the insurer.

As part of its analysis, the court addressed the issue of damages under a common law bad faith claim and §8371. According to the court,

In a contract action as with a tort claim, "damages are never presumed." In order for plaintiff to recover on a theory that the insurer breached its contractual duty of good faith by failing to settle within the terms of the policy, there must be evidence sufficient to show that such a settlement would not have been rejected.⁵

(5) *United States Fire Ins. Co. v. Royal Ins. Co.*, 759 F. 2d 306 (3d Cir. 1985) (Rosenn, J.)

Nordson Corporation was a defendant in a products liability suit. Nordson maintained liability insurance with Royal with policy limits of \$250,000. Nordson also carried excess insurance with United States Fire Insurance Company in the amount of \$5 million. The trial in the products liability action began in May of 1981. On that day, the plaintiffs offered to settle for \$1.2 million. Both the primary and the excess carrier agreed that the offer should be rejected. Royal, the primary carrier, made a counter offer of \$75,000 to \$80,000, which the plaintiff refused. The plaintiff then demanded \$800,000 to settle, but the attorneys for both the primary and the excess carriers concluded that the demand should be rejected. By the time the plaintiff concluded its case, attorneys for both the primary and the excess carriers believed that the defense was going very well. The attorney for the excess carrier even advised his client that, in his estimation, Nordson had an 80 percent chance of winning the case. After the close of all of the evidence, the trial judge informed counsel for the insurance carriers that \$400,000 would settle the case. The excess carrier then sent a letter to the primary carrier demanding that the primary carrier tender its policy limits of \$250,000. It also advised that if it failed to do so, the excess carrier would consider such a failure to be in bad faith. A jury ultimately found against Nordson and awarded \$1 million. The excess carrier later sued the primary carrier for \$600,000, which was the difference between the \$150,000 it would have had to pay if the case had settled for \$400,000 and the \$750,000 it had actually paid.

The Third Circuit reversed the bad faith judgment in favor of the excess carrier, finding that the excess carrier failed to show by clear and convincing evidence that the primary carrier acted in bad faith. The court found that there was no evidence the plaintiff had ever offered to settle for \$400,000, so that the primary carrier's refusal to offer its policy limits toward that settlement could not be considered bad faith. Further, the court noted that Royal demonstrated a willingness to explore settlement possibilities by making an initial settlement offer of \$75,000 to \$80,000 and reacting favorably to the court's high-low proposal. The court concluded that the excess carrier failed to prove by clear and convincing evidence that the primary carrier's evaluation of the case was "less than honest, intelligent, and objective."⁶ Thus, the court held that the district court erred in failing to direct a verdict in the primary carrier's favor.

(6) *Ashbrook v. Kowalick*, 332 F. Supp. 78 (E.D. Pa. 1971) (Fullam, J.)

In this case, Judge Fullam of the Eastern District held that an insurer may be liable for third party bad faith even if it settles an action within policy limits if it fails to do so within a reasonable time.

The plaintiff was a passenger in a vehicle driven by the defendant. They were involved in an accident on May 29, 1966. Shortly thereafter, the insurance company began to investigate the accident. The plaintiff filed suit in January of

⁴ *Schoffstall*, 58 Pa. D. & C.4th at 39-40.

⁵ *Builders Square*, 1996 U.S. Dist. LEXIS 19444, at *20.

⁶ *United States Fire Ins. Co. v. Royal Ins. Co.*, 759 F.2d at 311.

1967. Two months later, the plaintiff's counsel wrote to the defendant's counsel and offered to settle the case for \$10,000, the policy limits, and further advised that unless the offer was accepted within two weeks, it should be considered withdrawn. The insurer wrote a letter to its insured, advised of the possibility that a verdict might exceed his policy limits and that he was free to obtain his own counsel. The insurer did *not* advise the insured that the plaintiff had already offered to settle within the policy limits. However, through its counsel, the insurer declined to accept the plaintiff's offer because it needed further information about the case.

The case proceeded to trial on the issue of damages only, and a jury returned a verdict in the amount of \$60,714. The plaintiff thereafter initiated a garnishment proceeding to collect the excess judgment, asserting that the insurer was guilty of bad faith in failing to settle within the policy limits when it had an opportunity to do so. The jury in the garnishment action found in favor of the plaintiff.

The district court denied the insurer's motion for a judgment notwithstanding the verdict. The court found that the insurer made no offer to settle until after the plaintiff moved for summary judgment, even though: (1) the plaintiff had suffered permanent injuries and disfigurement; (2) medical expenses had exceeded the policy limits; and (3) the testimony of the insured driver and other witness statements "totally eliminated any likelihood of being able to prove assumption of the risk as a defense."⁷ While the plaintiff's demand that the insurer settle the case within two weeks was "an unreasonably brief period of time," the court held that the company's delay in making its offer "was also unreasonable and amounted to bad faith."⁸ The court stated that "good faith handling of the insured's interests as well as the company's interests required some affirmative attempt by the company during that period to settle the case, or at least inquire as to whether it could still be settled."⁹

(7) *White v. Behlke*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 444 (Lackawanna Oct. 7, 2009) (Nealon, J.)

In their medical malpractice action against defendants, plaintiffs received a jury verdict in their favor, in excess of the policy limits. Two of the defendants filed an appeal; one settled. The appealing defendants filed a motion to stay execution of the judgment and to reduce the appellate security amount, arguing that the malpractice carrier should be responsible for posting the full amount of security because of its alleged bad faith and the appealing defendants' assignment of the bad faith action to plaintiffs. Judge Nealon of the Lackawanna County Court of Common Pleas granted the motion.

The court noted that an insurer's responsibility for a supersedeas bond was to be considered based on the policy language, which here required the insurer to be responsible for a bond only up to the amount of the policy limits, plus its *pro rata* share of prejudgment interest. The court concluded that potential liability for bad faith could not support a finding that an insurer would be responsible for posting a bond in a greater amount than that contractually required. Citing New Jersey Supreme Court authority, the court explained:

Although the plaintiffs argue that Med Pro engaged in bad faith conduct by failing to settle this claim within its coverage limits prior to the verdict, any excess liability on the part of Med Pro has yet to be established. Other courts have declined to consider the alleged bad faith of an insurer when determining the amount of appellate security unless such bad faith liability has already been determined in a separate proceeding against the insurer.¹⁰

The court concluded: "Until such time as Med Pro's bad faith liability for the excess judgment has been definitively adjudicated, its alleged responsibility for the uninsured judgment cannot serve as grounds for compelling it to post bond in the amount of \$17,452,034.00."¹¹

§3:05 Who May Assert a Third Party Bad Faith Claim

§3:06 Cases

(1) *Empire Fire & Marine Ins. Co. v. Jones*, 739 F. Supp. 2d 746, 2010 U.S. Dist. LEXIS 101046 (M.D. Pa. Aug. 19, 2010) (Blewitt, M.J.), *adopted by*, 739 F. Supp. 2d 746 (M.D. Pa. Sept. 13, 2010) (Jones, J.)

The facts of this case appear in 10:03(a). Empire provided truckers' liability insurance to defendant Jones's business, a coal and trash hauling company. An employee who was injured while working sought coverage under the policy for his injuries. Empire sought declaratory judgment that the employee was not covered under the policy. The employee, Drumheiser, counterclaimed for bad faith. Magistrate Judge Blewitt of the Middle District held that Drumheiser was not a proper plaintiff under the liability policy, because his position was not as an insured, as required

⁷ *Ashbrook*, 332 F. Supp. at 80.

⁸ *Id.* at 82.

⁹ *Id.*

¹⁰ *White v. Behlke*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 444, at *15 (Lackawanna Oct. 7, 2009) (citing *Courvoisier v. Harley Davidson of Trenton*, 742 A.2d 542, 549-50 (N.J. 1999)).

¹¹ *White v. Behlke*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 444, at *20 (Lackawanna Oct. 7, 2009).

with a bad faith claim: “Mr. Drumheiser is acting as a third party claimant, not as an insured. However, under Pennsylvania law, a third party claimant cannot have a cause of action for bad faith.”¹²

(2) *Campbell v. State Farm Mut. Auto. Ins. Co.*, 617 F. Supp. 2d 378 (W.D. Pa. 2008) (Lancaster, J.)

In this case, discussed in §§3:04 and 3:08, the court permitted an assignee of the insured to bring a third party bad faith action.

(3) *Allstate Ins. Co. v. Johnson*, 1993 U.S. Dist. LEXIS 8740 (E.D. Pa. June 25, 1993) (Yohn, J.)

In this case, discussed in 3:04, Judge Yohn of the Eastern District stated as follows:

Under Pennsylvania law, an insurer has the obligation to exercise good faith in its handling of claims against its insured. . . . The duty of good faith is to the insured, not to the claimants. Claimants step into the shoes of the insured and have no rights or claims independent of or greater than those of the insured. Therefore, an insurer’s conduct must be viewed in relation to its insured, not to the claimants.¹³

(4) *United States Fire Ins. Co. v. Royal Ins. Co.*, 759 F.2d 306 (3d Cir. 1985) (Rosenn, J.)

This case is discussed in §3:04. The Third Circuit addressed the question of whether an excess insurance carrier may sue a primary carrier for failing to settle a lawsuit within the policy limits. The court concluded that Pennsylvania courts would permit an excess insurer to bring an action against a primary insurer for bad faith. The court stated, “Pennsylvania courts have ruled that an excess insurer who has discharged an insurer’s liability stands in the shoes of the insured and as subrogee may maintain an action for breach of the primary carrier’s duty to act in good faith.”¹⁴

(5) *Shearer v. Reed & State Farm Mut. Auto. Ins. Co.*, 428 A.2d 635 (Pa. Super. 1981) (Spaeth, J.)

In this case discussed in § 3:04, Shearer sued Reed. Prior to trial, Shearer’s attorney offered to negotiate a settlement with Reed for an amount within Reed’s \$10,000 policy limits with State Farm. Reed’s attorney took the position that Reed was not negligent, so no offer was made. The action proceeded to trial, and a jury found Reed and a co-defendant negligent. In Shearer’s suit against Reed, the jury returned a verdict in favor of Shearer for approximately \$34,000. State Farm paid the \$10,000 policy limits. Shearer then filed a Writ of Execution for the balance of the judgment, naming State Farm as garnishee. A jury found that State Farm had not acted in good faith and rendered a verdict in favor of Shearer for the balance of the verdict in the underlying case. The Pennsylvania Superior Court upheld the verdict which was the result of a garnishment action.

§3:11 The Questionable Expansion of the Third Party Common Law Bad Faith Claim

§3:12 Cases

(1) *Godfry v. State Farm Mut. Ins. Co.*, 2009 U.S. Dist. LEXIS 19123 (E.D. Pa. Mar. 4, 2009) (Yohn, J.)

In addressing whether Delaware or Pennsylvania law applied to an automobile claim, Judge Yohn of the Eastern District summarized Pennsylvania jurisprudence addressing a §8371 claim, and a contract claim for breach of the implied duty of good faith:

Under Pennsylvania law, an insured alleging bad faith on the part of an insurer can file either (or both) a bad faith claim pursuant to 42 Pa. Cons. Stat. §8371 or a breach of contract claim for breach of the implied duty of good faith. . . . If an insured establishes these elements, §8371(1)–(3) permits recovery of interest, court costs, attorney fees and punitive damages. If an insured establishes a breach of the implied duty of good faith (i.e., a breach of the insurance contract), an insured can recover typical contract remedies, including compensatory damages. *See Birth Central [sic] v. St. Paul Companies, Inc.*, 787 A.2d 376, 387 (Pa. 2001). . . . Recovery on the contract claim, however, does not include punitive damages. *See Baker v. Pa. Nat’l Mut. Cas. Ins. Co.*, 536 A.2d 1357, 1361-62 (Pa. Super. Ct. 1987).¹⁵

(2) *Aquila v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 93823 (E.D. Pa. Nov. 13, 2008) and 2008 U.S. Dist. LEXIS 101518 (E.D. Pa. Dec. 15, 2008) (Strawbridge, M.J.)

In this case, discussed elsewhere,¹⁶ the plaintiffs submitted a claim to Nationwide asserting that their automobile had been stolen. Nationwide’s claims investigation unearthed several “red flags” concerning the loss, but, after investigating the claim for approximately seven months, Nationwide paid the claim. Plaintiffs filed a complaint which

¹² *Empire Fire & Marine Ins. Co. v. Jones*, 739 F. Supp. 2d 746, 2010 U.S. Dist. LEXIS 101046, at *44 (M.D. Pa. Aug. 19, 2010) (citing *Allen v. Gen. Accident Ins. Co.*, 2004 WL 323664 (Pa. Com. Pl. 2004)).

¹³ *Allstate Ins. Co. v. Johnson*, 1993 U.S. Dist. LEXIS 8740, at *6.

¹⁴ *United States Fire Ins. Co. v. Royal Ins. Co.*, 759 F.2d 306 at 309.

¹⁵ *Godfry v. State Farm Mut. Ins. Co.*, 2009 U.S. Dist. LEXIS 19123, at *11-12 (footnotes omitted) (E.D. Pa. Mar. 4, 2009).

¹⁶ *See* §§ 4:04, 10:07(a), 10:13 and 10:15.

generally claimed that Nationwide was liable for “bad faith” by committing “actions constituting bad faith in violation of the law.”

In light of the general form of pleading, Magistrate Judge Strawbridge of the Eastern District accepted that the plaintiffs’ complaint had asserted both a §8371 claim and a common law bad faith claim. According to the court, “In addition to a bad faith claim pursuant to §8371, Pennsylvania law allows a plaintiff insured to bring a common law contract action against an insurer for a breach of the general ‘obligation to act in good faith’ inherent in every contract.”¹⁷ The court added, “To the extent that plaintiffs seek an award of compensatory damages, we construe them to assert a common law breach of contract action. To the extent that they seek punitive damages and attorney’s fees, we construe them to assert an action under §8371.”¹⁸

The court held that the plaintiffs were obligated to prove the §8371 claim as well as the common law bad faith claim by clear and convincing evidence, which “places a heavier burden upon a plaintiff”¹⁹ and which in turn renders the insured’s burden in opposing a summary judgment motion “commensurately high.”²⁰ The court granted Nationwide’s motion for summary judgment, finding, as a matter of law, the absence of bad faith under §8371 and common law.

CHAPTER 4 PARTIES TO A BAD FAITH ACTION UNDER SECTION 8371

§4:02 Who May Bring a Bad Faith Action

§4:03 — Cases Allowing Party to Bring Bad Faith Action

(1) *Platt v. Fireman’s Fund Ins. Co.*, 2012 U.S. Dist. LEXIS 71000 (E.D. Pa. May 22, 2012) (Buckwalter, J.)

In this case, discussed in detail in §9:03, plaintiff, who was uninsured, was hit by an automobile, whose driver was insured with defendant Fireman’s Fund. The following day, Fireman’s Fund opened a third-party bodily injury file, but it failed to open a first party PIP (“Personal Injury Protection”) file for plaintiff’s medical costs. In a subsequent bad faith suit, plaintiff allegedly argued that the insurer acted in bad faith in not properly investigating her claim, and failing to notify her of the PIP benefits to which she might be entitled. The court rejected the insurer’s argument that plaintiff lacked standing to raise the issue of its alleged bad faith as to PIP benefits because plaintiff was not the insured on the Fireman’s Fund policy, and thus could not bring a claim under §8371. The court concluded that plaintiff was arguing that the insurer had a duty to determine whether it directly owed her first party benefits, an issue for which summary judgment was not appropriate.

(2) *Davis v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 101359 (M.D. Pa. June 27, 2013) (Carlson, M.J.)

Plaintiff was in an accident in Pennsylvania. At the time of the accident, plaintiff was a resident of Delaware. She settled her claim against the tortfeasor, and then presented her auto insurer, GEICO, a claim for UIM benefits. At some time prior to presenting her UIM claim, plaintiff moved to Pennsylvania. When the parties were unable to resolve the UIM claim, plaintiff filed this bad faith suit and for UIM benefits. GEICO filed a motion to dismiss. Magistrate Judge Carlson of the Middle District recommended that the motion to dismiss be denied.

GEICO argued that Delaware law should apply to the bad faith claim and thus, the §8371 claim should be dismissed, explaining that at the time of the accident, the policy had been issued in Delaware, the insured resided there, the car was registered there, and most of her medical treatment was received there. Applying Pennsylvania’s choice of law analysis, the court noted that a critical date for considering a UIM claim is the date on which the insured resolves his or her claim against the tortfeasor, and plaintiff was a Pennsylvania resident at that time. The court also considered the fact that the accident was in Pennsylvania with a Pennsylvania driver, and that her surgery was in Pennsylvania. The court further pointed out that GEICO’s affirmative defenses indicated that they would avail themselves of the provisions of the MVFRL that would assist their case, but attempted to dismiss the portions of plaintiff’s complaint that relied on Pennsylvania law. Having reviewed these factors, the court concluded that Pennsylvania law should apply:

- The clear interest that Pennsylvania has in ensuring that one of its residents is treated fairly by an out-of-state insurance company, when considered alongside the fact that the bad-faith claim did not even accrue until the plaintiff had relocated to Pennsylvania, provides further demonstration that Pennsylvania’s contacts to the particular issue presented are greater than Delaware’s.²¹

¹⁷ *Aquila v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 93823, at *22, (E.D. Pa. Nov. 13, 2008) (citing *Birth Center v. St. Paul Cos.*, 787 A.2d 376 (Pa. 2001)).

¹⁸ *Aquila*, 2008 U.S. Dist. LEXIS 93823, at *19-20.

¹⁹ *Aquila*, 2008 U.S. Dist. LEXIS 93823, at *22.

²⁰ *Id.*

²¹ *Davis v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 101359, at *19 (M.D. Pa. June 27, 2013).

(3) *Kvaerner N. Am. Constr. Inc. v. Allianz Global Risks U.S. Ins. Co.*, 2017 U.S. Dist. LEXIS 11635 (Jan. 26, 2017) (Mitchell, J.), adopted by 2017 U.S. Dist. LEXIS 26757 (W.D. Pa. Feb. 27, 2017) (Bissoon, J.)

Plaintiff Kvaerner submitted two claims to Allianz, which issued a Construction “All Risks” and Advanced Loss of Profits policy, stemming from losses that occurred during the construction of a power plant in West Virginia. The policy included a provision that New Jersey law would apply to all matters relating to policy interpretation. After one claim was denied and the second resulted in no decision after a period of time, Kvaerner filed this breach of contract and bad faith suit, setting forth bad faith counts under both statutory and common law pursuant to West Virginia and New Jersey law. The parties filed cross motions for summary judgment on the choice of law issue. Magistrate Judge Mitchell of the Western District recommended granting Allianz’s motion, denying Kvaerner’s motion, and allowing leave for Kvaerner to amend to set forth a claim for bad faith under Pennsylvania law. Judge Bissoon adopted the recommendation as well as the Magistrate Judge’s opinion.

Kvaerner argued that West Virginia law would apply to the bad faith claims, or alternatively, New Jersey law should apply. Allianz argued that Pennsylvania law should apply. The court applied Pennsylvania’s choice of law rules and found an actual conflict existed between Pennsylvania and West Virginia due to the damages recoverable in each jurisdiction and turned to the question of which state had a greater interest. The court found that the following facts weighed in favor of application of Pennsylvania law: Kvaerner had its principal place of business in Pennsylvania; all claims communications from which the bad faith claims arose were received in Pennsylvania; Allianz was licensed to conduct business in Pennsylvania; and payments would be made to Kvaerner in Pennsylvania.²² The court dismissed the application of New Jersey law in short order, as not having “much interest in offering protection to Kvaerner under the facts and circumstances of this case and a fair reading of the policy and case law.”²³ Therefore, “the substantive law of Pennsylvania should apply to the bad faith claims set forth in the Complaint.”²⁴ Kvaerner was granted leave to amend its complaint to set forth such a claim.

(4) *Westfield Ins. Co. v Icon Legacy Custom Modular Homes*, 2016 U.S. Dist. LEXIS 115214 (M.D. Pa. Aug. 29, 2016) (Brann, J.)

Defendant Icon was sued in an action in Vermont, and sought defense and indemnification from its insurer, plaintiff Westfield. Plaintiff denied coverage and filed this declaratory judgment action seeking a declaration that it owed no coverage. Defendant filed a bad faith counterclaim, which plaintiff sought to dismiss. Judge Brann of the Middle District of Pennsylvania granted the motion with prejudice, as is also discussed in §10:07(b).

In the course of its decision, the court determined whether Pennsylvania law would apply to the bad faith claim. The court discussed *Davis v. GEICO General Insurance Co.*,²⁵ and *Kilmer v. Connecticut Indemnity Co.*²⁶ at length, noting that “the primary factor to be considered is the state of residence of the insured, guided by the policy motive that the insured’s home state enjoys a significant interest in ensuring its citizens’ rights vis-à-vis those of insurers.”²⁷ The court explained that defendant was incorporated and had its principal place of business in Pennsylvania, the policy was delivered to Pennsylvania, and the policy contained a provision that Pennsylvania law would apply. Although the insured risk was not located in Pennsylvania, the court found the residence of the insured was the most significant consideration for whether defendant could bring an action under §8371, and hence defendant could bring such a claim. The court concluded: “[G]iven Pennsylvania’s strong interests in protecting its own businesses against insurance bad practices as well as the numerous factual considerations suggesting that issuance of the instant policy was primarily a Pennsylvania matter, I now hold that the law of Pennsylvania should apply to Defendant’s bad faith claim.”²⁸

§4:04 — Cases Disallowing Party to Bring Bad Faith Action

(1) *Feingold v. State Farm Mut. Ins. Co.*, 2015 Phila. Ct. Com. Pl. LEXIS 232 (Phila. Aug. 12, 2015) (New, J.), *aff’d*, 153 A.3d 1117 (Pa. Super. 2016) (Mundy, J.), *appeal denied*, 160 A.3d 760 (Pa. 2016)

Plaintiffs filed suit against a number of defendants arising out of a UIM claim and lawsuit; included in the action was a bad faith claim against defendant State Farm. The defendants filed preliminary objections. Judge New of the Philadelphia Court of Common Pleas sustained the preliminary objections, dismissed the case with prejudice, and subsequently issued this 1925 opinion. As to State Farm’s objections, the trial court concluded that plaintiff Feingold “cannot establish standing”²⁹ because he was neither a party to the underlying litigation nor an insured under the applicable policy. The Superior Court, in an opinion by Judge Mundy, affirmed, “agree[ing] with the trial court that

²² *Kvaerner N. Am. Constr. Inc. v. Allianz Global Risks U.S. Ins. Co.*, 2017 U.S. Dist. LEXIS 11635, at *10 (W.D. Pa. Jan. 26, 2017).

²³ *Kvaerner N. Am. Constr. Inc. v. Allianz Global Risks U.S. Ins. Co.*, 2017 U.S. Dist. LEXIS 11635, at *10 (W.D. Pa. Jan. 26, 2017).

²⁴ *Kvaerner N. Am. Constr. Inc. v. Allianz Global Risks U.S. Ins. Co.*, 2017 U.S. Dist. LEXIS 11635, at *10 (W.D. Pa. Jan. 26, 2017).

²⁵ *Davis v. GEICO Gen. Ins. Co.*, 957 F. Supp. 2d 544, 551 (M.D. Pa. 2013).

²⁶ *Kilmer v. Conn. Indem. Co.*, 189 F. Supp. 2d 237, 239-40 (M.D. Pa. 2002).

²⁷ *Westfield Ins. Co. v Icon Legacy Custom Modular Homes*, 2016 U.S. Dist. LEXIS 115214, at *13 (M.D. Pa. Aug. 29, 2016).

²⁸ *Westfield Ins. Co. v Icon Legacy Custom Modular Homes*, 2016 U.S. Dist. LEXIS 115214, at *18 (M.D. Pa. Aug. 29, 2016).

²⁹ *Feingold v. State Farm Mut. Ins. Co.*, 2015 Phila. Ct. Com. Pl. LEXIS 232, at *5 (Phila. Aug. 12, 2015).

Feingold did not have standing in this lawsuit because he was not a party to the underlying UIM case or a party to the State Farm policy.”³⁰

(2) *International Management Consultants, Inc. v. Continental Cas. Co.*, 2016 U.S. Dist. LEXIS 50726 (E.D. Pa. Apr. 14, 2016) (Jones, J.)

Defendant Continental issued a builder’s risk policy to Phoenixville Area School District. Plaintiff was performing construction work for the school district, and after the work was damaged by flooding and plaintiff had to remediate, plaintiff submitted a claim under the policy to defendant, which denied the claim. Plaintiff then filed this declaratory judgment, breach of contract and bad faith suit. Defendant filed a motion to dismiss. Judge Jones of the Eastern District granted the motion.

The court looked to the policy attached to the pleadings and noted that the only insured was listed was the school district. Noting that factual allegations need only be taken as true if plausible, it concluded that plaintiff was not an insured under the policy, and therefore was not entitled to bring a bad faith action under the statute:

- Plaintiff attached the Policy as an exhibit to its amended complaint and at no point in that Policy is Plaintiff included as an “insured” under the Policy. Furthermore, there is no language in the Policy that would render Plaintiff an “insured” for purposes of the Policy. . . . Because Plaintiff did not have an insurance policy with Defendant [sic] has not alleged any facts that, taken as true, would show it qualifies as an “insured,” Plaintiff’s bad faith claim must be dismissed.³¹

(3) *LeBoon v. Zurich Am. Ins. Co.*, 2016 U.S. Dist. LEXIS 51381 (E.D. Pa. Apr. 18, 2016) (Pappert, J.), *aff’d*, 2016 U.S. App. LEXIS 22019 (3d Cir. Dec. 12, 2016) (per curiam)

Plaintiff LeBoon brought the underlying action against his employer, AMC, who was defended by its liability insurance carrier, Zurich. That action was eventually dismissed when plaintiff failed to appear at trial. In this bad faith action, LeBoon claimed that Zurich failed to make good faith offers to settle the underlying suit. Zurich filed a motion to dismiss. Judge Pappert of the Eastern District granted the motion and on appeal, the Third Circuit affirmed in a per curiam decision.

The Third Circuit concluded that the district court properly decided that LeBoon was not insured under the relevant policy and therefore could not bring a suit under §8371. The court stated:

- In that LeBoon plainly is not an Insured under the liability policy, he failed to state a plausible claim for relief on his allegations of bad faith. Under the unambiguous terms of the liability policy, Zurich’s only obligation was to provide for the defense and indemnity of covered claims against AMC. It had no obligation to LeBoon, as AMC’s adversary, to settle the employment litigation, and thus his bad faith claims cannot survive Zurich’s motion to dismiss, just as the District Court concluded.³²

(4) *National Slovak Soc’y v. Allenbaugh*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 250 (Allegheny Feb. 10, 2017) (Colville, J.)

Decedent entered into five annuity contracts with plaintiff NSS. She subsequently signed a power of attorney allowing her defendant son to manage her finances. The son later asked NSS whether he could change the beneficiary designations in the contracts and was advised that he could and that the subsequent changes were accepted. When decedent died, NSS asked an attorney whether the changes were properly made; the attorney advised that the changes were not effective. NSS then filed this interpleader action and defendant filed a bad faith counterclaim. Before the court were NSS’s preliminary objections. Judge Colville of the Allegheny Court of Common Pleas granted the motion.

The court concluded that §8371 did not apply to NSS, as it was not an insurer. Although the court noted that there were some similarities between the issuer of an annuity and an insurer, those similarities were insufficient to impose bad faith liability under the statute. The court explained: “While the *Beecham* trial court’s observation is sound, it does not, in my judgment, permit the application of a statutory bad faith cause of action that is explicitly directed towards insurers to be utilized against an annuity insurer.”³³

(5) *Brown v. Everett Cash Mut. Ins. Co.*, 2017 Pa. Super. LEXIS 161 (Pa. Super. Mar. 10, 2017) (Lazarus, J.)

Plaintiffs Brown filed a claim with the homeowner’s carrier for a home owned by Plaintiff Mrs. Brown and her father after the home they jointly owned burned down. After the claim was not resolved to the Browns’ satisfaction, they filed a bad faith claim against the carrier and the agent for the carrier. Insurer Everett Cash filed a summary judgment motion. The trial court granted the motion and in this opinion, authored by Judge Lazarus, affirmed as to the

³⁰ *Feingold v. State Farm Mut. Ins. Co.*, 2016 Pa. Super. Unpub. LEXIS 2227, at *10 (Pa. Super. June 24, 2016).

³¹ *Int’l Mgmt. Consultants, Inc. v. Cont’l Cas. Co.*, 2016 U.S. Dist. LEXIS 50726, at *11 (E.D. Pa. Apr. 14, 2016).

³² *LeBoon v. Zurich Am. Ins. Co.*, 2016 U.S. App. LEXIS 22019, at *7-8 (3d Cir. Dec. 12, 2016).

³³ *National Slovak Soc’y v. Allenbaugh*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 250, at *9 (Allegheny Feb. 10, 2017) (citing *Beecham v. Am. Life & Cas. Ins. Co.*, 63 Pa. D. & C.4th 52 (Lackawanna 2003)).

bad faith claim, as is discussed in with respect to Everett Cash in §10:03(b). The court also agreed with the trial court that the claim against the agent could not stand: “To the extent that the Browns assert a bad faith claim against [the agent], we agree with the trial court that a statutory action for bad faith can only be brought against an insurer. . . . Thus, there is no foundation for this claim.”³⁴

(6) *Westport Ins. Corp. v. Mylonas*, 2015 U.S. Dist. LEXIS 92039 (E.D. Pa. July 15, 2015) (Slomsky, J.)

In the underlying action, Mylonas was sued for legal malpractice, and was defended by Westport under a professional liability policy. After the underlying plaintiff obtained a \$525,000 verdict against Mylonas, Westport filed a declaratory judgment action seeking to limit its liability to \$500,000; Westport named Mylonas and the underlying plaintiff, Papadopoulos, as a defendant. Papadopoulos filed a counterclaim against Westport claiming bad faith in unreasonably eroding the policy limits in its defense of the underlying litigation. Westport filed a motion to dismiss the bad faith count. Judge Slomsky of the Eastern District granted the motion.

The court explained that only insureds or their assignees can bring bad faith claims under §8371, and therefore Papadopoulos, lacking an assignment, could not bring such a claim: “In the present case, Papadopoulos’s lack of standing is not curable. He was not a party to the contract between Westport and the Mylonas Defendants, and, absent an assignment, he cannot assert a claim for bad faith stemming from that contract.”³⁵

(7) *Charbonneau v. Chartis Prop. & Cas. Co.*, 2015 U.S. Dist. LEXIS 85428 (E.D. Pa. July 1, 2015) (Yohn, J.)

Plaintiff rented a historic mansion that was destroyed by fire, following which she attempted to exercise an option in her rental agreement to purchase the property. The property owner submitted a claim with his homeowner’s insurance company, defendant Chartis. Following litigation, the plaintiff eventually received the majority of the insurance benefits paid by Chartis, and also received title to the property and an assignment of rights against Chartis. Plaintiff then brought this breach of contract and bad faith (both common law and statutory) suit. Chartis filed a motion for summary judgment. Judge Yohn of the Eastern District granted the motion as to the bad faith claims.

The court explained that under the decision in *Allstate v. Wolfe*,³⁶ assignments of an insured’s §8371 claims were allowable. However, the court explained that under the facts of this case, the property owner had already signed a release of all claims against the insurer when he assigned his rights under the policy to plaintiff. Therefore, the plaintiff “cannot prevail on her statutory bad faith claim, because she stands in the shoes of [property owner], who could not bring such a claim himself after [signing release].”³⁷

(8) *Bancorp Bank v. Lawyers Title Ins. Corp.*, 2014 U.S. Dist. LEXIS 92151 (E.D. Pa. July 8, 2014) (Slomsky, J.)

Plaintiff provided a mortgage to a company to finance the purchase of commercial property. Defendant Lawyers Title provided title insurance for the property and loan amount, as well as a Closing Protection Letter (CPL), which promised reimbursement for certain losses in connection with the transaction. The borrower eventually defaulted, and in the course of selling the property, plaintiff discovered that the loan documents had falsely listed the sale price; the actual sale price was for the mortgage amount. Plaintiff sought reimbursement under the CPL, but it was denied. Lawyers Title filed a motion to dismiss. Judge Slomsky of the Eastern District of Pennsylvania granted the motion.

The insurers argued that §8371 did not permit plaintiff to recover for alleged bad faith with respect to the CPL, which was not an insurance policy. The court agreed. The court noted that §8371 provides a remedy with respect to insurance policies. It also explained that there was a split of opinions regarding whether a CPL was a policy. Finding that a CPL is an indemnity contract, not an insurance policy, the court dismissed the bad faith count:

In this case, the CPL does not protect against losses which arise from liens, encumbrances, or defects which render title unmarketable. Therefore, it does not constitute “title insurance,” as defined in 40 Pa. Stat. Ann. § 910-1(1). While the CPL may be an indemnity contract, it is not an insurance policy. Because a claim of bad faith denial of insurance benefits can only arise under an insurance policy, Bancorp cannot maintain this claim. For this reason, Bancorp’s bad faith claim in Count II will be dismissed.³⁸

(9) *Norco v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 128343 (W.D. Pa. July 17, 2012) (Lenihan, M.J.) and later proceeding at, 2012 U.S. Dist. LEXIS 154070 (W.D. Pa. Oct. 26, 2012) (Lenihan, M.J.)

Plaintiff minor was injured in a single vehicle accident in which his mother, an insured under defendant Allstate’s auto policy, was driving. After a complicated procedural history involving an attempted settlement, plaintiff minor and his guardians brought this bad faith action when they failed to reach a settlement for the minor’s injuries. Defendant Allstate filed a motion to dismiss the bad faith claim. Magistrate Judge Lenihan of the Western District recommended granting the motion.

³⁴ *Brown v. Everett Cash Mut. Ins. Co.*, 2017 Pa. Super. LEXIS 161, at *20-21 (Pa. Super. Mar. 10, 2017).

³⁵ *Westport Ins. Corp. v. Mylonas*, 2015 U.S. Dist. LEXIS 92039, at *26 (E.D. Pa. July 15, 2015).

³⁶ 105 A.3d 1181 (Pa. 2014).

³⁷ *Charbonneau v. Chartis Prop. & Cas. Co.*, 2015 U.S. Dist. LEXIS 85428, at *41 (E.D. Pa. July 1, 2015).

³⁸ *Bancorp Bank v. Lawyers Title Ins. Corp.*, 2014 U.S. Dist. LEXIS 92151, at *19 (E.D. Pa. July 8, 2014).

Allstate contended that neither plaintiff minor nor the plaintiff guardians had standing to bring a §8371 claim. As to the minor, the court concluded that he was not an insured under the policy, but rather a third-party claimant through his mother for liability coverage, and §8371 did not provide a remedy for him:

Although Talon may be an “insured” under the Policy for first party benefits as a passenger in the insured vehicle, as a third party claimant, his statutory bad faith claim, which is based on the handling of his negligence claim, does not arise from any duty owed under an insurance policy, as required by Section 8371. Merely because Talon may have a right to claim first party medical benefits under the Policy does not accord him the right to maintain a statutory bad faith claim in connection with Allstate’s handling of his tort claim against Jessica Norco. Allstate’s contractual duty is to the tortfeasor, Jessica Norco, not Talon.³⁹

The court concluded that neither of the guardian plaintiffs—one of whom was the named insured under the policy—had standing to raise a §8371 claim. Neither guardian plaintiff sought recovery of any benefits under the policy, so they failed to state a claim under generally recognized standing principles limiting actions to those who suffer harm.⁴⁰

The court held that the common law bad faith claim must hinge on an alleged breach of contract. Plaintiff Talon Norco was not a party to the contract, which therefore prevented his recovery under the proposed count: “The Court finds that because a common law bad faith claim is predicated on the insurer’s duty of fair dealing and good faith under the insurance policy, Talon cannot state a plausible claim for common law bad faith as he is a third party claimant, and as such, he did not have a contractual right to receive liability coverage under the policy.”⁴¹

(10) *Empire Fire & Marine Ins. Co. v. Jones*, 739 F. Supp. 2d 746, 2010 U.S. Dist. LEXIS 101046 (M.D. Pa. Aug. 19, 2010) (Blewitt, M.J.), adopted by, 739 F. Supp. 2d 746 (M.D. Pa. Sept. 13, 2010) (Jones, J.)

The facts of this case appear in §10:03(a). Empire provided truckers’ liability insurance to defendant Jones’s business, a coal and trash hauling company. An employee who was injured while working sought coverage under the policy for his injuries. Empire sought declaratory judgment that the employee was not covered under the policy. The employee, Drumheiser, counterclaimed for bad faith. Magistrate Judge Blewitt of the Middle District held that Drumheiser was not a proper plaintiff under the liability policy, because his position was not as an insured, as required with a bad faith claim: “Mr. Drumheiser is acting as a third party claimant, not as an insured. However, under Pennsylvania law, a third party claimant cannot have a cause of action for bad faith.”⁴²

(11) *Grammenos v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 37069 (E.D. Pa. Apr. 30, 2009) (Rueter, M.J.)

In this case, also discussed in §10:15, Allstate joined as a third party defendant Aclaim Adjustment Agency. Aclaim asserted an affirmative defense that Allstate had acted in bad faith as to Aclaim. Magistrate Judge Rueter of the Eastern District granted Allstate’s motion *in limine* to preclude Aclaim from submitting certain evidence in support of its bad faith affirmative defense. According to the court, “Aclaim has no standing to bring a claim of bad faith against Allstate since Aclaim is not an ‘insured’ under the Allstate policy.”⁴³

(12) *Aquila v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 93823 (E.D. Pa. Nov. 13, 2008) and 2008 U.S. Dist. LEXIS 101518 (E.D. Pa. Dec. 15, 2008) (Strawbridge, M.J.)

Aquila, Sr. and his wife owned a car insured by Nationwide. Aquila, Sr. reported the loss to Nationwide. As discussed in §10:15, Nationwide’s claims investigation unearthed several “red flags” concerning the loss, but ultimately the company determined to pay the claim. Aquila, Sr. and his wife filed a bad faith action; the suit was later amended to include their son, Aquila, Jr. Nationwide moved to dismiss the claim of Aquila, Jr., which motion was granted by Magistrate Judge Strawbridge of the Eastern District. The court held that §8371 applied only to a “narrow class of plaintiffs,” and that Aquila, Jr. was obligated to “show that he made a claim against Nationwide under the policy.”⁴⁴ Because Aquila, Jr. had not made such a claim, his bad faith claims were dismissed. In a subsequent decision, the court further held that the plaintiff-wife, even though technically an insured under the policy, was also not entitled to assert a bad faith action. Because she too had not brought a claim with Nationwide, she was not within the “narrow class of plaintiffs” entitled to bring a bad faith action.⁴⁵

(13) *Estakhrian v. Continental General Ins. Co.*, 2006 U.S. Dist. LEXIS 95607 (E.D. Pa. Dec. 18, 2006) (Davis, J.)

In this case, discussed in detail in §10:07, the defendant health insurer denied a woman’s claim for health benefits. The woman and her husband, both of whom were insureds on the health policy, filed suit for breach of contract and

³⁹ *Norco v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 128343, at *29-30 (W.D. Pa. July 17, 2012).

⁴⁰ *Norco v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 128343, at *31-32.

⁴¹ *Norco v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 128343, at *14-15.

⁴² *Empire Fire & Marine Ins. Co. v. Jones*, 739 F. Supp. 2d 746, 2010 U.S. Dist. LEXIS 101046, at *44 (M.D. Pa. Aug. 19, 2010) (citing *Allen v. Gen. Accident Ins. Co.*, 2004 WL 323664 (Pa. Com. Pl. 2004)).

⁴³ *Grammenos v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 37069, at *3 (E.D. Pa. Apr. 30, 2009).

⁴⁴ *Aquila v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 93823, at *19, (E.D. Pa. Nov. 13, 2008).

⁴⁵ *Id.* at *24-25.

bad faith. The court dismissed the husband's claim, because none of the requested benefits or claims handling pertained to him.

(14) *Silverman v. Rutgers Cas. Ins. Co.*, 2005 Phila. Ct. Com. Pl. LEXIS 130 (Phila. Mar. 31, 2005) (Jones, J.)

This case involved a motion by the plaintiff medical providers and policyholders for a class certification in a case alleging that the automobile insurer failed to properly handle claims for first party benefits. The plaintiffs brought claims against the insurer for breach of contract and violation of §8371. After a hearing, Judge Jones of the Philadelphia Court of Common Pleas denied the request for class certification. One of the issues concerned whether the medical providers had standing to bring a bad faith claim; the court held that they did not.

The issue essentially is one of standing. The proposed Medical Provider Class members have no direct contractual relationship with [the insurer; the insurer] did not enter into a motor vehicle insurance policy with any members of the Medical Provider Class. . . . Similarly, it has not been alleged that any of the insured's rights have assigned to the members of the Medical Provider Class.⁴⁶

(15) *Federico v. Charterers Mut. Assurance Ass'n Ltd.*, 2001 U.S. Dist. LEXIS 7713 (E.D. Pa. June 13, 2001) (Yohn, J.)

Federico, a longshoreman, was injured on a boat chartered to Gulf & Orient Steamship Line, which was insured under a marine protection and indemnity insurance agreement issued by Charterers Mutual Assurance Association Limited. Federico's bad faith claim against Charterers was dismissed because he was not an "insured" under the association rules which governed Charterers, with the court noting that "§8371 only grants standing to an individual who is an 'insured' under the insurance policy in question."⁴⁷

(16) *Bercosky v. Township of Cumberland, Slip Opinion, No. AD No. 159, 1998 (Greene County) (Nalitz, J.), appeal quashed, 928 A.2d 438 (Pa. Commw. 2007) (Smith-Ribner, J.)*

As part of a pension agreement with its sole full time police officer, the defendant Township purchased an annuity policy from Baltimore Life Insurance Company. When the policeman retired 25 years later, he filed an action against the Township requesting an accounting of the annuity's funds stemming from a rollover which had taken place several years before. He also alleged that Baltimore Life had acted in bad faith toward him. A portion of the matter was tried non-jury before Judge Nalitz of Greene County. With respect to the bad faith claim, the court held that no contract existed between the retired police officer and Baltimore Life, and that he was a third party beneficiary. Citing *Benefit Trust Life Insurance Co. v. Union National Bank of Pittsburgh*,⁴⁸ for the proposition that a life insurance company does not owe a fiduciary duty to a beneficiary, the court declined to impose a duty for Baltimore Life to obtain consent by all beneficiaries for a rollover. The court held that §8371 did not apply with respect to the Township's decision to roll over the annuity contract.

(17) *Goss v. Allstate Ins. Co.*, Civil Action No. 5444S (C.P. Dauph. Co. 1998) (Turgeon, J.)

In *Goss v. Allstate*, the plaintiff was involved in an auto-mobile accident with an Allstate policyholder. After the accident, an Allstate claims adjuster contacted plaintiff by telephone regarding potential claims. The adjuster also sent a letter stating "we consider anyone who has been involved in an accident with one of our policyholders an Allstate customer, who is entitled to quality customer service."⁴⁹

In a later action for fraud and bad faith, the plaintiff alleged that Allstate's pledges were made to dissuade her from hiring an attorney and led her to believe that Allstate would represent her interests. She further alleged that when she finally sought an attorney, she was unable to obtain one because the statute of limitations was about to run out. As a result, she settled her claim for \$9,600, allegedly an amount far below its true value. The court dismissed the bad faith claim, holding that the plaintiff did not have standing to pursue a bad faith action, because the plaintiff was a third party claimant and not an insured. The court rejected the plaintiff's assertion that Allstate "adopted" or "bestowed" upon her insured status by virtue of the customer service pledge.

(18) *Paul Revere Life Ins. Co. v. Patniak*, 2004 U.S. Dist. LEXIS 7669 (D.N.J. Apr. 1, 2004) (N.J. case)

In this case, a New Jersey federal district court held that a New Jersey resident was not entitled to bring an action under §8371. According to the court, "[t]he purpose of Pennsylvania's bad faith statute is to protect Pennsylvania residents, not residents from other states, from overreaching insurance companies."⁵⁰ The insured, according to the court, "has been a New Jersey resident since, at least, October, 1990. He was a New Jersey resident when his policy was reinstated in October, 1997, and he was a New Jersey resident when he suffered from a myocardial infarction in December, 1999."⁵¹

⁴⁶ *Silverman v. Rutgers Cas. Ins. Co.*, 2005 Phila. Ct. Com. Pl. LEXIS 130, at *9-11 (Phila. Mar. 31, 2005).

⁴⁷ *Federico*, 2001 U.S. Dist. LEXIS 7713 at *21.

⁴⁸ 776 F. 2d 1174 (3d Cir. 1985).

⁴⁹ *Goss v. Allstate*, No. 5444S, Slip Op. at 1 (C.C.P. Dauph. Co. 1998).

⁵⁰ *Patniak*, 2004 U.S. Dist. LEXIS 7669, at *10.

⁵¹ *Patniak*, 2004 U.S. Dist. LEXIS 7669, at *10.

The insured claimed that he had numerous contacts with Pennsylvania relating to the subject disability policy and his claim, and he asserted that the insurer should expect to be held accountable in Pennsylvania as it is licensed to transact business there. The court rejected these arguments, observing that “[e]ven though [the insured] has significant contacts with Pennsylvania, the fact remains that he is a New Jersey resident whose interests the Pennsylvania Legislature did not seek to protect when implementing the bad faith statute.”⁵²

(19) *Blair v. Ranger Ins.*, 1996 U.S. Dist. LEXIS 1651 (E.D. Pa. Feb. 13, 1996) (Fullam, J.)

Following *Strutz*, Judge Fullam of the Eastern District held that a passenger in a bus was not entitled to assert a bad faith claim against the bus company’s insurer.

(20) *Seasor v. Liberty Mut. Ins. Co.*, 941 F. Supp. 488 (E.D. Pa. 1996) (Broderick, J.)

Again following *Strutz*, the late Judge Broderick of the Eastern District held that a passenger in a van was not permitted to assert a direct bad faith claim against the van owner’s insurer, stating that it is “clear that the insurer’s duty to act in good faith belongs to those persons who qualify as ‘insureds’ under the policy.”⁵³

§4:07 Who May Be Sued for Bad Faith

§4:08 — Cases

(1) *Miller v. Community Ins. Servs., Inc.*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 5413 (Lancaster Aug. 20, 2015) (Ashworth, J.)

Plaintiffs worked with defendant Community, a broker, to obtain auto insurance for three vehicles. One vehicle was subsequently removed from the policy, erroneously, according to plaintiffs. After a claim with that vehicle arose and was denied by the carrier, plaintiffs filed this suit against Community alleging, *inter alia*, bad faith. Community filed preliminary objections. Judge Ashworth of the Lancaster County Court of Common Pleas granted the motion. Community argued that it was an insurance broker, not an insurance company, and therefore it could not be sued under §8371. The court, in this brief opinion, sustained the preliminary objections on this ground.

(2) *Connolly v. Progressive Northern Ins. Co.*, 2015 U.S. Dist. LEXIS 17074 (M.D. Pa. Feb. 4, 2015) (Conaboy, J.)

Plaintiff sought UIM benefits from her insurer Progressive after she was injured in an auto accident. When the parties could not resolve their dispute about whether plaintiff was entitled to stacked benefits, plaintiff filed this bad faith action against her defendant auto insurer, as well as two other Progressive entities, claiming they were also her insurers. Defendants filed a motion for summary judgment as to the two entities. Judge Conaboy of the Middle District granted the motion.

One of the entities was listed on the application for insurance; however, the court explained that the application was signed following the accident, so “it does not constitute any evidence”⁵⁴ that such entity was plaintiff’s insurer. As to the second entity, plaintiff pointed to the adjuster’s confusion as to whether the second entity or Progressive was her employer. The court rejected this as evidence that the second entity was plaintiff’s insurer: “[T]he Court is unconvinced that Ms. Kennedy’s apparent confusion as to the precise corporate identity of her employer is in any way indicative of a contractual relationship...”⁵⁵ Without a showing of a contractual relationship with either entity, the court dismissed both. The remainder of the opinion addressed issues raised by the insurer, as discussed in §§9:05(a) and 9:11.

(3) *Nusire v. Bristol West Ins. Co.*, 2015 U.S. Dist. LEXIS 135297 (E.D. Pa. Oct. 5, 2015) (Rufe, J.)

Plaintiff filed this bad faith action after he was unable to resolve his UIM claim with his defendant auto carrier. Named as defendants were the insurer who issued the policy (Bristol West), and another insurer identified in the letterhead of correspondence (Farmers). Farmers sought to dismiss the counts against it. Judge Rufe of the Eastern District denied the motion.

The court explained that “there is some relationship between Bristol West and Farmers. In addition, Plaintiff attached to the Complaint correspondence relating to Plaintiff’s claim. The letterhead has the Farmers Insurance log prominently displayed, with smaller references to Bristol West.”⁵⁶ The court concluded that these allegations were sufficient to allow plaintiff to proceed on his claims until discovery could develop further information on whether Farmers acted as an insurer.

⁵² *Patniak*, 2004 U.S. Dist. LEXIS 7669, at *12.

⁵³ *Seasor v. Liberty Mut. Ins. Co.*, 941 F. Supp. at 490.

⁵⁴ *Connolly v. Progressive N. Ins. Co.*, 2015 U.S. Dist. LEXIS 17074, at *10 (M.D. Pa. Feb. 4, 2015).

⁵⁵ *Connolly v. Progressive N. Ins. Co.*, 2015 U.S. Dist. LEXIS 17074, at *10-11 (M.D. Pa. Feb. 4, 2015).

⁵⁶ *Nusire v. Bristol W. Ins. Co.*, 2015 U.S. Dist. LEXIS 135297, at *12 (E.D. Pa. Oct. 5, 2015).

(4) McLaren v. AIG Domestic Claims, Inc., 853 F. Supp. 2d 499 (E.D. Pa. 2012) (Gardner, J.)

McLaren, a midwife, had a professional liability policy with National Union. AIG Domestic, a subsidiary of National Union, administered claims for National Union and had the authority to settle claims under National Union's policies. After a baby McLaren helped deliver died, she was sued for her alleged negligence. AIG notified McLaren that she would be provided a defense. As litigation progressed, AIG and the underlying plaintiffs agreed to settle. McLaren objected to settling the claim and attempted to revoke the consent to settle form she had signed earlier on the grounds that her signature had been coerced. The underlying plaintiffs filed a motion to enforce the settlement, which was granted. McLaren then filed this bad faith action, alleging that AIG had settled the claim in bad faith. AIG filed a motion to dismiss, which Judge Gardner of the Eastern District granted.

AIG Domestic argued that McLaren could not press a bad faith action against it because it was not McLaren's insurer. McLaren argued that AIG Domestic was acting as National Union's alter ego, and therefore could be treated as her insurer under §8371. McLaren pointed to the fact that she never directly communicated with National Union or AIG Domestic before the underlying lawsuit. When suit was filed, her communications were with only AIG Domestic, which, among other things, indicated that she was entitled to a defense and indemnification and appointed defense counsel. She also averred that AIG Domestic was a wholly-owned subsidiary of National Union. The court found these allegations insufficient to state a claim based on an alter ego theory, looking to Third Circuit precedent indicating that courts may disregard the corporate form where corporate formalities were not observed, funds were commingled, the debtor corporation was insolvent or seriously undercapitalized, the officers and directors were not functioning as such, or the corporation was a façade. McLaren had pled no facts to support any of these elements, and the fact that AIG Domestic was a wholly-owned subsidiary, without more, was insufficient to pierce the corporate veil.⁵⁷

The court explained that whether a company is an insurer under the bad faith statute was analyzed by considering “(1) the extent to which the company is identified as the insurer of the policy documents; and (2) the extent to which the company acted as an insurer.”⁵⁸ The court also found that “[i]n evaluating whether a party is an insurer under section 8371, courts applying Pennsylvania law have stated that a party acts as an insurer when it ‘issues policies, collects premiums, and in exchange assumes certain risks and contractual obligations.’”⁵⁹ The court noted that National Union, not AIG Domestic, was listed as the insurer on the policy. Additionally, the court found that “Ms. McLaren's contention that AIG acted as her insurer is grounded in averments regarding AIG's role in the underlying Miller litigation rather than the issuance of the insurance policy, collection of premiums, or the bearing of risk by AIG. Therefore, the Second Amended Complaint does not aver sufficient facts to support a finding that AIG is Ms. McLaren's insurer within the meaning of section 8371 and therefore, Ms. McLaren's bad faith claim against AIG is dismissed.”⁶⁰

(5) Kofsky v. Unum Life Ins. Co. of Am., 2014 U.S. Dist. LEXIS 122220 (E.D. Pa. Sept. 2, 2014) (Surrick, J.)

Plaintiff filed this bad faith action against Unum, which issued a life insurance policy, and the broker that sold him the policy, after the policy was cancelled and Unum refused to reinstate it. Defendant USI Affinity, the broker, filed a motion to dismiss, contending that it was not a proper defendant under a §8371 claim. Judge Surrick of the Eastern District granted the motion.

The court explained that the statute permitted a claim against an insurer, which the court had determined applied to companies that “‘issues policies, collects premiums, and in exchange assumes certain risks and contractual obligations.’”⁶¹ In this case, plaintiff had not averred that the broker “issued the Policy, but that it sold the Policy as a broker. Moreover, Plaintiff has not alleged that USI Affinity collected any premiums or assumed any risks or contractual obligations. Therefore, Plaintiff has not pled that USI Affinity is an insurer.”⁶²

(6) Wallace v. State Farm Mut. Auto. Ins. Co., 2013 U.S. Dist. LEXIS 179191 (E.D. Pa. Dec. 19, 2013), *aff'd*, 588 F. App'x 195 (3d Cir. 2014) (Stengel, J.)

Plaintiff was injured in an auto accident in 2008. He filed and resolved an earlier action stemming from this accident. In this suit, he again filed suit against his auto insurer, as well as the attorneys and expert involved in that action, and two State Farm employees. Defendants filed a motion to dismiss. Judge Stengel of the Eastern District of Pennsylvania granted the motion.

Having determined that plaintiff filed a bad faith claim against State Farm in the earlier litigation, the claim in this case was dismissed under the doctrine of *res judicata*. The court determined that the bad faith claims against the remaining defendants could not stand because §8371 did not provide a right to relief: “The bad faith statute only

⁵⁷ *McLaren v. AIG Domestic Claims, Inc.*, 853 F. Supp. 2d 499, 509 (E.D. Pa. 2012).

⁵⁸ *McLaren v. AIG Domestic Claims, Inc.*, 853 F. Supp. 2d 499, 511.

⁵⁹ *McLaren v. AIG Domestic Claims, Inc.*, 853 F. Supp. 2d 499, 511.

⁶⁰ *McLaren v. AIG Domestic Claims, Inc.*, 853 F. Supp. 2d 499, 512.

⁶¹ *Kofsky v. Unum Life Ins. Co. of Am.*, 2014 U.S. Dist. LEXIS 122220, at *14 (E.D. Pa. Sept. 2, 2014) (citation omitted).

⁶² *Kofsky v. Unum Life Ins. Co. of Am.*, 2014 U.S. Dist. LEXIS 122220, at *14 (E.D. Pa. Sept. 2, 2014).

affords relief against insurers.... Since none of the other defendants insured plaintiff, he cannot bring a statutory bad faith claim against them.”⁶³ The Third Circuit subsequently affirmed, for the reasons stated by the district court.

(7) *Upper Pottsgrove Twp. v. Int’l Fidelity Ins. Co.*, 2013 U.S. Dist. LEXIS 142372 (E.D. Pa. Oct. 2, 2013) (Dalzell, J.)

Plaintiff township and THC entered into a contract relating to public improvements and construction of a subdivision. IFIC issued a bond for the financing and acted as surety; THC was the principal. After THC filed for bankruptcy, plaintiff township sought payment of the balance of the bonds, which IFIC refused to pay. Plaintiff township then filed this bad faith suit. IFIC moved to dismiss the bad faith claim. Judge Dalzell of the Eastern District of Pennsylvania granted the motion.

IFIC contended that §8371 did not apply to sureties as surety agreements were not insurance policies. The court reviewed case law on the issue, and concluded that the statute did not apply to surety bonds: “The surety bond IFIC issued reflects a garden variety relationship between a surety, a principal, and an obligee.... Treatise authors, the Pennsylvania Supreme Court, and the United States Supreme Court have routinely found that such a relationship does not constitute an insurance contract, and their findings bear on our analysis here. Under this approach a surety bond is not an insurance contract, and the bad faith provision of §8371 would thus not apply to sureties.”⁶⁴

(8) *Dolph v. Illinois Nat’l Ins. Co.*, 2013 U.S. Dist. LEXIS 20158 (M.D. Pa. Feb. 11, 2013) (Mannion, J.)

Following an auto accident, plaintiffs filed this bad faith action against AIG and Illinois National. AIG filed a motion to dismiss. Judge Mannion of the Middle District of Pennsylvania denied the motion.

AIG argued that it was not plaintiffs’ insurer, but was merely a holding company without license to perform insurance services or otherwise act as an insurer by issuing policies. AIG contended that plaintiffs could not state a claim with respect to the bad faith action because it was not an insurer. Plaintiffs argued that they had contracts with both defendants and that AIG handled their claim. The court found that the record was not definitive enough to dismiss the claim against AIG: “Questions remain as to AIG’s role in the service of the insurance claims underlying this matter; however, the current record cannot support a determinative finding that AIG is, as a matter of law, not an insurer under 42 Pa. C.S. §8371.”⁶⁵

(9) *Hyjurick v. Commonwealth Land Title Ins. Co.*, 2012 U.S. Dist. LEXIS 59087 (M.D. Pa. Apr. 27, 2012) (Munley, J.)

Plaintiff purchased property, and at that time, also purchased title insurance from Commonwealth. Sometime later, when a dispute arose over whether the seller was the sole owner of the property, plaintiff sought coverage from Commonwealth. Commonwealth apparently never rendered a decision on the issue, and plaintiff filed this bad faith action against Commonwealth and its parent company, Fidelity. The defendant insurers filed a motion to dismiss. Judge Munley of the Middle District granted the motion in part and denied it in part.

The defendant insurers argued that Fidelity should be dismissed as a defendant because it was not plaintiff’s insurer. The court agreed, and granted the motion to dismiss in this regard, finding that if plaintiff wished to proceed under an alter ego theory, to reach Fidelity as a defendant, plaintiff was required to plead facts in support of such a theory. However, plaintiff did not plead any such facts, and thus the bad faith claim could not stand against Fidelity: “District courts sitting in the Third Circuit have held that a plaintiff who seeks to pierce the corporate veil of a wholly owned subsidiary corporation must allege some facts beyond mere evidence of ownership to support such an action against the parent company. . . . [I]n the absence of any factual averments that could lead us to find that Commonwealth’s corporate veil should be pierced, we will dismiss plaintiff’s claims with respect to Fidelity.”⁶⁶

(10) *Allegrino v. Conway E & S, Inc.*, 2010 U.S. Dist. LEXIS 48781 (W.D. Pa. May 18, 2010) (Fischer, J.)

An earlier opinion in this case is discussed in §§4:04 and 5:03. In connection with the denial of a commercial insurance claim stemming from building damage resulting from windstorm and several acts of vandalism, plaintiff filed suit against eleven defendants, including the City of Duquesne, Twin Rivers Council of Governments, and W&J Contractors. These three defendants filed motions to dismiss the bad faith claim against them, which motions were granted by Judge Fischer of the Western District, who reasoned:

[A] claim for bad faith under 42 Pa. C.S.A. §8371 can be brought only against an insurer. . . . It is undisputed that Duquesne is a Pennsylvania municipal corporation, and not an insurer. . . . Therefore, the Court finds that Duquesne cannot be held liable for statutory bad faith under Pennsylvania law.⁶⁷

⁶³ *Wallace v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 179191, at *14 (E.D. Pa. Dec. 19, 2013), *aff’d*, 588 F. App’x 195 (3d Cir. 2014).

⁶⁴ *Upper Pottsgrove Twp. v. Int’l Fidelity Ins. Co.*, 2013 U.S. Dist. LEXIS 142372, at *14-15 (E.D. Pa. Oct. 2, 2013).

⁶⁵ *Dolph v. Illinois Nat’l Ins. Co.*, 2013 U.S. Dist. LEXIS 20158, at *9 (M.D. Pa. Feb. 11, 2013).

⁶⁶ *Hyjurick v. Commonwealth Land Title Ins. Co.*, 2012 U.S. Dist. LEXIS 59087, at *13-14 (M.D. Pa. Apr. 27, 2012).

⁶⁷ *Allegrino v. Conway E & S, Inc.*, 2010 U.S. Dist. LEXIS 48781, at *18-19 (W.D. Pa. May 18, 2010) (citation to record omitted; citing *Lindsey v. Chase Home Fin., L.L.C.*, 2006 U.S. Dist. LEXIS 61893, at *3-4 (M.D. Pa. Aug. 30, 2006)).

Likewise, the court found that “Plaintiff does not contest the fact that Twin Rivers is a municipal council of governments and W&J is a private contractor, and not insurers. . . . Consequently, . . . the Court finds that they cannot be liable for bad faith under Pennsylvania law.”⁶⁸

(11) *United States v. AEGIS Ins. Co.*, 2009 U.S. Dist. LEXIS 2381 (M.D. Pa. Jan. 14, 2009) (Rambo, J.)

Judge Rambo of the Middle District has similarly held that a § 8371 claim may not be asserted against a surety, stating:

[T]his court will follow the sound and thorough reasoning of the district courts that have conducted a comprehensive analysis of the issue and concluded that an individual may not bring a claim against a surety for bad faith under §8371. These courts have given due consideration to the intent of the Pennsylvania legislature, and, for the reasons described above, have determined that the differences between insurance policies and surety bonds encourage not judicially expanding the bad faith statute to encompass surety bonds.⁶⁹

(12) *Stephano v. TRI-ARC Financial Servs., Inc.*, 2008 U.S. Dist. LEXIS 16673 (M.D. Pa. Mar. 4, 2008) (Vanaskie, J.)

In this first party auto benefits claim discussed in §15:03, the plaintiff sued Frontier, an adjustment firm. Frontier moved to dismiss plaintiff’s claim, stating that it was not an “insurer” within the meaning of §8371. Judge Vanaskie of the Middle District granted Frontier’s motion. The court concluded that Frontier’s alleged actions consisted of conducting an investigation of the driver’s supposed policy with another insurer, allegations which “fall short of pleading that Frontier issued the insurance policy in question, assumed any risks or contractual obligations under the policy, or was licensed to conduct insurance business in Pennsylvania. . . . Accordingly, because Plaintiff is unable to allege that Frontier is an insurer under 42 PA. CONS. STAT. §8371, her claim against it will be dismissed.”⁷⁰

(13) *Intercon Construction, Inc. v. Williamsport Municipal Water Authority*, 2008 U.S. Dist. LEXIS 6022 (M.D. Pa. Jan. 28, 2008) (McClure, J.)

In this case, the plaintiff sued Williamsport Municipal Water Authority based upon an alleged breach of contract to construct a water line. Safeco Insurance Company of America provided the performance bond on the contract. The Authority made a third party claim against Safeco alleging bad faith in the manner in which it investigated and denied the Authority’s coverage under the performance bond. Safeco sought to dismiss the bad faith claim, and the question before the court was whether a surety bond may be considered “an insurance policy” for the purposes of §8371. Judge McClure of the Middle District agreed with the conclusion of prior cases that the provider of a surety bond cannot be held liable under §8371. According to the court, “Due to the numerous differences between insurance policies and surety bonds which we have discussed, we conclude that had the Pennsylvania legislature intended §8371 to apply to a surety bond, it would have done so explicitly.”⁷¹

(14) *Delaware Valley Home Evaluations, Inc., t/a Housemaster of Delaware Valley v. Housemaster of America, Inc.*, 559 F. Supp. 2d 591 (E.D. Pa. 2008) (Padova, J.)

A franchisee sued its franchisor for bad faith under §8371. The franchisor moved for summary judgment. Judge Padova of the Eastern District granted the franchisor’s motion, reasoning that the franchisee could not pursue a bad faith claim against its franchisor unless the franchisor was an insurance company that issued an insurance policy to the franchisee. Judge Padova held that neither the franchisor nor the franchisee was an insurance company, further noting that the franchise agreement was not an insurance policy.

(15) *Estakhrian v. Continental General Ins. Co.*, 2006 U.S. Dist. LEXIS 95607 (E.D. Pa. Dec. 18, 2006) (Davis, J.)

In this case, discussed in detail in §10:07, Judge Davis of the Eastern District granted summary judgment in favor of Ceres Group, a non-insurance holding company, in connection with a breach of contract and bad faith action brought against a health insurance policy underwritten by Continental General Insurance Company. The court held that although several Ceres employees were involved in an internal appeal of plaintiff’s claim denial, Ceres was not an insurance company, and did not issue the insurance policy at issue. The court also rejected the plaintiff’s claim that Ceres was a “de facto insurer” for purposes of §8371, finding the involvement of the Ceres employees to have been relatively minor.

⁶⁸. *Id.* at *24-25 (citation to record omitted).

⁶⁹. *United States v. AEGIS Ins. Co.*, 2009 U.S. Dist. LEXIS 2381, at *12-13 (M.D. Pa. Jan. 14, 2009).

⁷⁰. *Stephano v. TRI-ARC Financial Servs., Inc.*, 2008 U.S. Dist. LEXIS 16673, at *9 (M.D. Pa. 2008).

⁷¹. *Intercon Construction, Inc. v. Williamsport Municipal Water Authority*, 2008 U.S. Dist. LEXIS 6022, at *9 (M.D. Pa. Jan. 28, 2008) (citations omitted).

(16) *Lindsey v. Chase Home Fin. L.L.C.*, 2006 U.S. Dist. LEXIS 61893 (M.D. Pa. Aug. 30, 2006) (Vanaskie, C.J.)

In this case, Chief Judge Vanaskie of the Middle District held that Chase Home Finance, a mortgagee which had collected a monthly premium for home disaster insurance, was not an insurer for purposes of §8371:

The amended complaint does not aver any facts that Chase has agreed to assume certain risks, such as flood damage to the Property, in consideration for premiums; that Chase is licensed to conduct insurance business in Pennsylvania; that the Agreement was reviewed and approved by the state insurance regulator; or that Chase issued an insurance policy naming Ms. Lindsey as an insured. If an insurance claims adjuster was deemed not to be an insurer, see Powell; Dresdner, then Chase, an entity more remote from the insurance business than a claims adjuster, cannot be an insurer under section 8371.⁷²

(17) *Chu v. Disability Reinsurance Mgmt. Servs.*, 2006 U.S. Dist. LEXIS 61244 (W.D. Pa. Aug. 29, 2006) (Cohill, J.)

Plaintiff, a doctor, alleged that defendants, a claims management company and a physician, engaged in alleged bad faith breach of contract for failure to pay disability benefits. The defendants moved to dismiss. Judge Cohill of the Western District, following *Brown v. Progressive*, held that it was premature, prior to discovery being conducted, to dismiss plaintiff's §8371 claim against the claims management company, since it was alleged in the complaint that the company initially did not approve and/or denied the plaintiff's claims for benefits. However, the court dismissed the §8371 claim against the physician defendant, "whom Plaintiffs do not allege was a decision-maker with respect to [plaintiff's] insurance claims."⁷³

(18) *Comcast Spectacor LP v. Chubb & Son, Inc.*, 2006 U.S. Dist. LEXIS 55226 (E.D. Pa. Aug. 8, 2006) (Dalzell, J.)

The plaintiff, the owner of the Philadelphia Flyers, sued its insurer under a policy of performance bonus insurance for one of its professional ice hockey players. Also sued were McCarthy and ASU, who participated in producing the insurance policy. McCarthy and ASU sought dismissal of the §8371 bad faith count on the grounds that they were not "insurers." Judge Dalzell of the Eastern District agreed, and granted the motion to dismiss. Finding that McCarthy "did not issue any of the three policies, collect any premiums, or assume any risks or obligations under the policies," the court found that he was not an insurer.⁷⁴ Similarly the court found that ASU placed the insurance "as a Correspondent and Producer," but the policies expressly identified the insurers – Chubb and Underwriters – so that "the policies make clear that ASU did not insure the risk itself."⁷⁵

(19) *Caruso v. Neumann Medical Ctr.*, PICS Case No. 03-0505 (Phila. C.C.P. April 2003) (Tereshko, J.)

Judge Tereshko of the Philadelphia Court of Common Pleas ruled that the Medical CAT Fund is not subject to liability under §8371.

(20) *Lloyd v. Pennsylvania Medical Professional Liability Catastrophe Loss Fund*, 821 A.2d 1230; 2003 Pa. LEXIS 659 (Pa. 2003) (Newman, J.)

The plaintiff, as assignee, brought an action against the Medical CAT Fund over a denial of coverage in the defense of a medical malpractice action. The CAT Fund had denied coverage because the involved physician had not timely paid the surcharge imposed by the Fund pursuant to the Fund's regulations. The plaintiff sought permission to amend his petition for review to add a claim of bad faith either under common law or pursuant to §8371. The Commonwealth Court denied that request. The Pennsylvania Supreme Court affirmed the Commonwealth Court's decision, determining that the CAT Fund properly acted within the confines of that regulation, and could not have acted in bad faith.

(21) *Superior Precast, Inc. v. Safeco Ins. Co. of America*, 71 F. Supp. 2d 438 (E.D. Pa. 1999) (Giles, J.)

The court granted Safeco's motion to dismiss the bad faith count, finding that "the term insurance policy in §8371 does not include surety contracts."⁷⁶ Citing the U.S. Supreme Court case of *Pearlman v. Reliance Insurance Company*,⁷⁷ the court noted the "usual view, grounded in commercial practice, is that suretyship is not insurance."⁷⁸ The court also noted that a surety bond premium is determined based upon the lender's evaluation of risk, not on the basis of loss; premiums for surety bonds are not paid by the lenders but by the investors; they are paid up front and not subject to adjustment; and they have no fixed terms and no right of cancellation or renewal. The court was also

⁷² *Lindsey v. Chase Home Fin. L.L.C.*, 2006 U.S. Dist. LEXIS 61893 (M.D. Pa. Aug. 30, 2006).

⁷³ *Chu v. Disability Reinsurance Mgmt. Servs.*, 2006 U.S. Dist. LEXIS 61244, at *33 (W.D. Pa. Aug. 29, 2006).

⁷⁴ *Comcast Spectacor LP v. Chubb & Son, Inc.*, 2006 U.S. Dist. LEXIS 55226, at *73.

⁷⁵ *Id.* at *74.

⁷⁶ *Superior Precast, Inc.*, 71 F. Supp. 2d 438, 449.

⁷⁷ 371 U.S. 132 (1962).

⁷⁸ *Superior Precast, Inc.*, 71 F. Supp. 2d 438, 451.

persuaded by the fact that under the law of suretyship, the liability of a surety can be no greater than its principal, and there was no question that A&L, the general contractor, could not have been subject to a bad faith claim.⁷⁹

(22) *Peer v. Minnesota Mut. Fire & Cas. Co.*, 1993 U.S. Dist. LEXIS 18008 (E.D. Pa. Dec. 21, 1993) (DuBois, J.)

Judge DuBois of the Eastern District held that §8371 did not apply to alleged bad faith conduct by an independent insurance adjustment company hired by plaintiff's insurer.

CHAPTER 5 THE NATURE AND SCOPE OF AN ACTION UNDER §8371

§5:03 The Evolving First Party Common Law Bad Faith Action

§5:03(a) — Cases

(1) *Davis v. Allstate Prop. & Cas. Co.*, 2014 U.S. Dist. LEXIS 138022 (E.D. Pa. Sept. 30, 2014) (Gardner, J.)

Plaintiff's husband died following an auto accident and plaintiff thereafter sought UIM benefits from their auto carrier, defendant Allstate. Allstate maintained that plaintiff had reduced the amount of UIM benefits under the policy by signing a step-down form, and paid out the limits it contended applied; plaintiff contended that such reduction was not valid because her husband did not also sign the form, and therefore, she was entitled to higher limits. Plaintiff filed suit, alleging breach of contract and both common law and statutory bad faith. Defendant Allstate filed a motion to dismiss. Judge Gardner of the Eastern District granted the motion as to the bad faith claims.

The court concluded that the common law bad faith count "merges with the underlying breach of contract action" and therefore, because the contract claim was dismissed, the common law bad faith claim would also be dismissed.⁸⁰

(2) *Lane v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 60064 (M.D. Pa. May 7, 2015) (Mariani, J.)

Plaintiff filed this statutory and common law bad faith action after he was unable to resolve his UM claim with defendant State Farm. Defendant filed a motion to dismiss. Judge Mariani of the Middle District denied the motion, as is also discussed in §7:01.

The court explained that the Pennsylvania courts have recognized an implied duty of good faith in insurance contracts, citing *Berg v. Nationwide Mutual Ins. Co.*,⁸¹ and that common law bad faith actions are distinct from statutory bad faith actions, citing *Ash v. Continental Ins. Co.*⁸² Thus, "though the two causes of action are similar, they are not interchangeable, and Plaintiff may properly allege both here."⁸³

The court rejected the insurer's argument that the policy provided a mechanism to resolve disputes under the policy, such as allowing an insurer to investigate a claim, and therefore, there could be no breach. The court stated that the policy did provide a mechanism for resolving disputes, but stated further:

[E]ven if these procedures were permitted under the contract in appropriate cases, that does not mean that Defendant necessarily exercised them reasonably given the actual facts of this case. When Plaintiff has alleged a protracted refusal to pay the proceeds of the policy not justified by the existing record, as well as wrongful use of delay tactics by being forced to submit duplicative medical records and unnecessary sworn testimony, the Court finds that he has adequately pleaded a breach of the duty of good faith.⁸⁴

The court also rejected the insurer's argument that there was no such duty in the contract because the court cannot assume that there is such a duty in the contract:

Because the theoretical availability of these procedures does not necessarily affect the reasonableness of their application in this case, the Court is unwilling to accept Plaintiff's first argument either. It is unwilling to rule as a matter of law at this early stage that a duty to act in good faith does not exist when Plaintiff has pleaded facts which, if true, would indicate that Defendant engaged in tactics intended to frustrate the very purpose for which Plaintiff procured his insurance policy in the first place, i.e., to receive coverage in the event of an automobile accident. If true, this appears to be the type of breach of duty giving rise to a common law cause of action, as discussed in *Birth Center*, where an insurer refuses to settle a claim without a good faith basis to do so. *See Birth Center*, 787 A.2d at 379. Therefore, in light of Plaintiff's factual allegations, the Court cannot dismiss Count II

⁷⁹ For similar cases and holdings, see *MA Bruder & Sons, Inc. v. Williams*, 47 Pa. D. & C.4th 243 (Monroe, 2000); *Pullman v. Power Prods. v. Fid. & Guarantee Ins. Co.*, 1997 U.S. Dist. LEXIS 23554 (W.D. Pa. Feb. 21, 1997); *Allegheny Valley Joint Sewage Auth. v. Am. Ins. Co.*, 1995 U.S. Dist. LEXIS 22091 (W.D. Pa. Aug. 17, 1995); *Norwood Co. v. RLI Ins. Co.*, 2002 U.S. Dist. LEXIS 5560 (E.D. Pa., Apr. 1, 2002).

⁸⁰ *Davis v. Allstate Prop. & Cas. Co.*, 2014 U.S. Dist. LEXIS 138022, at *26 (E.D. Pa. Sept. 30, 2014).

⁸¹ *Berg v. Nationwide Mut. Ins. Co.*, 44 A.3d 1164 (Pa Super. 2012).

⁸² *Ash v. Cont'l Ins. Co.*, 932 A.2d 877 (Pa. 2007).

⁸³ *Lane v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 60064, at *14 (M.D. Pa. May 7, 2015).

⁸⁴ *Lane v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 60064, at *15 (M.D. Pa. May 7, 2015).

just because it is possible that the language of the contract will indicate that a duty of good faith does not attach.⁸⁵

Finally, the court rejected defendant's argument that plaintiff improperly sought consequential damages with respect to its common law bad faith claim. The court cited *Birth Center* for the proposition that when an insurer breaches the contract in bad faith, it will be "liable for the known and/or foreseeable compensatory damages of its insured that reasonably flow from the insurer's bad faith."⁸⁶ The court permitted the request to stand.

(3) *Monck v. Progressive Corp.*, 2015 U.S. Dist. LEXIS 47801 (M.D. Pa. Apr. 13, 2015) (Conaboy, J.)

Plaintiff filed this suit, alleging breach of contract and common law and statutory bad faith, after she and her defendant auto insurers were unable to resolve her UIM claim. Defendants moved to dismiss the common law bad faith claim. Judge Conaboy of the Middle District of Pennsylvania granted the motion. The court agreed with defendants that the common law bad faith and the breach of contract counts were redundant. The court explained:

Here Plaintiff asserts a claim for breach of contract (Count Two) within which she alleges that the conduct complained of constitutes a breach of the policy's implied covenant of good faith and fair dealing...and Count Three for "Good Faith and Fair Dealing" relies upon the same conduct.... Therefore, under the facts of this case, Plaintiff's claim for good faith and fair dealing is subsumed into her breach of contract claim.⁸⁷

(4) *Rau v. Allstate Fire & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 69466 (M.D. Pa. May 29, 2015) (Mariani, J.)

Plaintiff filed a common law bad faith claim that arose out a dispute with her carrier. Defendant opposed plaintiff's request for the deposition of the adjuster on the grounds that the scope of the deposition could not include investigation, evaluation and specifics of claims handling procedures because there was no bad faith claim to which such testimony would be relevant. Judge Mariani of the Middle District ruled that the deposition could proceed.

The court explained that the common law bad faith allegations "sufficiently set forth a claim for a breach of the common law duty of good faith and fair dealing—which may be understood as part of the broader breach of contract action—and therefore make her proposed lines of deposition questioning appropriate and permissible."⁸⁸ Citing *Ash* and *Birth Center*, the court explained that the statutory bad faith action "does not alter or supplant" the cause of action for the breach of the implied duty of good faith and fair dealing. The court explained: "Thus, by invoking a breach of the common law duty of good faith and fair dealing, Plaintiff has properly put the claims handling procedures at issue in this case, even though she did not also bring a [statutory] bad faith action."⁸⁹

(5) *St. Clair v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 59117 (E.D. Pa. May 6, 2015) (Yohn, J.)

Plaintiff's home was damaged by fire, after which she submitted a claim to her homeowner's carrier, defendant State Farm. State Farm paid only a portion of the claimed loss, so plaintiff sought appraisal. State Farm refused to participate in an appraisal, contending that it was not called for because the parties had not agreed on the scope of damage. Plaintiff then filed this breach of contract and bad faith suit, including claims for both common law and statutory bad faith. State Farm filed a motion to dismiss. Judge Yohn of the Eastern District granted the motion as to the common law bad faith claim, but denied it as to the statutory claim.

The court explained that the common law bad faith claim was merely part of a breach of contract claim, which was pled in a separate count, and was not a claim independent of that: "To be sure, a party to an insurance contract can bring a contract cause of action for breach of the implied duty of good faith and fair dealing.... This duty, however, 'does not allow for a cause of action separate and distinct from a breach of contract claim.'⁹⁰ The count alleging the common law bad faith count was dismissed.

(6) *Tippett v. Ameriprise Ins. Co.*, 2015 U.S. Dist. LEXIS 37513 (E.D. Pa. Mar. 25, 2015) (Sanchez, J.)

Plaintiffs filed this statutory bad faith suit after they were unable to resolve a fire damage claim with their defendant homeowner's insurers. The insurers moved to strike portions of the claim for damages in the bad faith count. Judge Sanchez of the Eastern District granted the motion.

In the course of its discussion of what types of damages are permissible in a statutory bad faith claim, the court noted: "There are two types of 'bad faith' claims that an insured can bring against an insurer: a contract claim for breach of the implied contractual duty to act in good faith and a statutory bad faith tort claim under 42 Pa. Cons. Stat. §8371."⁹¹

⁸⁵ *Lane v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 60064, at *15-16 (M.D. Pa. May 7, 2015).

⁸⁶ *Lane v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 60064, at *17-18 (M.D. Pa. May 7, 2015) (quoting *Birth Ctr.*, 787 A.2d 376, 389).

⁸⁷ *Monck v. Progressive Corp.*, 2015 U.S. Dist. LEXIS 47801, at *9-10 (M.D. Pa. Apr. 13, 2015).

⁸⁸ *Rau v. Allstate Fire & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 69466, at *4 (M.D. Pa. May 29, 2015).

⁸⁹ *Rau v. Allstate Fire & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 69466, at *4-5 (M.D. Pa. May 29, 2015).

⁹⁰ *St. Clair v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 59117, at *6 (E.D. Pa. May 6, 2015) (citation omitted).

⁹¹ *Tippett v. Ameriprise Ins. Co.*, 2015 U.S. Dist. LEXIS 37513, at *21 n.11 (E.D. Pa. Mar. 25, 2015).

(7) *United Nat'l Ins. Co. v. Indian Harbor Ins. Co.*, 2015 U.S. Dist. LEXIS 12370 (E.D. Pa. Feb. 2, 2015) (Bartle, J.)

Plaintiff insurers each had all-risk insurance policies with defendant Indian Harbor. When they were sued in coverage disputes, they sought a defense and indemnification from Indian Harbor and when it was denied, they filed this suit, alleging *inter alia*, common law bad faith. Indian Harbor filed a motion to dismiss. Judge Bartle of the Eastern District granted the motion as to this claim.

The court concluded that Indian Harbor had not breached the contract with the insurers because the pollution exclusion applied. Turning to the common law bad faith claim, the court explained that “Pennsylvania lacks a common law cause of action for bad faith on the part of insurers but maintains a statutory cause of action through 42 Pennsylvania Consolidated Statutes Annotated § 8371.”⁹² Further, the court explained that because there was no contractual obligation to provide defense and indemnity, “Indian Harbor cannot have breached any duty in failing to investigate [the insurers’] claim.”⁹³

(8) *Johnson v. State Farm Life Ins. Co.*, 695 F. Supp. 2d 201 (W.D. Pa. 2010) (Hay, M.J.), adopted by, 695 F. Supp. 2d 201 (W.D. Pa. 2010) (McVerry, J.)

In this life insurance dispute, addressed more fully in §10:25, Magistrate Judge Hay of the Western District dismissed plaintiff’s common law bad faith claim:

[T]he Supreme Court of Pennsylvania expressly declined to create a common law tort cause of action for bad faith finding that the legislature had already enacted a system of sanctions to punish insurance companies for any wrongdoing in the form of the Unfair Insurance Practices Act and that it was up to the legislature to determine if sanctions beyond that were required to deter less than scrupulous conduct by insurance companies.⁹⁴

The magistrate judge also recommended dismissing the breach of duty of good faith and fair dealing count on the grounds that it was redundant because she already pled a breach of contract claim that was surviving the motion to dismiss:

Although Pennsylvania law recognizes a cause of action for breach of the contractual duty of good faith and fair dealing in the insurance context, it is clear that “Pennsylvania law does not recognize a separate breach of contractual duty of good faith and fair dealing where said claim is subsumed by a separately pled breach of contract claim.”⁹⁵

Because both the breach of contract and breach of duty of good faith and fair dealing counts relied on the same actions—“the allegedly unlawful purchase of the Policy”—the latter would be subsumed into the former. The district court adopted the report and recommendation without substantive discussion as its opinion after it reviewed the record and received no objections.⁹⁶

(9) *Moss Signs, Inc. v. State Automobile Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 26770 (W.D. Pa. Apr. 2, 2008) (Standish, J.)

Moss filed a claim for vandalism and water damage to its building. Based on the report of an expert, State Auto denied the claim. Moss filed a multi-count complaint against State Auto, alleging breach of contract, violation of §8371 claim, and a separate count alleging breach of the implied duty of good faith and fair dealing. Citing *Ash v. Continental Insurance Co.*,⁹⁷ Judge Standish of the Western District dismissed the count for breach of the implied duty of good faith and fair dealing, stating, “Our review of the case law addressing the duty of good faith reveals that courts generally treat a breach of that duty as a breach of contract action.”⁹⁸ The court also ruled that in light of the §8371 claim, Moss was not entitled to assert a separate tort claim for breach of an implied covenant of good faith and fair dealing:

Because State Auto does not contend that the Complaint fails to adequately set forth allegations which would support a claim pursuant to 42 Pa. Cons. Stat. §8371, we conclude Plaintiff can achieve its ultimate goals without separately alleging a tort claim for breach of an implied covenant of good faith and fair dealing. Count II is therefore dismissed with prejudice in its entirety....⁹⁹

⁹² *United Nat'l Ins. Co. v. Indian Harbor Ins. Co.*, 2015 U.S. Dist. LEXIS 12370, at *18 (E.D. Pa. Feb. 2, 2015) (*Romano*, 646 A.2d 1228 and *Cecil Twp.*, 836 F. Supp. 2d 367).

⁹³ *United Nat'l Ins. Co. v. Indian Harbor Ins. Co.*, 2015 U.S. Dist. LEXIS 12370, at *18 (E.D. Pa. Feb. 2, 2015).

⁹⁴ *Johnson v. State Farm Life Ins. Co.*, 695 F. Supp. 2d 201, 210-11 (W.D. Pa. Jan. 14, 2010).

⁹⁵ *Johnson v. State Farm Life Ins. Co.*, 695 F. Supp. 2d 201, 213-14 (W.D. Pa. 2010) (quoting *Smith v. Lincoln Benefit Life Co.*, 2009 U.S. Dist. LEXIS 24941, 2009 WL 789900, at *11-12 (W.D. Pa. Mar. 23, 2009)).

⁹⁶ *Johnson v. State Farm Life Ins. Co.*, 695 F. Supp. 2d 201, 203-04 (W.D. Pa. 2010).

⁹⁷ 932 A.2d 877, 883 (Pa. 2007).

⁹⁸ *Moss Signs, Inc. v. State Auto. Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 26770, at *11-12 (W.D. Pa. Apr. 2, 2008).

⁹⁹ *Moss Signs, Inc. v. State Auto. Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 26770, at *13-14.

(10) Bukofski v. USAA Cas. Ins. Co., 2009 U.S. Dist. LEXIS 48128 (M.D. Pa. June 9, 2009) (Munley, J.)

In this case arising out of a UIM claim, Judge Munley of the Middle District dismissed plaintiff's common law bad faith claim. According to the court, the Pennsylvania Supreme Court decision in *Toy v. Metropolitan* "explained that Pennsylvania courts have refused to allow a common law 'bad faith' tort action for an insured's violation of the implied covenant of good faith and fair dealing in the first party insurance claim setting."¹⁰⁰ Accordingly, the court dismissed the common law bad faith claim "because plaintiff's claim of violation of the duty of good faith and fair dealing merges with her breach of contract claim."¹⁰¹

(11) Zenglen v. Northwestern Mut. Life Ins. Co., 2014 U.S. Dist. LEXIS 118147 (M.D. Pa. Aug. 25, 2014) (Mariani, J.)

Plaintiff submitted a claim under his disability policy to carrier defendant Northwestern. Northwestern initially paid benefits, but eventually stopped after review by a psychiatrist. Plaintiff then filed this bad faith suit, which included a common law bad faith count. Northwestern filed a motion to dismiss in part. Judge Mariani of the Middle District of Pennsylvania granted the motion as to the common law bad faith claim.

Northwestern sought dismissal of the common law bad faith claim, as it was merely a part of the breach of contract count. The court agreed, noting that because there was a separately pled breach of contract count, the common law bad faith count was subsumed in that: "[W]here parties bring breach of contract claims and common law bad faith claims simultaneously the 'bad faith claim sounding in contract is subsumed within [the] breach of contract claim."¹⁰²

(12) Plummer v. State Farm Fire & Cas. Co., 2014 U.S. Dist. LEXIS 87570 (W.D. Pa. June 27, 2014) (Conti, C.J.)

Plaintiffs filed suit against their homeowner's carrier, defendant State Farm, after the parties could not resolve a claim relating to roof damage. Included in the suit were counts for breach of contract and breach of the duty of good faith and fair dealing. Defendant filed a motion to dismiss the common law bad faith claim. Chief Judge Conti of the Western District of Pennsylvania granted the motion.

The court explained that the breach of the duty of good faith and fair dealing count could not stand, where there was also a breach of contract count in the same action, "because Pennsylvania law considers the claims equivalent."¹⁰³ The court further stated: "Since plaintiffs attempted to plead a common law tort for insurer bad faith by stating that the insurer breached the duty of good faith and fair dealing, this count is subsumed by plaintiffs' breach of contract count."¹⁰⁴

(13) Hudgins v. Travelers Home & Marine Ins. Co., 2013 U.S. Dist. LEXIS 107775 (E.D. Pa. July 31, 2013) (Yohn, J.)

The facts of this case are discussed in detail in §9:03(b) and elsewhere. One issue addressed by Judge Yohn of the Eastern District was whether plaintiff could assert a count for breach of the duty of good faith and fair dealing in addition to a breach of contract action. The court ruled that she could not: "Travelers argues that...the claim for breach of the implied covenant of good faith and fair dealing is subsumed by the breach of contract claim in Count I. Defendant is correct."¹⁰⁵

(14) Bare v. State Auto Group, 2013 U.S. Dist. LEXIS 105335 (E.D. Pa. July 26, 2013) (McLaughlin, J.)

Plaintiff filed this UIM and bad faith suit against defendant auto insurers. The insurers filed a motion to dismiss. Judge McLaughlin of the Eastern District of Pennsylvania granted the motion. Defendants moved to dismiss the breach of the duty of good faith and fair dealing count. The court concluded that "in the insurance context, Pennsylvania does not recognize a separate cause of action for the breach of such duty.... Thus, if a complaint alleges an insurer's breach of its duty of good faith, such claims are subsumed within a breach of contract claim."¹⁰⁶

(15) National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc., 2013 U.S. Dist. LEXIS 97226 (W.D. Pa. July 12, 2013) (Ambrose, J.)

Defendant was sued in an Iowa state court action, and plaintiff insurers provided a defense and indemnification under its E&O policy, but denied coverage under its CGL and umbrella policies. The judge returned a verdict for defendant in that action. Plaintiff insurers then filed a declaratory judgment action. Defendant counterclaimed, seeking recovery for breach of contract and common law and statutory bad faith. Plaintiffs filed a motion for summary judgment. Judge Ambrose of the Western District of Pennsylvania granted the motion as to the common law bad faith

¹⁰⁰ *Bukofski v. USAA Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 48128, at *14 (M.D. Pa. June 9, 2009).

¹⁰¹ *Bukofski v. USAA Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 48128, at *15.

¹⁰² *Zenglen v. Northwestern Mut. Life Ins. Co.*, 2014 U.S. Dist. LEXIS 118147, at *7 (M.D. Pa. Aug. 25, 2014) (quoting *Finglex*, 2010 U.S. Dist. LEXIS 41643).

¹⁰³ *Plummer v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 87570, at *10 (W.D. Pa. June 27, 2014).

¹⁰⁴ *Id.* at *11.

¹⁰⁵ *Hudgins v. Travelers Home & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 107775, at *15 (E.D. Pa. July 31, 2013).

¹⁰⁶ *Bare v. State Auto Group*, 2013 U.S. Dist. LEXIS 105335, at *4 (E.D. Pa. July 26, 2013).

claim, finding that such a claim was subsumed in the breach of contract count: “In other words, the implied covenant arises from the contract, and its breach is a breach of the contract.... Count II will be deemed subsumed under Count I of the Counterclaim...”¹⁰⁷

(16) *Reginella Constr. Co., Ltd. v. Travelers Cas. & Surety Co. of America*, 2013 U.S. Dist. LEXIS 76353 (W.D. Pa. May 30, 2013) (Hornak, J.)

Plaintiff Reginella Construction Company purchased surety bonds from defendant Travelers for two large scale public projects. When the relationship between Reginella and the public entities began to go bad, disputes arose between Reginella and Travelers. When the parties could not resolve these disputes, Reginella filed this bad faith suit. Travelers moved to dismiss. Judge Hornak of the Western District granted the motion.

Reginella contended that Travelers acted in bad faith by preventing Reginella from completing the construction projects and sought tort recovery for this alleged bad faith. The court concluded that no such tort recovery existed in common law, and §8371 was the sole avenue for relief in this instance. The court found that the gist of the action doctrine barred Reginella’s common law tort action:

Pennsylvania law permits an insured to pursue a bad faith action in tort against an insurer free of the gist of the action doctrine’s bar . . . Despite Reginella’s argument to the contrary, there is no tort bad faith claim at common law in Pennsylvania; rather, parties may bring such claims only under section 8731 [sic] . . . Similarly, although section 8731 [sic] is a remedial statute, it applies only to insurers . . . Therefore, absent any contrary guidance and given Pennsylvania law’s interest in maintaining clear boundaries between tort and contract actions, we find that the gist of the action doctrine may be applied to bar a tort bad faith claim brought by a principal against a surety.¹⁰⁸

(17) *Keppol v. State Farm Ins.*, 2013 U.S. Dist. LEXIS 10106 (E.D. Pa. Jan. 25, 2013) (Schiller, J.)

In this dispute over wage loss benefits in an automobile policy, plaintiff filed this action alleging statutory and common law bad faith against his insurer. Defendant insurer filed a motion to dismiss. Judge Schiller of the Eastern District denied the motion. Plaintiff did *not* file a separate breach of contract count. The court explained that in all insurance contracts, there is an implied duty of good faith and fair dealing. Because plaintiff’s complaint contained allegations that he had an insurance policy with defendant insurer and that the insurer failed to pay benefits in bad faith, the court permitted the common law bad faith claim to proceed.

(18) *Norco v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 128343 (W.D. Pa. July 17, 2012), and later proceeding at 2012 U.S. Dist. LEXIS 154070 (W.D. Pa. Oct. 26, 2012) (Lenihan, M.J.)

Defendant Jessica Norco was driving a vehicle insured by defendant Allstate when she was involved in a single vehicle accident. Her son, plaintiff Talon Norco, was injured in the accident. The named insured under the Allstate policy, plaintiff Wendy Welsh Norco, was not in the vehicle at the time of the accident. Also covered under the applicable policy was Jessica Norco. The bodily injury policy limits were \$50,000 and the first party medical benefits were \$5,000. The insured had chosen a limited tort option.

After the accident, plaintiff guardians for Talon sought coverage under the policy. Following an agreed settlement, the guardians and Allstate appeared in Orphans Court for approval of the settlement, but the proposed settlement was rejected and the judge advised the insureds to seek counsel. Shortly thereafter, plaintiffs filed this action, which included both common law and statutory bad faith claims. Defendants filed a motion to dismiss the amended complaint, which Magistrate Judge Lenihan recommended granting in part and denying in part. Plaintiffs then filed a motion for leave to file a second amended complaint to add new claim for common law bad faith. Magistrate Judge Lenihan of the Western District denied the motion.

The court found that the first amended complaint alleged a contract-based, rather than a tort-based, breach of the common law duty. While a contract-based common law bad faith claim was recognized in Pennsylvania, the court concluded that the case relied upon by plaintiffs, *Dercoli v. National Mutual Casualty Insurance Co.*,¹⁰⁹ “has been narrowly construed and thus limited to situations where the insurer has knowingly and purposefully misrepresented coverage available under the policy, and has voluntarily transformed itself into a legal advisor to the insured.”¹¹⁰ The court found that *Dercoli* was distinguishable because plaintiffs ultimately did not go through with the settlement agreement and thus suffered no harm, even though defendant insurer had apparently discouraged plaintiffs from getting counsel and had drafted a settlement agreement. Once plaintiffs obtained counsel, “any fiduciary duty Defendants may have assumed under *Dercoli* to advise Plaintiffs about coverage under the Policy ended. . . .”¹¹¹ The court concluded that the common law bad faith claim would be dismissed without prejudice.

¹⁰⁷ *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2013 U.S. Dist. LEXIS 97226, at *20-21 (W.D. Pa. July 12, 2013).

¹⁰⁸ *Reginella Constr. Co., Ltd. v. Travelers Cas. & Surety Co. of America*, 2013 U.S. Dist. LEXIS 76353, at *33-34 (W.D. Pa. May 30, 2013) (citations omitted).

¹⁰⁹ 554 A.2d 906 (Pa. 1989).

¹¹⁰ *Norco v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 12843, at *18 (W.D. Pa. July 17, 2012) (citing *Miller v. Keystone Ins. Co.*, 636 A.2d 1109, 1112-13 (Pa. 1994)).

¹¹¹ *Id.* at *19.

Plaintiffs subsequently sought leave to file a second amended complaint with a new common law bad faith count. The proposed complaint alleged that plaintiff Talon Norco was harmed by defendants' actions by the delay in payment of settlement amounts, and reduction of the settlement amount due to the deduction of attorney's fees. Plaintiffs Wendy and Ricky Norco alleged that they were harmed by defendants' actions due to loss of earnings while dealing with the attempted settlement. Defendants contended that these allegations could not, as a matter of law, support a common law bad faith claim. The court agreed and denied the motion, and explained that "[a] bad faith claim based on breach of the duty of good faith and fair dealing is, in essence, a claim for breach of contract" and a successful claim would permit damages permitted in contract cases.¹¹²

The court explained that the allegations relating to Talon Norco "arising from the reduction in the amount of the settlement he received due to the need to retain counsel, is just another way of attempting to recover his attorneys' fees."¹¹³ The court found that plaintiffs' attempt to recover fees, as well as the attempt to recover punitive damages and interest, was not permissible because these were not damages that could be obtained in a contract case.¹¹⁴ The court also found that the guardian plaintiffs' attempt to recover lost earnings for time spent negotiating settlement and attending the court hearing "are not the type of compensatory damages potentially available to an insured under a common law bad faith claim based upon the insurance contract at issue here."¹¹⁵

Finally, the court concluded that because the common law bad faith claim must hinge on an alleged breach of contract, the fact that Talon Norco was not a party to the contract prevented his recovery under the proposed count: "The Court finds that because a common law bad faith claim is predicated on the insurer's duty of fair dealing and good faith under the insurance policy, Talon cannot state a plausible claim for common law bad faith as he is a third party claimant, and as such, he did not have a contractual right to receive liability coverage under the policy."¹¹⁶ The court also found that the guardian plaintiffs, who were not injured in the accident, had no commonlaw bad faith claim "because Allstate did not owe a duty to them with regard to Talon's third-party claim"¹¹⁷ Instead, with respect to the liability coverage, defendant owed its insured tortfeasor, not a party to the action, such a duty.

(19) *Dameshek v. Encompass Ins. Co. of Am.*, 2012 U.S. Dist. LEXIS 87570 (M.D. Pa. June 25, 2012) (Kane, C.J.)

In this case, also discussed in §§10:03(b) and 10:25, plaintiffs disputed with their homeowner's insurer whether they were entitled to additional living expenses ("ALE") beyond the one-year limitation for such benefits in the policy. One of the counts set forth by plaintiffs was a cause of action for breach of the covenant of good faith and fair dealing. Defendant insurer filed a motion for summary judgment, which was granted by Chief Judge Kane of the Middle District. The court explained that no such cause of action existed apart from the breach of contract claim: "Plaintiffs cannot sustain a common law cause of action for breach of the duties of good faith and fair dealing, because no such cause of action exists in Pennsylvania separate from a breach of contract claim."¹¹⁸

(20) *OneBeacon Am. Ins. Co. v. UBICS, Inc.*, 2010 U.S. Dist. LEXIS 136801 (W.D. Pa. Dec. 28, 2010) (Standish, J.)

Plaintiff OneBeacon filed this declaratory judgment action seeking a declaration that it did not owe defendant UBICS employee theft coverage under its business insurance policy. UBICS filed counterclaims for breach of contract, common law bad faith, and statutory bad faith under §8371. OneBeacon filed a motion to dismiss the common law bad faith counter-claim, which Judge Standish of the Western District denied without prejudice to raise the issue at a later stage of the proceedings.

OneBeacon argued that whether the common law bad faith action sounded in tort or in contract, it must be dismissed, because such a cause of action sounding in tort did not exist, and such a cause of action sounding in contract was to be subsumed into the existing breach of contract count. UBICS countered, primarily contending that it should be permitted to press both a breach of contract and a common law bad faith cause of action until discovery flushed out the facts and permitted it to plead more precisely. The court agreed with UBICS that under the federal rules, pleading in the alternative was permitted: "Early in the litigation, *e.g.*, at the point of a motion to dismiss, courts will generally allow the plaintiff to proceed under conflicting theories until such time as the details of the actions between the parties have been clarified."¹¹⁹

(21) *Chebatoris v. Monumental Life Ins. Co.*, 2010 U.S. Dist. LEXIS 86367 (W.D. Pa. Aug. 23, 2010) (Lenihan, M.J.)

This case is discussed in greater detail in §§10:05 and 10:07(c). After a claim for accidental death benefits was denied, plaintiff filed suit against defendant insurers for breach of contract, breach of the duty of good faith and fair

¹¹² *Id.* at *7.

¹¹³ *Id.* at *10.

¹¹⁴ *Id.* at 10-13.

¹¹⁵ *Id.* at *13.

¹¹⁶ *Id.* at *14-15.

¹¹⁷ *Norco v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 154070, at *16 (W.D. Pa. Oct. 26, 2012).

¹¹⁸ *Dameshek v. Encompass Ins. Co. of Am.*, 2012 U.S. Dist. LEXIS 87570, at *22 (M.D. Pa. June 25, 2012) (citation omitted).

¹¹⁹ *OneBeacon Am. Ins. Co. v. UBICS, Inc.*, 2010 U.S. Dist. LEXIS 136801, at *11 (W.D. Pa. Dec. 28, 2010).

dealing, and statutory bad faith. Before Magistrate Judge Lenihan was defendants' motion for summary judgment, which was granted as to the bad faith counts. With respect to the common law count for breach of the implied duty of good faith, the court held that "Plaintiff's claim for breach of the implied duty of good faith . . . is subsumed into its breach of contract claim."¹²⁰

(22) *Allegrino v. Conway E & S, Inc.*, 2010 U.S. Dist. LEXIS 40732 (W.D. Pa. Apr. 26, 2010) (Fischer, J.)

Plaintiff was the primary stockholder and president of Liberty Immobiliare, Inc., a closely held corporation that was the holder of two insurance policies for a building which suffered damage from a windstorm and from several acts of vandalism. Following the losses, Liberty assigned its claims against the insurer to plaintiff. Champion Claim Service, an independent adjuster hired by the claims administrator to handle the claim, sent acknowledgment letters but, it was alleged, did nothing else. Claiming that he had not received any further communication regarding his claims, plaintiff sued Champion, the insurer, the underwriting agent, and several other related parties for breach of contract, breach of the duty of good faith and fair dealing, and bad faith.

Champion filed a motion to dismiss, which was granted by Judge Fischer of the Western District. The court dismissed the breach of contract claim on the grounds that there was no contractual relationship between the parties. Because a claim for breach of good faith and fair dealing cannot stand separate from a breach of contract claim, that count was dismissed as well:

Plaintiff appears to be asserting a separate, new claim for a breach of the covenant of good faith, with citation to Pennsylvania case law. . . . However, a separate and distinct claim for a breach of the duty of good faith, apart from a breach of an insurance contract claim, is not recognized under Pennsylvania law. *See Smith v. Lincoln Benefit Life Co.*, Civ. A. No. 08-1324, 2009 U.S. Dist. LEXIS 24941, at *35-38, 55-56 (W.D. Pa. Mar. 23, 2009). Therefore, to the extent that Plaintiff attempts to state such a claim against Champion, it is dismissed.¹²¹

(23) *Schmitt v. State Farm Ins. Co.*, 2010 U.S. Dist. LEXIS 45451 (W.D. Pa. Apr. 16, 2010) (Lenihan, M.J.)

This homeowner's policy case is discussed in more depth in §12:02. Plaintiffs' suit included counts, *inter alia*, for breach of contract and breach of the duty of good faith and fair dealing. As part of its discussion of whether plaintiffs could recover compensatory damages, Magistrate Judge Lenihan of the Western District recommended that the breach of the implied duty of good faith and fair dealing be subsumed into the breach of contract claim:

With regard to an insurance contract, the implied covenant of good faith and fair dealing acts as a term of the contract, and arises from the contract itself. . . . Therefore, Plaintiffs' breach of the implied covenant of good faith and fair dealing claim merges with Plaintiffs' claim for breach of contract, leaving compensatory damages available only for the breach of contract claim.¹²²

(24) *Zaloga v. Provident Life & Accident Ins. Co. of Am.*, 671 F. Supp. 2d 623 (M.D. Pa. 2009) (Kosik, J.)

Zaloga was a board certified nephrologist who was injured in an auto accident in which he suffered severe injuries, which progressively worsened. The complaint alleged that more than three years after the accident, he submitted a disability claim to defendants, with whom he had a disability policy. Defendants began an investigation into the claim, including research into Zaloga and the many career ventures he was involved in. Defendants approved the claim, finding that he was disabled from his occupation as a nephrologist. Some time later, a new benefits specialist took over Zaloga's file and he began looking back over the claims decision. The complaint alleged that the new specialist determined that Zaloga had not, in fact, been acting as a nephrologist at the time of his disability, but rather had been a chief medical officer of a medical services provider. As a result, defendants terminated the disability payments.

Plaintiff filed suit, alleging, *inter alia*, breach of contract and breach of the covenant of fair dealing. The insurer defendants filed a motion to dismiss the count for breach of the covenant of fair dealing, and to strike portions of the complaint which it claimed were prejudicial and unnecessary. Judge Kosik of the Middle District denied the insurers' motion.

The court determined that the Pennsylvania courts, if presented with the issue, would likely adopt the Restatement (Second) of Contracts §205 (1981), which imposes on every contract a duty of good faith and fair dealing, a duty recognized by Pennsylvania in the insurance context.¹²³ The court held that "[w]hether express or implied, the covenant of good faith and fair dealing acts as a term of the contract, and that covenant arises from the contract itself."¹²⁴ According to the court, the breach of the implied duty did not stand independently from a breach of contract

¹²⁰ *Chebatoris v. Monumental Life Ins. Co.*, 2010 U.S. Dist. LEXIS 86367, at *17 (W.D. Pa. Aug. 23, 2010) (citing *Schmitt v. State Farm Ins. Co.*, 2010 U.S. Dist. LEXIS 45451 (W.D. Pa. Apr. 16, 2010), *Zaloga v. Provident Life & Acc. Ins. Co. of Am.*, 671 F. Supp. 2d 623 (M.D. Pa. 2009) and *Fingles v. Cont'l Cas. Co.*, 2010 U.S. Dist. LEXIS 41643 (E.D. Pa. Apr. 28, 2010)).

¹²¹ *Allegrino v. Conway E & S, Inc.*, 2010 U.S. Dist. LEXIS 40732, at *48-49 n.29 (W.D. Pa. Apr. 26, 2010) (citation omitted).

¹²² *Schmitt v. State Farm Ins. Co.*, 2010 U.S. Dist. LEXIS 45451, at *8 (W.D. Pa. Apr. 16, 2010) (citations omitted).

¹²³ *Zaloga v. Provident Life & Accident Ins. Co. of Am.*, 671 F. Supp. 2d 623, 630 (M.D. Pa. 2009) (citing *Appeal of Elliott, 3 Watts & Serg.* 449 (Pa. 1842); *Fedas v. Ins. Co. of State of Pa.*, 151 A. 285 (Pa. 1930); *Stambler v. Order of Pente*, 28 A. 301 (Pa. 1894); and *Dercoli v. Pa. Nat'l Mut. Ins. Co.*, 554 A.2d 906 (Pa. 1989)).

¹²⁴ *Zaloga*, 671 F. Supp. 2d at 630.

claim “because such a breach is merely a breach of contract . . . It has been said that a breach of the implied covenant of good faith and fair dealing merges with a breach of contract claim.”¹²⁵

The court held that *D’Ambrosio v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*¹²⁶ concluded that Pennsylvania did not recognize common law bad faith claims sounding in tort, and had no bearing on a common law bad faith claim sounding in contract.¹²⁷ The court rejected the insurers’ argument that actions for breach of the implied duty were not recognized in first party actions:

Defendants also rely on the difference between first and third party claims. The difference between first and third party claims does not matter to the implied covenant of good faith and fair dealing. First, the implied covenant is brought on a contractual theory of recovery, so the relationship of the parties does not matter. Although the Supreme Court of Pennsylvania distinguished these types of claims in *D’Ambrosio*, that case involved a bad faith claim arising out of tort law. Further, we note that the Pennsylvania legislature passed section 8371 in response to the holding in *D’Ambrosio*, therefore imposing a fiduciary duty on all insurers. See *Ash*, 932 A.2d at 885. Finally, we note that *Toy v. Metropolitan Life Insurance Co.*, 593 Pa. 20, 928 A.2d 186 (Pa. 2007), repeatedly cited by Defendants in their Reply Brief, states that at the time section 8371 was adopted, “the term ‘bad faith’ concerned the duty of good faith and fair dealing in the parties’ contract and the manner by which an insurer discharged its obligations of defense and indemnification in the third-party claim context or *its obligation to pay for a loss in the first party claim context.*” *Id.* at 199 (emphasis added).¹²⁸

The court denied the motion to dismiss and concluded “an action for breach of an implied covenant of good faith and fair dealing does lie as a breach of contract claim, which may allow a plaintiff to recover compensatory damages”¹²⁹

(25) *Bukofski v. USAA Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 48128 (M.D. Pa. June 9, 2009) (Munley, J.)

In this case arising out of a UIM claim, Judge Munley of the Middle District dismissed plaintiff’s common law bad faith claim. According to the court, the Pennsylvania Supreme Court decision in *Toy v. Metropolitan* “explained that Pennsylvania courts have refused to allow a common law ‘bad faith’ tort action for an insured’s violation of the implied covenant of good faith and fair dealing in the first party insurance claim setting.”¹³⁰ Accordingly, the court dismissed the common law bad faith claim “because plaintiff’s claim of violation of the duty of good faith and fair dealing merges with her breach of contract claim.”¹³¹

(26) *Banos v. State Farm Ins. Co.*, 2007 U.S. Dist. LEXIS 75189 (E.D. Pa. Oct. 10, 2007) (Sanchez, J.)

In this case, discussed in §4:04, Judge Sanchez of the Eastern District observed, “There is no common law remedy in Pennsylvania for bad faith on the part of insurers. . . . The question of whether §8371 sounds in contract or in tort is unsettled.”¹³²

(27) *Meyer v. CUNA Mut. Grp.*, 2007 U.S. Dist. LEXIS 72833 (W.D. Pa. Sept. 28, 2007) (Conti, J.)

In this case arising out of a disability policy, discussed in §10:05, Judge Conti of the Western District dismissed the plaintiff’s common law claim for breach of the covenant of good faith and fair dealing. Noting that the claim against CUNA was a first party insurance claim, as opposed to a third party/liability claim, the court ruled that “plaintiff’s claim for breach of the implied covenant of good faith and fair dealing merges with the breach of contract claim.”¹³³

(28) *Coppola v. Travelers Indem. Co.*, 2007 U.S. Dist. LEXIS 21771 (E.D. Pa. Mar. 27, 2007) (Bartle, J.)

The plaintiff insured alleged that the insurer improperly retaliated against the insured by increasing the premium on the plaintiff’s property insurance policy, after the plaintiff instituted an action to recover under the policy. The plaintiff alleged breach of contract, bad faith under §8371, and “concerted tortious action.” The insurer moved to dismiss the count for concerted tortious action, alleging that the “gist of the action” doctrine established that the claims sounded in contract, not tort. Judge Bartle of the Eastern District agreed and dismissed that claim.

The court ruled that “the Pennsylvania bad faith statute. . . does not create a new duty but only provides for additional remedies when the court finds that an insurer has acted in bad faith.”¹³⁴ According to the court: In Pennsylvania, breach of a duty of good faith pertaining to an insurance policy sounds in contract, not in tort. The right to punitive damages under the “bad faith” statute is allowed in an action “arising under an insurance policy,”

¹²⁵ *Id.* at 631 (citations and footnote omitted).

¹²⁶ 494 Pa. 501, 431 A.2d 966 (Pa. 1981).

¹²⁷ *Zaloga*, 671 F. Supp. 2d at 631.

¹²⁸ *Id.* at 632.

¹²⁹ *Id.*

¹³⁰ *Bukofski v. USAA Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 48128, at *14 (M.D. Pa. June 9, 2009).

¹³¹ *Id.* at *15.

¹³² *Banos v. State Farm Ins. Co.*, 2007 U.S. Dist. LEXIS 75189, at *5 (E.D. Pa. Oct. 10, 2007).

¹³³ *Meyer v. CUNA Mut. Grp.*, 2007 U.S. Dist. LEXIS 72833, at *42 (W.D. Pa. Sept. 28, 2007).

¹³⁴ *Coppola v. Travelers Indem. Co.*, 2007 U.S. Dist. LEXIS 21771, at *7 (E.D. Pa. Mar. 27, 2007).

which is a contract. Accordingly, there is no actionable tort of conspiring or taking concerted action to breach a duty of good faith.¹³⁵

(29) *Oehlmann v. Metro. Life Ins. Co.*, 644 F. Supp. 2d 521 (M.D. Pa. 2007) (Kosik, J.)

In this case, discussed in §10:07(c), Judge Kosik of the Middle District granted summary judgment in favor of MetLife as to a separate count in plaintiff's complaint alleging breach of the implied covenant of good faith, in addition to a breach of contract count. According to the court, "The duty of good faith and fair dealing is an implied covenant that arises in every contract, and thus, its breach is tantamount to a breach of contract."¹³⁶

(30) *Harlan v. Erie Ins. Grp.*, 80 Pa. D. & C.4th 61 (Lawrence 2006) (Motto, P.J.)

In this case, Judge Motto of Lawrence County stated that the "contract right of action is wholly independent from the statutory bad faith action, 42 Pa. C.S.A. §8371, as the bad faith statute is not inconsistent with the common law and the statute merely authorizes additional damages beyond the common law compensatory damages."¹³⁷

(31) *Miller Pools, Inc. v. Nationwide Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 70859 (W.D. Pa. Sept. 29, 2006) (Gibson, J.)

In this case, Miller Pools alleged that its insurer, Nationwide, acted in bad faith in connection with its investigation and adjustment concerning damages and business losses arising from a fire. Miller Pools' complaint included Count I, alleging breach of contract, and Count II, alleging bad faith. Nationwide moved to dismiss the bad faith count, arguing that Miller Pools was not entitled to assert a claim for compensatory damages in a first party bad faith claim. Judge Gibson of the Western District disagreed. The court held that the bad faith count in the plaintiff's complaint alleged that the insurer "has violated the policy's covenant of good faith and fair dealing and/or committed the tort of bad faith, including, but not limited to violating 42 Pa. C.S.A. §8371." The court held that this alleged not only a §8371 claim but a violation of the "covenant of good faith and fair dealing" imposed by Pennsylvania common law. According to the court:

§8371 does not prohibit an award of compensatory damages. . . . Compensatory damages are available under Pennsylvania's common law of contracts, even where the action is brought under a bad faith theory.¹³⁸

Citing *Birth Center v. St. Paul*, the court held, "It is now clear that Pennsylvania law permits a party bringing a bad faith action sounding in contract to recover damages that are otherwise available to parties in contract actions."¹³⁹ The court concluded, "Miller Pools can proceed with its breach of contract actions under Counts I and II, supplementing its action under Count II with a tort claim under §8371 for the specific damages authorized in that statute."¹⁴⁰

§5:04(c) — Cases Where There Is No Coverage Under The Policy

(1) *Gold v. State Farm Fire & Cas. Co.*, 880 F. Supp. 2d 587 (E.D. Pa. 2012), 2012 U.S. Dist. LEXIS 102470 (McLaughlin, J.)

Following two separate instances of water damage to their home, the Golds sought coverage under their homeowner's policy with defendant State Farm. After State Farm denied their second claim, plaintiffs brought this breach of contract and bad faith action. State Farm moved for summary judgment. In an order discussed also in §5:04(d), Judge McLaughlin of the Eastern District granted the motion in part and denied it in part.

The Golds' complaint alleged that State Farm acted in bad faith with respect to its claim denial and with respect to its investigation. Insofar as the bad faith claim was tied to a claim that coverage was improperly denied, the court granted State Farm's motion, having found the denial was proper under the policy language. The court noted that where a bad faith claim hinges on an improper claim denial, "[r]esolution of a coverage claim on the merits in favor of the insurer requires dismissal of a bad faith claim premised on the denial of coverage, because under the circumstances the insurer necessarily has a reasonable basis for denying benefits."¹⁴¹

(2) *Becker v. Farmington Cas. Co.*, 2010 U.S. Dist. LEXIS 73902 (M.D. Pa. July 22, 2010) (Conner, J.)

This case, involving claims of negligence in allowing sexual abuse to occur in Becker's home, is discussed in more detail in §10:03(a). Becker filed this declaratory judgment suit following Farmington's refusal to provide her a defense or indemnification in the underlying suit relating to the claims of sexual abuse. Farmington filed a motion to dismiss. After analyzing the contractual language, the court concluded that the insurance policy clearly excluded such a

¹³⁵ *Id.* (quoting *Greater N.Y. Mut. Ins. Co. v. North River Ins. Co.*, 872 F. Supp. 1403, 1408 (E.D. Pa. 1995)).

¹³⁶ *Oehlmann v. Metro. Life Ins. Co.*, 644 F. Supp. 2d 521, 534-33 (M.D. Pa. 2007).

¹³⁷ *Harlan v. Erie Ins. Grp.*, 80 Pa. D. & C. 4th 61, 65 (Lawrence 2006).

¹³⁸ *Miller Pools, Inc. v. Nationwide Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 70859, at *29.

¹³⁹ *Id.* at *31, n.5 (citing *Birth Center v. St. Paul Cos.*, 787 A.2d 376, 386 (Pa. 2001)).

¹⁴⁰ *Id.* at *32.

¹⁴¹ *Gold v. State Farm Fire & Cas. Co.*, 880 F. Supp. 2d 587, 2012 U.S. Dist. LEXIS 102470, at *25 (E.D. Pa. 2012) (citing *Frog, Switch, and Treadways*).

defense, and the court dismissed the bad faith claim, stating, “Becker’s claims of breach of contract and bad faith, premised upon an unreasonable denial of coverage by Farmington, are without merit.”¹⁴²

(3) *Amitie One Condo. Ass’n v. Nationwide Prop. & Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 26867 (M.D. Pa. Mar. 22, 2010) (Conner, J.)

In this case also discussed in §7:21, the defendant property insurer denied insurance coverage for losses following damage to plaintiff’s property caused by a sinkhole, stating that there was no coverage under the policy. Plaintiff insured sued for breach of contract and bad faith. The insurer filed a motion for severance and stay of the bad faith claims, arguing that the court should first resolve the issue of coverage. Judge Conner of the Middle District denied the defendant’s motion to bifurcate the issues and to stay discovery relating to bad faith.

In the context of the motion for severance, the court discussed whether the bad faith claim could stand independently of the breach of contract claim. The insurer argued that if the coverage question was decided in its favor, no bad faith claim could stand. Plaintiff contended that even if it could not recover for breach of contract, it could recover for bad faith. The court agreed that there were cases holding that breach of contract and bad faith claims could stand independently, but that this case was distinguishable:

Although the two claims are independent, plaintiff has raised a bad faith claim which is inextricably tied to its contract claim. Plaintiff’s bad faith claim is based solely on defendant’s refusal to provide insurance coverage for the damage to plaintiff’s property. If defendant were to prevail on the contract claim—in other words, if its denial of coverage was proper—then plaintiff’s bad faith claim would be doomed.¹⁴³

The court decided that where the alleged breach of contract related to denial of coverage, the bad faith claim could not stand if the breach of contract claim fell: “. . . *the failure to provide coverage* cannot be bad faith where the insurer has no obligation to provide coverage.” . . . Hence, insofar as plaintiff’s bad faith claim is based solely on defendant’s denial of coverage, *Gallatin* actually undercuts, rather than supports, plaintiff’s argument.¹⁴⁴

(4) *Prudential Prop. & Cas. Ins. Co. v. Boyle*, 2007 U.S. Dist. LEXIS 63690 (E.D. Pa. Aug. 29, 2007) (Kelly, J.)

In this case discussed in §10:03(a), Judge Kelly of the Eastern District concluded that Prudential had no duty to defend its insured, and therefore there was no bad faith:

“[B]ad faith claims cannot survive a determination that there was no duty to defend, because the court’s determination that there was no potential coverage means that the insurer had good cause to refuse to defend. . . . It follows that an insurer with no duty to defend or indemnify its insured could not have acted in bad faith in violation of §8371. . . .”¹⁴⁵

(5) *Younis Brothers & Co. v. CIGNA Worldwide Ins. Co.*, 899 F. Supp. 1385 (E.D. Pa. 1995), *aff’d*, 91 F. 3d 13 (3d Cir. 1996) (O’Neill, J.)

The policyholder, Younis Brothers & Co., sued the insurer for breach of fire and other property insurance policies, and bad faith, for denying coverage for loss of the insureds’ property when unrest occurred in Liberia, where the property was located. The insurer denied the claim, contending that the unrest constituted “insurrection” within meaning of the “war risk” exclusion in its policies. Judge O’Neill of the Eastern District agreed, ruling that the exclusion clause in the policy precluded the insured’s claim. The court then overturned a jury’s finding that the insurer had acted in bad faith in failing to pay the claim.

The court ruled that, as a matter of law, the insurer’s decision to deny the policyholder’s claim could not be bad faith in view of the court’s decision that the claim was properly excluded:

No common law action for bad faith conduct by an insurer existed under Pennsylvania law prior to the enactment of §8371 . . . Rather, the Pennsylvania Legislature regulated claim investigation practices through the Unfair Insurance Practices Act which was held to be the exclusive remedy for alleged improper or tortious conduct by an insurer prior to the enactment of §8371 . . . I find no basis for conclusion that the Legislature intended to create a broad ranging private enforcement mechanism with respect to the handling of claims via §8371. I therefore conclude that an insurer’s investigation and adjustment of a claim does not support an action under §8371 where an insured’s claim for coverage fails upon its merits and the insurer’s action in handling the claim would not have been actionable under Pennsylvania common law prior to the enactment of §8371.¹⁴⁶

¹⁴² *Becker v. Farmington Cas. Co.*, 2010 U.S. Dist. LEXIS 73902, at *20 (M.D. Pa. July 22, 2010) (citation omitted).

¹⁴³ *Amitie One Condo. Ass’n*, 2010 U.S. Dist. LEXIS 26867, at *4 (M.D. Pa. Mar. 22, 2010) (citation to record omitted).

¹⁴⁴ *Id.* at *5-6 (quoting *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 F. App’x, 424, 434 (3d Cir. 2007) (emphasis in original)).

¹⁴⁵ *Prudential Prop. & Cas. Ins. Co. v. Boyle*, 2007 U.S. Dist. LEXIS 63690, at *12 (E.D. Pa. Aug. 29, 2007) (citing *Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.*, 193 F.3d 742, 751 n.9 (3d Cir. 1999) and *Pizzini v. A.M. Int’l. Specialty Lines Ins. Co.*, 249 F. Supp. 2d 569, 570 (E.D. Pa. 2003)).

¹⁴⁶ *Younis Brothers*, 899 F. Supp. at 1397.

§5:04(d) — Cases Suggesting Bad Faith Claim May Proceed Irrespective of Whether There Is Coverage

(1) *Mountainside Holdings, LLC v. American Dynasty Surplus Lines Ins. Co.*, 2014 Pa. Dist. & Cnty. Dec. LEXIS 73 (Centre June 30, 2014) (Grine, J.)

Plaintiffs had been sued in a qui tam action, originally filed in 1996, and sought defense and indemnification under a D & O liability policy from their primary and excess insurers, defendants in this action. When that coverage was denied, plaintiffs brought this breach of contract and bad faith action in 2003. Defendants filed a motion for summary judgment. Judge Grine of the Centre County Court of Common Pleas granted the motion on statute of limitations grounds.

The court explained that if the complaint had been timely filed, the allegations of bad faith investigation could provide the basis for a §8371 action: “In light of the holdings in *Berg* and *Grossi*, Plaintiffs’ Bad Faith claim based on an *alleged failure to promptly acknowledge and Investigate [sic]* is clearly actionable.”¹⁴⁷

(2) *Hampton v. GEICO Gen. Ins. Co.*, 759 F. Supp. 2d 632 (W.D. Pa. 2010) (Lenihan, M.J.), *adopted by*, 759 F. Supp. 2d 632 (W.D. Pa. 2010) (Ambrose, J.)

This case involving a claim for first party medical benefits is discussed in §§5:04(c), 15:02 and 15:03. The court ruled that the insurer, GEICO, did not breach the policy when it discontinued plaintiff’s medical benefits. Because some of the plaintiff’s bad faith allegations were based on the insurer’s denial of coverage, the court held, those allegations could not stand. “To the extent Plaintiff’s bad faith claim is predicated upon the denial of first party benefits without any reasonable basis, it is foreclosed by this Court’s ruling earlier that Plaintiff failed to establish that GEICO breached its duty of care to Plaintiff in terminating payments for first party medical benefits.”¹⁴⁸ However, the court ruled that those bad faith claims that were not related to denial of coverage—which included allegations that GEICO selected a biased peer review organization (PRO) to evaluate her claim—were not precluded by the court’s finding that the contract was not breached.¹⁴⁹

(3) *Suscavage v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 43793 (M.D. Pa. June 3, 2008) (Munley, J.)

In this UIM case, discussed in §7:21, Judge Munley of the Middle District denied the insurer’s motion to “trifurcate” the trial, and stated, “Pennsylvania courts have indicated that bad faith claims are separate and distinct from breach of contract claims,” and “the language of §8371 does not indicate that success on the contract claim is a prerequisite to success on the bad faith claim.”¹⁵⁰

(4) *Doylestown Electrical Supply Co. v. Maryland Casualty Ins. Co.*, 942 F. Supp. 1018 (E.D. Pa. Apr. 16, 1996) (Padova, J.)

In this case, the insured brought a breach of contract and bad faith action under a property insurance policy. The insurer filed a motion to dismiss the bad faith count, alleging that the §8371 action was not ripe for disposition because the contractual count was pending. Judge Padova of the Eastern District denied the insurer’s arguments. Citing *March v. Paradise*, the court held that a §8371 action “is a separate and distinct cause of action and is not contingent on the resolution of the underlying contract claim. . . . A plaintiff may succeed on its bad faith claim even if it fails on the underlying breach of contract claim.”¹⁵¹ The court further rejected the insurer’s argument that it was inefficient to allow the plaintiff to bring a §8371 claim before the contract dispute was resolved.

§5:05(a) — Cases Holding §8371 Does Not Apply to Acts Preceding the Formation of Insurance Contract

(1) *Harrisburg Dairies, Inc. v. Selective Ins. Co. of America*, 2008 U.S. Dist. LEXIS 33381 (M.D. Pa. Apr. 23, 2008) (Rambo, J.)

In this case, Judge Rambo of the Middle District held that the bad faith statute does not apply to acts or conduct that occurred before the issuance of the insurance policy: Pennsylvania courts have consistently held that the bad faith statute applies only to an insurance company’s handling of claims pursuant to the insurance agreement, and not to actions taken by an insurance company that fall outside of its obligations under the policy. . . . The Pennsylvania Supreme Court reaffirmed this interpretation most recently in *Toy v. Metropolitan Life Insurance Company*, where it held that the bad faith statute did not extend to actions by an insurance company in persuading the insured to purchase a policy. . . . Instead, the statute applies only to actions arising out of the insurance company’s performance pursuant to the insurance contract, such as the company’s failure to defend a claim or make a payment on a claim.¹⁵²

¹⁴⁷ *Mountainside Holdings, LLC v. American Dynasty Surplus Lines Ins. Co.*, 2014 Pa. Dist. & Cnty. Dec. LEXIS 73, at *21 (Centre June 30, 2014).

¹⁴⁸ *Hampton v. GEICO Gen. Ins. Co.*, 759 F. Supp. 2d 632, 646-47 (W.D. Pa. 2010).

¹⁴⁹ *Id.* at 647.

¹⁵⁰ *Suscavage v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 43793, at *5 (M.D. Pa. June 3, 2008) (citing *March v. Paradise Mut. Ins. Co.*, 435 Pa. Super. 597, 646 A.2d 1254 (Pa. Super. Ct. 1994)).

¹⁵¹ *Doylestown Electric v. Maryland Cas. Ins. Co.*, 942 F. Supp. at 1019-20.

¹⁵² *Harrisburg Dairies, Inc. v. Selective Ins. Co. of America*, 2008 U.S. Dist. LEXIS 33381, at *10-11 (M.D. Pa. Apr. 23, 2008).

(2) *Nationwide Mutual Ins. Co. v. Brown*, 2005 U.S. Dist. LEXIS 25417 (W.D. Pa. 2005) (Hardiman, J.), *aff'd*, 2007 U.S. App. LEXIS 6569 (3d Cir. Mar. 21, 2007) (Sloviter, J.)

The plaintiffs alleged that the insurer acted in bad faith in allegedly misrepresenting the coverage terms when it sold the automobile insurance policies. Citing *Brickman Group v. CGU Insurance* and *Wise v. American General Life Insurance Company*, both cited in this section, Judge Hardiman of the Western District held that he was “persuaded by these cases that the Browns may not proceed under the bad faith statute for alleged misrepresentation in selling the policies.”¹⁵³

(3) *Novinger Group, Inc. v. Hartford Ins., Inc.*, 514 F. Supp. 2d 662 (M.D. Pa. 2007) (Conner, J.)

In this case Judge Conner of the Middle District dismissed counts against defendant insurer alleging statutory bad faith and breach of the duty of good faith and fair dealing. The allegations pertained to alleged misrepresentations that preceded the issuance of the insurance policy. According to the court:

In the instant case, plaintiffs’ allegations of bad faith relate to alleged misrepresentations and omissions that occurred prior to formation of the insurance contracts. . . . Because plaintiffs have not alleged that Hartford denied them benefits under the policy, plaintiffs have failed to state a claim for insurance bad faith.

(4) *Dilworth v. Metropolitan Life Ins. Co.*, Slip Opinion, Civil Action No. 01-128 (W.D. Pa. Mar. 17, 2003) (Ambrose, J.)

In this case, the plaintiff challenged the nationwide sales practices employed by Met Life. Plaintiff included in her multi-count complaint allegations that Met Life violated the implied duty of good faith and fair dealing. Judge Ambrose of the Western District granted Met Life’s motion to dismiss, stating, “Pennsylvania does not recognize an independent tort claim for breach of the implied duty of good faith and fair dealing. . . .”¹⁵⁴

The plaintiff also alleged that the fraudulent sales practices violated §8371. The court granted Met Life’s motion to dismiss this count as well, stating:

Plaintiff . . . cannot state a claim under §8371 by alleging bad faith conduct in the context of the sale of an insurance policy. Courts within Pennsylvania have interpreted §8371 to apply only in the context of a bad faith denial of benefits under an existing policy. . . . Plaintiff cites to Pennsylvania cases which contain dicta to the effect that §8371 does not expressly limit its application to bad faith in the denial of claims made under an existing policy. Plaintiff can point to no case, however, where courts have actually expanded §8371’s reach to include such claims. Thus, this claim will be dismissed.¹⁵⁵

(5) *Altimari v. John Hancock Variable Life Ins. Co.*, 247 F. Supp. 2d 637 (E.D. Pa. 2003) (Katz, J.)

In granting summary judgment in favor of the defendant life insurer, the court held that the breach of contract claim failed since the insurer never issued the policy and there was a letter to plaintiff, which included a refund of premiums, clearly informing plaintiff that her husband’s application had been denied because he failed to answer the requisite medical questions. The court also dismissed the bad faith case, citing *Weisblatt v. Minnesota Mutual* above, and stating, “§8371 does not apply to conduct which occurs prior to the formation of an insurance contract.”¹⁵⁶

(6) *Seiss v. Sherman*, 49 Pa. D. & C.4th 367 (Butler 2000) (Doerr, P.J.)

Where the plaintiff insureds filed an action against their life insurer and agent alleging bad faith based upon the actions of the agent in inducing them to purchase certain insurance policies, the court held that the plaintiffs did not have a cause of action under Section 8371 because the alleged acts preceded the formation of the insurance contract, and did not allege a failure of the insurer to pay a claim arising under an insurance policy.

(7) *Connors v. Metropolitan Life Ins. Co.*, 35 Pa. D. & C.4th 58 (Fayette 1997) (Solomon, J.)

Judge Solomon of Fayette County ruled that §8371 applies only to denials of insurance claims, and thus denied plaintiff’s bad faith claim stemming from an alleged improper sale of life insurance. The court opined that “[t]he courts of this Commonwealth have consistently held that ‘bad faith’ in the insurance context related to bad faith denial of claims. . . . Here [plaintiff] has not presented any direct authority for his expansion of the remedies under the statute, and it appears to the court that his proposed remedy does not exist under the statute.”¹⁵⁷

¹⁵³ *Nationwide Mut. Ins. Co. v. Brown*, 2005 U.S. Dist. LEXIS 25417, at *18.

¹⁵⁴ *Dilworth v. Metro. Life Ins. Co.*, Civil Action No. 01-128 (W.D. Pa. March 17, 2003), slip op. at 9.

¹⁵⁵ *Id.* at 9-10.

¹⁵⁶ *Altimari v. John Hancock*, 247 F. Supp. at 649.

¹⁵⁷ *Id.* at 62-63.

§5:05(b) — Cases Suggesting §8371 Applies Only to Claims Denials and Claims Handling Issues

(1) *Grudowski v. Foremost Ins. Co.*, 2013 U.S. Dist. LEXIS 30567 (M.D. Pa. Mar. 5, 2013), *reconsideration denied*, 2013 U.S. Dist. LEXIS 91848 (M.D. Pa. July 1, 2013) (Caputo, J.)

Plaintiff Grudowski filed this purported class action, claiming that the automobile policy she purchased from defendant Foremost for her classic and antique vehicles did not contain stacked UM/UIM coverage, despite Foremost's assurances that there would be stacked coverage. Defendant Foremost filed a motion to dismiss, which Judge Caputo of the Middle District granted in the earlier of the above-cited opinions. Plaintiff Grudowski then filed the motion for reconsideration addressed in the latter order. Judge Caputo denied the motion.

Foremost argued that plaintiff's bad faith claim was legally insufficient because the alleged bad faith conduct did not arise out of claims handling or denial. Plaintiff countered, arguing that any action with respect to an insurance policy could provide the basis for a bad faith claim, and specifically, Foremost's misrepresentations with respect to the available coverage under the policy was actionable bad faith. The court agreed with Foremost: "Grudowski alleges Foremost engaged in pre-contract formation bad faith. The bad faith claim, therefore, is not related to Foremost's performance of its contractual obligations of defense and indemnification or payment of a loss."¹⁵⁸ The court also explained: "At most, Grudowski alleges that Foremost engaged in bad faith conduct by drafting a contradictory or unlawful policy of insurance, a claim which both this Court and the United States District Court for the Eastern District have recently noted has yet to be recognized by any court applying Pennsylvania law."¹⁵⁹

The court concluded that its original decision on the breach of contract claim was not subject to reconsideration because plaintiff failed to show a clear error of law and further, was improperly attempting to raise new arguments in the context of the motion for reconsideration.¹⁶⁰

(2) *Principal Life Ins. Co. v. Minder*, 2009 U.S. Dist. LEXIS 56568 (E.D. Pa. July 1, 2009) (Bartle, C.J.)

In this case, discussed in §10:25, Chief Judge Bartle found no bad faith where a life insurer filed a declaratory judgment action based upon alleged misrepresentations in the application prior to the death of the insured, stating, "[T]here is no allegation that Principal Life has acted in bad faith in the handling of a claim or in the denial of benefits. Filing a declaratory judgment action concerning the parties' rights and obligations under an insurance policy prior to the time a claim becomes ripe is not tantamount to the denial or mishandling of a claim."¹⁶¹

(3) *Prusky v. Allstate Life Ins. Co.*, 2010 U.S. Dist. LEXIS 105864 (E.D. Pa. Sept. 30, 2010) (Ditter, S.J.)

In this case, discussed in §4:04, Senior Judge Ditter of the Eastern District refused to extend §8371's protections to an annuity contract issued by an insurer, stating:

The Pennsylvania Supreme Court has held that "[t]he bad faith insurance statute . . . is concerned with 'the duty of good faith and fair dealing in the parties' contract and the manner by which an insurer discharge[s] its obligation of defense and indemnification in the third party claim context or its obligation to pay for a loss in the first party claim context."¹⁶²

(4) *Liberty Mutual Ins. Co. v. Muskin Leisure Products, Inc.*, 2006 U.S. Dist. LEXIS 65271 (M.D. Pa. Sept. 13, 2006) (Vanaskie, J.)

The insured alleged that the insurer acted in bad faith by attempting to collect retrospective premiums that purportedly were not allowed under the insured's agreement with the insurer. The insurer moved to dismiss the claims, arguing that a bad faith claim premised on extracting a higher premium was not actionable under §8371. Relying on *UPMC Health Systems v. Metropolitan Life* and *Toy v. Metropolitan Life*, Judge Vanaskie of the Middle District agreed. The bad faith count was dismissed.

(5) *Toll Naval Assocs. v. Lexington Ins. Co.*, 2005 U.S. Dist. LEXIS 16393 (E.D. Pa. Aug. 10, 2005) (Yohn, J.)

This case is discussed in §10:07. In finding in favor of the property insurer, Judge Yohn of the Eastern District held:

While the defendants' alleged bad faith need not be limited to the literal act of denying a claim, and may extend to the investigation of a claim, "the essence of a bad faith claim must be the unreasonable and intentional (or reckless) denial of benefits." *UPMC Health System*, 391 F.3d at 505-506. There was no frivolous or unfounded denial of benefits in this case, nor has plaintiff adduced clear and convincing evidence that there was an unreasonable claims investigation.¹⁶³

¹⁵⁸ *Grudowski v. Foremost Ins. Co.*, 2013 U.S. Dist. LEXIS 30567, at *38-39 (M.D. Pa. Mar. 5, 2013) (citing *Toy*).

¹⁵⁹ *Id.* at *39.

¹⁶⁰ *Id.* at *4 (citing *Toy*).

¹⁶¹ *Principal Life Ins. Co. v. Minder*, 2009 U.S. Dist. LEXIS 56568, at *9-10 (E.D. Pa. July 1, 2009).

¹⁶² *Prusky v. Allstate Life Ins. Co.*, 2010 U.S. Dist. LEXIS 105864, at *12-13 (E.D. Pa. Sept. 30, 2010) (quoting *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530-31, 932 A.2d 877 (Pa. 2007) (emphasis added)).

¹⁶³ *Toll Naval Assocs. v. Lexington Ins. Co.*, 2005 U.S. Dist. LEXIS 16393, at *18-19 (E.D. Pa. Aug. 10, 2005).

(6) *American Empire Surplus Lines Ins. Co. v. Ardsley Grp.*, 2004 U.S. Dist. LEXIS 26134 (E.D. Pa. Dec. 30, 2004) (Kauffman, J.)

The plaintiff insurer brought an action for breach of contract and declaratory judgment against the policyholders, alleging that the policyholders improperly canceled a professional liability policy prior to its expiration date. The insureds counterclaimed alleging bad faith, arguing that they never agreed to the policy terms or became bound by them. The insurer moved to dismiss the defendants' counterclaim, and Judge Kauffman of the Eastern District agreed. According to the court, for purposes of §8371, "bad faith is defined as 'any frivolous or unfounded refusal to pay proceeds of a policy,'" and in the present case, "[t]he conduct Defendants allege is entirely unrelated to the paying of any sort of claim."¹⁶⁴

(7) *Simon Wrecking Co., Inc. v. AIU Ins. Co.*, 350 F. Supp. 2d 624 (E.D. Pa. 2004) (Brody, J.)

In this case discussed in §7:09, Judge Brody observed, "Be-cause the Third Circuit has held that a bad faith claim must allege an actual denial of benefits, it is questionable whether [the insured] can bring a bad faith claim against [the insurer] CNA until CNA has actually denied coverage."¹⁶⁵

(8) *Echevarria v. UNITRIN Direct Ins. Co.*, 2003 U.S. Dist. LEXIS 4680 (E.D. Pa. Mar. 17, 2003) (O'Neill, J.)

Judge O'Neill of the Eastern District dismissed a §8371 claim based upon the alleged wrongful cancellation of a policy. According to the court, "The wrongful cancellation claim is not based on a wrongful denial of plaintiffs' insurance claim, but rather on separate conduct. Plaintiffs may recover on this claim, therefore, only if Section 8371 provides or recovery for bad faith insurance practices other than treatment of insurance claims. I find that Section 8371 does not provide a claim for wrongful cancellation of an insurance policy, and accordingly will dismiss Count II of the complaint."¹⁶⁶

(9) *Berks Mut. Leasing Corp. v. Travelers Prop. & Cas.*, 2002 U.S. Dist. LEXIS 23749 (E.D. Pa. Dec. 9, 2002) (Yohn, J.)

The plaintiff sued its insurer concerning the company's decision not to renew several commercial insurance policies it had issued to the plaintiff. Judge Yohn of the Eastern District ruled that plaintiff's §8371 claim was inappropriate under the facts alleged. Citing *Kurtz v. American Motorists Ins. Co.*, above, and the legislative background of §8371, the court concluded:

Based on the above review of the parties' arguments, the statute's plain language, its legislative history and federal and state court interpretations of the statute, I am persuaded Section 8371 is limited to causes of actions arising out of the bad faith handling or payment of claims and does not apply to conduct unrelated to the denial of a claim. . . .¹⁶⁷

(10) *Belmont Holdings Corp. v. Unicare Life & Health Ins. Co.*, 1999 U.S. Dist. LEXIS 1802 (E.D. Pa. Feb. 5, 1999) (Bechtel, J.)

Approving the *Kurtz* rationale, former Judge Bechtel of the Eastern District also viewed §8371 narrowly, holding that the statute did not apply to disputes over an increase in insurance premiums.

[T]he court agrees that §8371 applies to the bad faith handling or payment of claims or benefits under an insurance policy and does not apply to a dispute over contract terms. A dispute over the increase in premium rates, the related threat to cancel the policy and the contractual dispute over the payment of a dividend is not conduct that relates to the handling or payment of claims or benefits under an insurance policy. Therefore those disputes should be decided as part of [the policyholder's] breach of contract claim and not as a bad faith claim under §8371.¹⁶⁸

(11) *Monticello Ins. Co. v. Spinning Wheels, Inc.*, 34 Pa. D. & C.4th 141 (C.P. Allegheny 1996) (Wettick, J.)

In a decision rendered prior to *Ihnat v. Pover*, discussed in §5:05(c), the Allegheny Court of Common Pleas held that §8371 did not apply to a premium dispute. The court ruled that the plain-tiff's §8371 claim was not based on conduct that would violate the Unfair Insurance Practices Act or constitute misconduct under tort law, nor did it involve the breach of any duty of good faith imposed on an insurance carrier.

§5:05(c) — Cases More Broadly Interpreting §8371

(1) *Schifino v. GEICO Gen. Ins. Co.*, 2012 U.S. Dist. LEXIS 177072 (W.D. Pa. Dec. 14, 2012) (McVerry, J.)

Plaintiff was injured in an auto accident. He was a passenger in a vehicle that was rear-ended. The driver was insured with defendant. After receiving the policy limits from the tortfeasor's carrier, he sought UIM coverage under

¹⁶⁴ *American Empire Surplus Lines Ins. Co. v. Ardsley Grp.*, 2004 U.S. Dist. LEXIS 26134, at *5 (E.D. Pa. Dec. 30, 2004).

¹⁶⁵ *Simon Wrecking Co., Inc. v. AIU Ins. Co.*, 350 F. Supp. 2d 624, 633 (E.D. Pa. 2004), *partial reconsideration denied*, 2005 U.S. Dist. LEXIS 3430 (E.D. Pa. 2005).

¹⁶⁶ *Echevarria v. UnitrinDirect Ins. Co.*, 2003 U.S. Dist. LEX-IS 4680, at *6 -7.

¹⁶⁷ *Berks Mut. Leasing Corp. v. Travelers Prop. & Cas.*, 2002 U.S. Dist. LEXIS 23749, at *18-19.

¹⁶⁸ *Belmont Holdings Corp. v. Unicare Life & Health Ins. Co.*, 1999 U.S. Dist. LEXIS 1802, at *9 (E.D. Pa. Feb. 5, 1999).

the auto policy. When the parties could not agree on the value of plaintiff's injuries, plaintiff filed this breach of contract and bad faith action. Defendant filed a motion for summary judgment on the bad faith claim. Judge McVerry of the Western District denied the motion.

In the course of the court's opinion, the court explained that "'bad faith is actionable regardless of whether it occurs before, during or after litigation . . . [Moreover], using litigation in a bad faith effort to evade a duty owed under a policy would be actionable under Section 8371.'"¹⁶⁹

(2) *Bukofski v. USAA Casualty Ins. Co.*, 2009 U.S. Dist. LEXIS 48128 (M.D. Pa. June 9, 2009) (Munley, J.)

In this UIM claim, arising after the *Koken v. Insurance Federation* case, the plaintiff alleged that the insurer acted in bad faith by removing the arbitration clause from the policy after *Koken*. The plaintiff argued that (1) the removal of the arbitration provision was unilateral, (2) the insurer failed to provide notice to the plaintiff of the ramifications of changing the policy language, and (3) the insurers removed the arbitration clause to delay payments of benefits and attempt settlement leverage by requiring protracted expensive litigation.

The insurer filed a motion to dismiss, which was denied by Middle District Judge Munley. The court rejected the insurer's argument that plaintiff's allegations preceded the formation of the policy, and thus were not actionable under the bad faith. According to the court:

The presence of an arbitration clause deals directly with the defendant's contractual obligations and clearly arises from the insurance policy. If, as plaintiff asserts, the defendant removed the clause without notification to the plaintiff in order to force favorable settlements of UIM claims, then a statutory bad faith claim might be established.¹⁷⁰

(3) *Scottsdale Ins. Co. v. City of Hazleton*, 2009 U.S. Dist. LEXIS 44861 (M.D. Pa. May 28, 2009), reconsideration denied, 2009 U.S. Dist. LEXIS 90029 (M.D. Pa. Sept. 28, 2009) (Caputo, J.), *aff'd*, 400 F. App'x 626 (3d Cir. 2010) (Rendell, J.)

In this case, discussed in §§10:03(a) and 10:13, Judge Caputo of the Middle District stated, "Courts have not restricted § 8371 to an insurer's denial of a claim, allowing bad faith claims for other conduct, including an insurer's investigative practices."¹⁷¹

(4) *Bukofski v. USAA Casualty Ins. Co.*, 2009 U.S. Dist. LEXIS 48128 (M.D. Pa. June 9, 2009) (Munley, J.)

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(5) *Northwestern Mut. Life Ins. Co. v. Stein*, 2005 U.S. Dist. LEXIS 590 (E.D. Pa. Jan. 13, 2005) (Stengel, J.)

This case is discussed in §10:07. An issue involved the adequacy of the disability insurer's claims investigation, including whether the insurer should have obtained an independent medical exam. Judge Stengel of the Eastern District granted the insurer's motion for summary judgment. With respect to the insurer's not conducting an IME, the court noted that under Pennsylvania law, "'Section 8371 is not restricted to an insurer's bad faith in denying a claim,' but 'may also extend to the insurer's investigative processes.'"¹⁷³

¹⁶⁹ *Schifino v. GEICO Gen. Ins. Co.*, 2012 U.S. Dist. LEXIS 177072, at *8 (W.D. Pa. Dec. 14, 2012) (quoting *W.V. Realty, Inc. v. Northern Ins. Co.*, 334 F.3d 306, 313 (3d Cir. 2003)).

¹⁷⁰ *Bukofski v. USAA Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 48128, at *12-13 (M.D. Pa. June 9, 2009). See also *Graham v. Progressive Direct Ins. Co.*, 2010 U.S. Dist. LEXIS 79402, at *7-8 n.4 (W.D. Pa. Aug. 6, 2010) ("[I]n his [*Bukofski*] ruling, Judge Munley noted that if the plaintiffs proved that the arbitration clause in that case was removed without notice, 'a statutory bad faith claim might be established.' *Bukofski*, 2009 U.S. Dist. LEXIS 48128, 2009 WL 1609402, at *5 . . . , presumably deferring a decision on the ultimate dispute until summary judgment or some later stage. To this Court's knowledge, *Bukofski* settled before summary judgment motions were brought.").

¹⁷¹ *Id.* at *40.

¹⁷² *Bukofski v. USAA Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 48128, *12-13 (M.D. Pa. June 9, 2009). See also *Graham v. Progressive Direct Ins. Co.*, 2010 U.S. Dist. LEXIS 79402, at *7-8 n.4 (W.D. Pa. Aug. 6, 2010) ("[I]n his [*Bukofski*] ruling, Judge Munley noted that if the plaintiffs proved that the arbitration clause in that case was removed without notice, 'a statutory bad faith claim might be established.' *Bukofski*, 2009 U.S. Dist. LEXIS 48128, 2009 WL 1609402, at *5 . . . , presumably deferring a decision on the ultimate dispute until summary judgment or some later stage. To this Court's knowledge, *Bukofski* settled before summary judgment motions were brought.").

¹⁷³ *Northwestern Mut. Life Ins. Co. v. Stein*, 2005 U.S. Dist. LEXIS 590, at *25 (E.D. Pa. Jan. 13, 2005) (citing *O'Donnell v. Allstate Ins. Co.*, 734 A.2d 901, 906 (Pa. Super. 1999)).

(6) *Bowers v. Prudential Ins. Co. of America*, PICS Case No. 9816232300 (C.C.P., York 1998) (Thompson, J.)

In this case, the insurers filed preliminary objections arguing that §8371 does not provide a remedy for allegedly improper acts committed during the sale of insurance policies. Noting that there was an absence of appellate authority on this issue, Judge Thompson of York County relied on *Ihnat v. Pover*, and overruled the defendants' preliminary objections. The court stated that §8371 was not restricted to an insurance company's acts with regard to payment of claims but also includes bad faith acts in the sale of insurance policies.

(7) *Argonaut Ins. Co. v. HGO, Inc.*, 1996 U.S. Dist. LEXIS 10892 (E.D. Pa. July 24, 1996) (Yohn, J.)

In this action, the Argonaut Insurance Company sued HGO, Inc. to recover premiums allegedly owed under two policies covering HGO's workers' compensation obligations. The policies provided for retrospective determination of the insured's premium obligations according to a formula based upon the cost of claims. Argonaut alleged that HGO breached the contracts and conspired with the insurance broker to avoid payment. In response, HGO filed a counterclaim, asserting that Argonaut breached the insurance policies, mismanaged its account, and acted in bad faith. Argonaut moved to dismiss the bad faith claim, asserting that §8371 applied only to refusals to pay the proceeds of a policy. The court rejected this claim, holding that "§8371 provides statutory relief for any bad faith conduct toward an insured that is related to an action arising under an insurance policy."¹⁷⁴ According to the court, bad faith under §8371 included practices forbidden by the UIPA as well as conduct during litigation.

(8) *Britamco Underwriters, Inc. v. B&D Milmount Inn, Inc.*, 1996 U.S. Dist. LEXIS 4020 (E.D. Pa. Mar. 29, 1996) (Kelly, J.)

In this case, the insurance company filed a declaratory judgment action seeking to determine its obligations under a policy issued to the insured. The insured filed a counterclaim, alleging a violation of §8371 in that the insurer was involved in an ongoing scheme to defraud insureds by filing declaratory judgment actions. Britamco moved to dismiss, arguing that §8371 applied only to benefit denials. The Eastern District rejected this argument, noting that §8371 had been applied in other contexts "arising under an insurance policy," and not just denial of benefit

(9) *Rosengarten v. United States Fire Ins. Co.*, 1996 U.S. Dist. LEXIS 1864 (E.D. Pa. Feb. 14, 1996) (Rendell, J.)

In *Rosengarten*, the Eastern District permitted a bad faith claim concerning an insurer's pricing of its policies to proceed. The plaintiff alleged that this pricing scheme constituted bad faith. The court permitted the bad faith claim to go forward, stating, "while 'bad faith' is normally based on failure to pay or process claims, fraudulent pricing practices can also be instances of bad faith under the UIPA and, therefore, under §8371."¹⁷⁵

(10) *Ihnat v. Pover*, 35 Pa. D. & C.4th 120 (Allegheny 1997) (Wettick, J.)

In this case, Judge Wettick of the Allegheny County Court of Common Pleas ruled that §8371 is not limited to cases where claims have been denied. The plaintiffs filed multiple actions against several insurance companies and their agents alleging widespread improper sales practices.

The court rejected the defendant's assertion that the legislature intended to limit §8371 to bad faith refusals to pay claims. Rather, the court viewed §8371 as creating a private cause of action based upon trade practices of an insurance company that constitute unfair acts or practices under the Unfair Insurance Practices Act. With respect to the particular claims asserted by the plaintiffs, the court determined that "[t]he plain meaning of 'bad faith' reaches fraudulent practices on the part of an insurance company directed toward an existing policyholder that are intended to induce the policyholder to unknowingly give up the policy reserve and other benefits of the policy."¹⁷⁶ Reasoning that the claims arose out of the insurer-insured relationship, the court also determined that individuals who were not policyholders could bring a bad faith action under §8371 where they were allegedly fraudulently induced to purchase insurance policies based upon misrepresentations as to the nature of the transaction and/or based upon misrepresentations concerning the length of time the purchaser would be required to pay premiums.

(11) *Builder's Square, Inc. v. National Union Fire Ins. Co.*, 1995 U.S. Dist. LEXIS 11537 (E.D. Pa. 1995) (Waldman, J.)

In this case, the plaintiff insured alleged that the insurer acted in bad faith in providing legal representation in an underlying products liability suit. Specifically, the policyholder complained about being represented by the company's "house counsel." The insurer moved to dismiss the claim, arguing that §8371 was limited to denials of first party claims. The late Judge Waldman rejected this argument, stating that "defendant cites no case to support its contention that §8371 is limited to denials of first party claims. The statute contains no such limitation."¹⁷⁷ The court stated further, "§8371 should be liberally construed to provide a remedy to an insured for wrongful conduct by an insurer."¹⁷⁸

¹⁷⁴ *Argonaut Ins. Co.*, 1996 U.S. Dist. LEXIS 10892 at *11.

¹⁷⁵ *Rosengarten*, 1996 U.S. Dist. LEXIS 1864, at *8.

¹⁷⁶ *Ihnat*, 35 Pa. D. & C.4th 120, 139-40.

¹⁷⁷ *Builders Square Inc.*, 1995 U.S. Dist. LEXIS 11537 at *12.

¹⁷⁸ *Id.*

(12) *Axelsson Supply Inc. v. Tongue, Brooks & Co.*, 1994 U.S. Dist. LEXIS 5528 (E.D. Pa. Apr. 24, 1994) (O’Neill, J.)

Judge O’Neill of the Eastern District rejected the insurer’s argument that §8371 applies only to bad faith conduct in performing duties under an insurance contract, i.e., claims handling. The court held that the duty imposed upon an insurer to act in good faith applies to negotiations for insurance coverage. In this case, the policyholder sued the insurer for a violation of §8371, alleging, among other things, that the insurer had charged “grossly excessive” premiums. The court stated that Pennsylvania case law did not indicate any intent to limit the scope of an insurer’s duty to act in good faith only to the performance of an insurance contract.

CHAPTER 6 DEFINING BAD FAITH UNDER SECTION 8371

§6:02 A Two-Part Definition of Bad Faith

(1) *Leporace v. N.Y. Life & Annuity Corp.*, 2014 U.S. Dist. LEXIS 108804 (E.D. Pa. Aug. 7, 2014) (Baylson, J.), *aff’d*, 619 F. App’x 172 (3d Cir. 2015) (Smith, J.) 6:02, from CD

When plaintiff and defendant UNUM were unable to resolve a disability claim, plaintiff filed this breach of contract and bad faith action. Prior decisions on motions in limine are discussed in §§3:12, 8:07 and 14:14. The case proceeded to a jury trial, and a verdict was rendered for UNUM. Before the court were plaintiff’s post-trial motions. Judge Baylson of the Eastern District of Pennsylvania denied the motions, and in doing so confirmed that he properly charged the jury on the definition of bad faith:

An insurance company acts in bad faith if it: (1) does not have a reasonable basis for what it does; and (2) knows or recklessly disregards its lack of a reasonable basis. . . . Put another way, bad faith occurs if an insurer knowingly or recklessly acts without a reasonable basis in handling an insured’s claim.

In deciding whether or not an insurance company acted in bad faith toward its insured, the Court will consider all of the company’s actions, including its responses to communications from its insured, its investigation of the claim, and its handling of settlement negotiations. If the defendant knowingly or recklessly acted without a reasonable basis, the plaintiff is entitled to recover. See Pa. Suggested Standard Jury Instructions §17.300.¹⁷⁹

The Third Circuit affirmed, in an opinion written by Judge Smith, but did not address the substance of the bad faith claim.

(2) *Berg v. Nationwide Mut. Ins. Co., Inc.*, 2012 PA Super. 88 (Pa. Super. Apr. 17, 2012) (Donohue, J.), *reargument denied*, 2012 Pa. Super. LEXIS 1557 (Pa. Super. June 29, 2012)

In vacating a trial court’s directed verdict in favor of an insurer in a bad faith case, the Superior Court, in this decision authored by Judge Donohue, recently explained:

In an early case, this Court looked to Black’s Law Dictionary to define “bad faith” as “any frivolous or unfounded refusal to pay proceeds of a policy.” *Terletsky v. Prudential Property and Cas. Ins. Co.*, 437 Pa. Super. 108, 649 A.2d 680, 688 (Pa. Super. 1994), *appeal denied*, 540 Pa. 641, 659 A.2d 560 (1995); *see also Adamski v. Allstate Ins. Co.*, 1999 PA Super 241, 738 A.2d 1033, 1036 (Pa. Super. 1999). In subsequent cases, we have held that to succeed on a claim under section 8371, the insured must show that “the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim.” *See, e.g., O’Donnell v. Allstate Ins. Co.*, 1999 PA Super 161, 734 A.2d 901, 906 (Pa. Super. 1999) (citing *MGA Ins. Co. v. Bakos*, 699 A.2d 751, 754 (Pa. Super. 1997)). To constitute bad faith it is not necessary that the refusal to pay be fraudulent. However, mere negligence or bad judgment is not bad faith. *Bonenberger v. Nationwide Mut. Ins. Co.*, 2002 PA Super 14, 791 A.2d 378, 380 (Pa. Super. 2002). *Id.* The insured must also show that the insurer breached a known duty (i.e., the duty of good faith and fair dealing) through a motive of self-interest or ill will. *Id.*¹⁸⁰

(3) *Post v. St. Paul Travelers Ins. Co.*, 2009 U.S. Dist. LEXIS 52167 (E.D. Pa. Mar. 31, 2009), *reconsideration denied*, 2009 U.S. Dist. LEXIS 43730 (E.D. Pa. May 21, 2009) (Brody, J.), *aff’d in part (on bad faith issue) and vacated and remanded in part*, 2012 U.S. App. LEXIS 15767 (3d Cir. July 31, 2012) (Ambro, J.)

In this case discussed in §10:05, the court held, “Pennsylvania Courts have established a two-prong test for a plaintiff to recover for bad faith denial of insurance coverage; first, the plaintiff must show that the insurer did not

¹⁷⁹ *Leporace v. N.Y. Life & Annuity Corp.*, 2014 U.S. Dist. LEXIS 108804, at *3-4 (E.D. Pa. Aug. 7, 2014).

¹⁸⁰ *Berg v. Nationwide Mut. Ins. Co., Inc.*, 44 A.3d 1164, 1171 (Pa. Super. 2012).

have a reasonable basis to deny coverage.”¹⁸¹ Summary judgment was granted to the insurer because the plaintiff was unable to meet the first prong of this test. The Third Circuit, in an opinion written by Judge Ambro, affirmed as to the bad faith issue. The court concluded: “The sanctions exclusion in the Policy provided Travelers a reasonable basis for declining to provide a defense to Post, and there is nothing in the record—let alone clear and convincing evidence—indicating that Travelers’ purported mishandling of Post’s claim was motivated by a dishonest purpose or ill will.”¹⁸²

(4) *Luse v. Liberty Mut. Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 67608 (M.D. Pa. July 7, 2010) (Rambo, J.), *aff’d*, 411 F. App’x 462 (3d Cir. 2011) (per curiam)

In this case, discussed in §§10:05 and 10:07(b), the Third Circuit addressed the definition of bad faith, stating:

“Bad faith” is defined as “any frivolous or un-founded refusal to pay proceeds of a policy.” *See Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 437 Pa. Super. 108, 649 A.2d 680, 688 (Pa. Super. Ct. 1994) (citations omitted). A valid cause of action for bad faith under Pennsylvania law requires clear and convincing evidence that: (1) the insurer did not have a reasonable basis for its action, and (2) the insurer knew or recklessly disregarded its lack of reasonable basis. *See Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 225 (3d Cir. 2000); *See also Terletsky*, 649 A.2d at 688 (“[B]ad faith must be proven by clear and convincing evidence and not merely insinuated.”). While an insurer has a duty to investigate claims fairly and objectively, *Diamon v. Penn Mut. Fire Ins. Co.*, 247 Pa. Super. 534, 372 A.2d 1218 (Pa. Super. Ct. 1977), an insurer may defeat a bad faith claim by showing that it conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its action. *See J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 367 (3d Cir. 2004) (“A reasonable basis is all that is required to defeat a claim of bad faith.”) Mere negligence or bad judgment is not bad faith. *Terletsky*, 649 A.2d at 688.¹⁸³

(5) *NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos.*, 2009 U.S. Dist. LEXIS 92991 (E.D. Pa. Oct. 1, 2009) (Baylson, J.)

In this case, discussed in §§3:10 and 10:07(a), an auto insurer exhausted its policy limits in settling two claims against the insured. When a lawsuit was filed against the insureds on behalf of a third claimant, the insurer refused to defend or indemnify because the policy limits were exhausted. The insureds filed a bad faith lawsuit, contending that the earlier settlements were completed in bad faith, leaving the insured open to personal liability. In determining the applicable standard of bad faith, Judge Baylson of the Eastern District ruled that the *Terletsky* standard applied, so “the insured must show that the insurer (1) did not have a reasonable basis for denying benefits under the policy, and (2) that the insured knew or recklessly disregarded its lack of reasonable basis in denying the claim.”¹⁸⁴

(6) *Kister v. W.N. Tuscano Agency, Inc.*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 96 (Somerset Aug. 26, 2009) (Klementik, J.)

In this case, discussed in §10:02, Judge Klementik of the Somerset County Court of Common Pleas dismissed a bad faith claim, and applied the following definition of bad faith under §8371:

It is well established that bad faith must be proven by “*clear and convincing evidence of bad faith, rather than by mere insinuation*, and a showing by the insured that the insurer did not have a reasonable basis for denying benefits under the policy.” *Morrison v. Mountain Laurel Assurance Co.*, 2000 PA Super 43, 748 A.2d 689, 691-691 (Pa. Super. 2000) (emphasis added); *see also Terletsky*, 649 A.2d at 688. The Plaintiff must also show that “the insurer knew of or recklessly disregarded its lack of a reasonable basis in denying the claim.” *Id.*¹⁸⁵

(7) *Scottsdale Ins. Co. v. City of Hazleton*, 2009 U.S. Dist. LEXIS 44861 (M.D. Pa. May 28, 2009) (Caputo, J.)

In this case, discussed in §§10:03(a) and 10:13, Judge Caputo of the Middle District held that an insured was obligated to prove (1) that the insurer did not have a reasonable basis for denying benefits under the policy; and (2) that the insurer knew of or recklessly disregarded its lack of a reasonable basis in denying the claim.¹⁸⁶ The court further stated, “Courts have not restricted §8371 to an insurer’s denial of a claim, allowing bad faith claims for other conduct, including an insurer’s investigative practices.”¹⁸⁷

(8) *Bottke v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 4203 (E.D. Pa. Jan. 22, 2009) (Schiller, J.)

In this case, discussed in § 10:07(b), Judge Schiller of the Eastern District set forth the definition of bad faith in Pennsylvania:

¹⁸¹ *Post v. St. Paul Travelers Ins. Co.*, 2009 U.S. Dist. LEXIS 52167, at *8 (E.D. Pa. Mar. 31, 2009).

¹⁸² *Post v. St. Paul Travelers Ins. Co.*, 2012 U.S. App. LEXIS 15767, at *57-58 (3d Cir. July 31, 2012).

¹⁸³ *Luse v. Liberty Mut. Fire Ins. Co.*, 411 F. App’x 462, 465 (3d Cir. 2011).

¹⁸⁴ *NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos.*, 2009 U.S. Dist. LEXIS 92991, at *27 (E.D. Pa. Oct. 1, 2009).

¹⁸⁵ *Kister v. W.M. Tuscano Agency, Inc.*, 2009 Pa. D. & C. Dec. LEXIS 96, at *6 (Somerset Aug. 26, 2009).

¹⁸⁶ *Scottsdale Ins. Co. v. City of Hazleton*, 2009 U.S. Dist. LEXIS 44861, at *39-40 (M.D. Pa. May 28, 2009).

¹⁸⁷ *Id.* at *40.

In the insurance context, “bad faith” is defined as “any frivolous or unfounded refusal to pay proceeds of a policy.” . . . In order to prevail on a bad faith claim, an insured must show that the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying those benefits. . . . To constitute bad faith for the failure to pay a claim, the insurer must have a dishonest purpose. . . . Although the refusal to pay need not be fraudulent, mere negligence or bad judgment is insufficient.¹⁸⁸

(9) *Smith v. Continental Cas. Co.*, 2008 U.S. Dist. LEXIS 76818 (M.D. Pa. Sept. 30, 2008) (Jones, J.), *aff’d*, 347 F. App’x 812 (3d Cir. 2009) (Barry, J.)

In this case, discussed in §10:07(d), the Third Circuit upheld summary judgment in favor of the insurance company, holding that the two-part definition of bad faith was established by clear and convincing evidence: “There is a ‘two-part test’ for bad faith claims, and ‘both elements . . . must be supported with clear and convincing evidence: (1) that the insurer lacked a reasonable basis for denying benefits; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis.’”¹⁸⁹

(10) *Naumov v. Progressive Ins. Agency, Inc.*, 2008 U.S. Dist. LEXIS 110731 (W.D. Pa. Dec. 17, 2008) (Ambrose, J.)

In this action involving allegations of insurance fraud, discussed in §§9:05 and 9:19, Judge Ambrose of the Western District summarized what must be demonstrated to prove bad faith:

“To make out a claim for bad faith, a plaintiff must show by clear and convincing evidence that the insurer (1) did not have a reasonable basis for denying benefits under the policy; and (2) knew or recklessly disregarded its lack of reasonable basis in denying the claim.” *W.V. Realty, Inc. v. Northern Ins. Co. of N.Y.*, 334 F.3d 306, 312 (3d Cir. 2003). In addition, a claim for bad faith may arise from an insurer’s investigation of the claim. . . . Finally, a claim of bad faith may be based on an insurer’s use of litigation in a bad faith effort to evade a duty owed under the policy.¹⁹⁰

(11) *Ressler v. Enterprise Rent-A-Car Co.*, 2007 U.S. Dist. LEXIS 50967 (W.D. Pa. July 13, 2007) (Ambrose, J.)

The facts of this case are discussed in §10:13. As to the applicable definition of bad faith, Judge Ambrose of the Western District wrote as follows:

Although the [bad faith] statute does not define the term “bad faith,” the Court of Appeals for the Third Circuit has predicted that the Pennsylvania Supreme Court would adopt the definition set forth by the Pennsylvania Superior Court in *Terletsky v. Prudential Property & Casualty Insurance Company*. . . . In *Terletsky*, the court held that to recover on a bad faith claim, the insured must prove: (1) that the insurer did not have a reasonable basis for denying benefits under the policy; and (2) that the insurer knew of or recklessly disregarded its lack of a reasonable basis in denying the claim.¹⁹¹

(12) *Berks Mut. Leasing Corp. v. Travelers Prop. & Cas.*, 2002 U.S. Dist. LEXIS 23749 (E.D. Pa. Dec. 9, 2002) (Yohn, J.)

In this case dismissing a claim under §8371, Judge Yohn of the Eastern District, citing numerous cases, held, “Courts interpreting the meaning of bad faith under Section 8371 have repeatedly said that the statute does not protect against mere negligence or bad decision making. . . .”⁶⁴

(13) *Booze v. Allstate Ins. Co.*, 750 A.2d 877 (Pa. Super. 2000) (Beck, J.), *appeal denied*, 766 A.2d 1242 (Pa. 2000)

In this case, discussed in Section 10:03(b), the Superior Court, citing *Terletsky*, held that in order to establish a bad faith claim under §8371, the plaintiff needed to prove by clear and convincing evidence, “(1) that the insurer lacked a reasonable basis for denying benefits; and (2) that the insurer knew or recklessly disregarded its lack of a reasonable basis.”

(14) *Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747 (3d Cir. 1994) (Rosenn, J.)

In one of the earliest bad faith cases, the Third Circuit acknowledged that §8371 did not define bad faith, but held that, in the insurance context, the term bad faith had acquired a universally acknowledged meaning:

“Bad faith” on part of the 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.¹⁹²

¹⁸⁸. *Bottke v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 4203, at *11 (E.D. Pa. Jan. 22, 2009) (citations omitted).

¹⁸⁹. *Smith v. Cont’l Cas. Co.*, 347 F. App’x 812, 815 (3d Cir. 2009) (citing *Klinger v. State Farm Mut. Ins. Co.*, 115 F.3d 230, 233 (3d Cir. 1997)).

¹⁹⁰. *Naumov v. Progressive Ins. Agency, Inc.*, 2008 U.S. Dist. LEXIS 110731, at *18-19 (W.D. Pa. Dec. 17, 2008) (citations omitted).

¹⁹¹. *Ressler v. Enterprise Rent-A-Car Co.*, 2007 U.S. Dist. LEXIS 50967, at *21 (W.D. Pa. July 13, 2007).

¹⁹². 23 F.3d at 751 (citing *Black’s Law Dictionary* 139 (6th ed. 1990)).

While the Third Circuit held that mere negligence on the part of the insurer was insufficient to support a finding of bad faith, it held that recklessness could support a finding of bad faith. Nationwide had argued that recklessness alone could not support a finding of bad faith. The Third Circuit rejected this argument and remanded the case to the trial court so that it could make a proper finding on whether Nationwide afforded “the interest of the insured the same faithful consideration it gives its own interest.”¹⁹³

§6:02(a) – No Reasonable Basis for Denying a Claim

(1) *Atwood v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 121319 (M.D. Pa. Aug. 27, 2013) (Rambo, J.)

Plaintiff obtained a homeowner’s policy with defendant in 2011. In this case, which is discussed in more detail in §§10:07(b) and 10:13(b), plaintiff filed this bad faith action before defendant rendered a coverage decision, but after defendant had notified plaintiff that it would not make any payments until certain motions were resolved relating to forfeiture of the home in a criminal case. Defendant filed a motion to dismiss the bad faith claim. Judge Rambo of the Middle District granted the motion. The court explained:

Based on Plaintiff’s allegations and upon proper consideration of exhibits, the court concludes that Plaintiff has failed to make a claim for bad faith. Plaintiff has failed to plead that Defendant had no reasonable basis to deny coverage, because coverage has not been denied at this point.¹⁹⁴

(2) *Colella v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 31895 (E.D. Pa. Apr. 1, 2010) (Joyner, J.), *aff’d*, 407 F. App’x 616 (3d Cir. 2011) (Barry, J.)

In this case, discussed in more detail in §10:07(b), the Third Circuit affirmed the district court’s grant of State Farm’s motion for summary judgment on the coverage and bad faith claims. The Colellas argued that State Farm acted in bad faith when its claims handler decided to deny plaintiffs’ claim for water damage to their basement based on his own interpretation of the policy language without first obtaining a legal opinion on the coverage issue. The Third Circuit, in an opinion by Judge Barry, found that State Farm properly denied coverage and, therefore, did not act in bad faith: “[B]ecause State Farm had a reasonable basis for denying the Colellas’ claim, the Colellas could not establish the elements of the cause of action.”¹⁹⁵

(3) *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 12992 (W.D. Pa. Feb. 16, 2010) (McVerry, J.), *aff’d*, 410 F. App’x 484 (3d Cir. 2011) (Greenberg, J.)

In this case, discussed in §§10:07(a) and 10:15, in recounting the two part *Terletsky* definition of bad faith, Judge McVerry of the Western District observed,

Plaintiff must establish two elements to succeed on a bad faith insurance claim: (1) that the insurer did not have a reasonable basis for denying benefits under the policy; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim. *W.V. Realty, Inc. v. Northern Ins. Co.*, 334 F.3d 306, 312 (3d Cir. 2003). The term “bad faith” is not defined in the statute but has been described as a “frivolous or unfounded refusal to pay proceeds of a policy,” which “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. *Terletsky v. Prudential Prop. and Cas. Ins. Co.*, 437 Pa. Super. 108, 649 A.2d 680, 688 (Pa. Super. 1994).¹⁹⁶

The court also noted that if the insurer had a reasonable basis for its denial, even if it did not rely on that basis, bad faith does not exist.¹⁹⁷

The Third Circuit affirmed the district court’s grant of summary judgment for State Farm. The Third Circuit discussed the legal standard by which bad faith claims were to be analyzed:

Accordingly, to establish that the insurer acted in bad faith the insured must demonstrate that the insurance company acted frivolously with a dishonest purpose and breached its known duty. . . . Here, the District Court’s comprehensive analysis led it to conclude that the record could not support a finding that State Farm acted in bad faith and, exercising plenary review, we agree with that conclusion.¹⁹⁸

¹⁹³ *Id.* at 752.

¹⁹⁴ *Atwood v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 121319, at *13-14 (M.D. Pa. Aug. 27, 2013).

¹⁹⁵ *Colella v. State Farm Fire & Cas. Co.*, 407 F. App’x 616, 622 (3d Cir. 2011).

¹⁹⁶ *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 12992, at *16-17 (W.D. Pa. Feb. 16, 2010).

¹⁹⁷ *Id.* at *18.

¹⁹⁸ *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 410 F. App’x 484, 486 (3d Cir. 2011) (citing *Nordi v. Keystone Health Plan West Inc.*, 989 A.2d 376 (Pa. Super. Ct. 2010); *Brickman Grp., Ltd v. CGU Ins. Co.*, 865 A.2d 918 (Pa. Super. Ct. 2004); *W.V. Realty Inc. v. Northern Ins. Co.*, 334 F.3d 306 (3d Cir. 2003); and *Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747 (3d Cir. 1994)).

§6:02(b) — Knowing or Reckless Disregard of Lack of Reasonable Basis

(1) *Kojeszewski v. Infinity Ins. Co.*, 2006 U.S. Dist. LEXIS 79306 (M.D. Pa. Oct. 31, 2006) (Caputo, J.)

In this case, Judge Caputo of the Middle District dismissed plaintiff's count alleging statutory bad faith under §8371. According to the court,

Here, plaintiffs failed to aver that defendant possessed a reckless and wrongful state of mind – i.e., that defendant knew or recklessly disregarded the lack of a reasonable basis for denying liability coverage. As such, plaintiffs have failed to state a claim for the bad faith denial of insurance coverage under . . . §8371.¹⁹⁹

(2) *H.L. Libby Corp. v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 50433 (W.D. Pa. July 24, 2006) (Cercone, J.)

Where the court found there was no bad faith in connection with an insurer's denial of a third party claim, the court discussed the applicable definition of bad faith and included the following:

[T]he [bad faith] statute does not require a plaintiff to prove that the insurer consciously acted pursuant to such a motive or interest; it is enough that the insurer recklessly disregarded a lack of a reasonable basis in denying benefits. . . .

Pennsylvania law defines reckless conduct as the “acting or failing to act in complete disregard of a risk of harm to others which is known or should be known to be highly probable and with a conscious indifference to the consequences.”²⁰⁰

(3) *Toll Naval Assocs. v. Lexington Ins. Co.*, 2005 U.S. Dist. LEXIS 16393 (E.D. Pa. Aug. 10, 2005) (Yohn, J.)

This case is discussed in §10:07. In finding in favor of the property insurer, Judge Yohn of the Eastern District held:

While the defendants' alleged bad faith need not be limited to the literal act of denying a claim, and may extend the investigation of a claim, ‘the essence of a bad faith claim must be the unreasonable and intentional (or reckless) denial of benefits.’ UPMC Health System, 391 F.3d at 505-506. There was no frivolous or unfounded denial of benefits in this case, nor has plaintiff adduced clear and convincing evidence that there was an unreasonable claims investigation. Although an insurance company has an obligation to give the interest of its insured the same consideration it gives to its own interest, ‘an insurer is not bound to submerge its own interests in order that the insured's interests may be made paramount, and that an insurer does not act in bad faith by investigating and litigating legitimate issues of coverage.’²⁰¹

(4) *Klinger v. State Farm Mut. Auto. Ins. Co.*, 895 F. Supp. 709 (M.D. Pa. 1995) (Caldwell, J.), *aff'd*, 115 F.3d 230 (3d Cir. 1997) (Nygaard, J.)

In this case,²⁰² the insurer attempted to argue that in order to establish bad faith, a policyholder must fulfill a three-part test, proving: (1) that the insurer had no reasonable basis for denying the claim; (2) that the insurer knew or recklessly disregarded the lack of a reasonable basis; and (3) that the insurer's actions were motivated through self-interest or ill will. Judge Caldwell of the Middle District rejected this argument, concluding that “the additional element that State Farm attempts to interject, a showing of improper purpose or ill will, is inconsistent with the two-part test set forth in *Terletsky*.”²⁰³

The Third Circuit affirmed the trial court's decision, stating that the “standard for bad faith claims under §8371 is set forth in *Terletsky v. Prudential Property & Casualty Insurance Company*. . . .”²⁰⁴ The Third Circuit held that *Terletsky* applied a two-part test, both elements of which must be supported with clear and convincing evidence: (1) that the insurer lacked a reasonable basis for denying benefits; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis. Any suggestion by *Terletsky* that there was a third element, according to the Third Circuit, was *dicta*.

¹⁹⁹ *Kojeszewski v. Infinity Ins. Co.*, 2006 U.S. Dist. LEXIS 79306, at *9 (M.D. Pa. Oct. 31, 2006).

²⁰⁰ *H.L. Libby Corp. v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 50433, at *19 (W.D. Pa. July 24, 2006) (citation omitted).

²⁰¹ *Toll Naval Assocs. v. Lexington Ins. Co.*, 2005 U.S. Dist. LEXIS 16393, at *18-19 (E.D. Pa. Aug. 10, 2005).

²⁰² The facts in *Klinger* are discussed in §9:11.

²⁰³ 895 F. Supp. at 714.

²⁰⁴ 115 F.3d at 233. Accord: *Thomas v. State Farm Ins. Co.*, 1999 U.S. Dist. LEXIS 17384 (E.D. Pa. 1999).

§6:04 Is an Insurer a Fiduciary?

§6:05 — Cases

(1) *Fitzpatrick v. State Farm Ins. Cos.*, 2010 U.S. Dist. LEXIS 51348 (W.D. Pa. May 25, 2010) (Hay, C.M.J.)

This case, discussed in §5:03, arose out of a UIM claim. The insureds filed suit alleging violation of §8371, breach of contract and breach of fiduciary duty for State Farm's alleged failures as to the investigation and settlement process. State Farm filed a motion to dismiss the breach of contract and breach of fiduciary duty claims. As to the breach of fiduciary duty claim, Magistrate Judge Hay of the Western District sided with the insurer, stating:

[A]n insurer assumes a fiduciary duty toward an insured only when a third party has asserted a claim against the insured.²⁰⁵

This case involved a dispute between the Fitzpatricks and State Farm; no third party was pressing any claims against the Fitzpatricks, so State Farm had simply a duty of good faith and fair dealing, not a fiduciary duty:

Because the instant case revolves around the Fitzpatricks' claims for UIM benefits under the Policy and does not involve claims by a third party, State Farm did not assume a fiduciary duty toward the Fitzpatricks. Since no duty was owed, it follows that State Farm could not have breached that duty and the Fitzpatricks' claim for breach of fiduciary duty must fail as a matter of law.²⁰⁶

(2) *Allstate Prop. & Cas. Ins. Co. v. Vargas*, 2006 U.S. Dist. LEXIS 95608 (E.D. Pa. Dec. 28, 2006) (Davis, J.)

In this case, Judge Davis of the Eastern District granted the insurer's motion to dismiss a claim for breach of fiduciary duty, stating as follows:

In Pennsylvania, a fiduciary relationship does not automatically arise any time an insurer enters into a contract with an insured.... No fiduciary duty flows from the existence of a duty to act in good faith and fair dealing – any such claims of breach of fiduciary duty are generally subsumed by breach of contract and statutory bad faith cases....

Defendant's allegations with regard to her breach of fiduciary duty claim, in essence that Allstate failed to process her insurance claim in a timely manner, and failed to pay her stacked benefits, are mere restatements of her bad faith and breach of contract claims.²⁰⁷

(3) *Bukofski v. USAA Casualty Ins. Co.*, 2009 U.S. Dist. LEXIS 48128 (M.D. Pa. June 9, 2009) (Munley, J.)

In this case, arising out of a UIM claim, Judge Munley of the Eastern District dismissed plaintiff's claim asserting a cause of action for breach of fiduciary duty. The court agreed with the defendant insurer that that claim "is redundant of the breach of contract claim."²⁰⁸ According to the court:

The same duty of good faith that is grounded in the insurer's fiduciary duty underlies the plaintiff's claim of bad faith. To have a separate cause of action for breach of fiduciary duty would be redundant.²⁰⁹

(4) *Taylor v. Government Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 39708 (E.D. Pa. Apr. 21, 2010) (Padova, J.)

In this case, discussed in §9:13(a), Judge Padova of the Eastern District dismissed a claim for breach of fiduciary duty as follows:

"The Pennsylvania Supreme Court treats the breach of the contractual duty of good faith and breach of fiduciary duty synonymously in the context of insurance cases." *Greater N.Y. Mut. Ins. Co. v. N. River Ins. Co.*, 872 F. Supp. 1403, 1409 (E.D. Pa. 1995) (citing *Gedeon v. State Farm Mut. Auto. Ins. Co.*, 410 Pa. 55, 188 A.2d 320, 322 (Pa. 1963)). Pennsylvania law does not permit common law tort actions for breach of fiduciary duty in the context of insurance cases. *Id.*; see also *Wood v. Allstate Ins. Co.*, Civ. A. No. 96-4574, 1996 U.S. Dist. LEXIS 16332, 1996 WL 637832, at *2 (E.D. Pa. Nov. 4, 1996) (striking an insured plaintiff's cause of action for breach of fiduciary duty, and ruling that it was subsumed by the plaintiff's bad faith claim and therefore redundant). . . . Therefore, to the extent

²⁰⁵ *Fitzpatrick v. State Farm Ins. Cos.*, 2010 U.S. Dist. LEXIS 51348, at *13 (W.D. Pa. May 25, 2010) (citing *Birth Ctr. v. St. Paul Cos. Inc.*, 787 A.2d 376 (Pa. 2001)).

²⁰⁶ *Fitzpatrick v. State Farm Ins. Cos.*, 2010 U.S. Dist. LEXIS 51348, at *13 (citing *Zappile v. Amex Assurance Co.*, 928 A.2d 251, 256 (Pa. Super. 2007) and *Condio v. Erie Ins. Exch.*, 899 A.2d 1136, 1145 (Pa. Super. 2006)).

²⁰⁷ *Allstate Prop. & Cas. Ins. Co. v. Vargas*, 2006 U.S. Dist. LEXIS 95608, at *9-11 (E.D. Pa. Dec. 28, 2006) (citations omitted).

²⁰⁸ *Bukofski v. USAA Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 48128, at *16 (M.D. Pa. June 9, 2009).

²⁰⁹ *Bukofski v. USAA Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 48128, at *16.

the Complaint asserts a claim for breach of fiduciary duty, we grant the Motion to Dismiss with respect to such a claim.²¹⁰

(5) *Harhai v. Travelers Cos., Inc.*, Slip Op., July Term, 2008, No. 03747 (Phila. Com. Pl. July 2009) (Bernstein, J.)

In this case, discussed in §9:15, the plaintiff insured claimed that Travelers acted in bad faith in failing to advise him that he had UM coverage which might cover an excessive wage loss claim. In his complaint, the plaintiff included a claim alleging “breach of fiduciary duty of good faith and fair dealing.” Judge Bernstein of the Philadelphia Court of Common Pleas granted the insurer’s motion for summary judgment as to that claim, stating, “[A] claim for a breach of fiduciary duty is applied to the third party context when an insurer assumes the responsibility to handle claims, control settlement or take over litigation on the insured’s behalf,” and not to a first party claim.²¹¹

(6) *Millwood v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 8415 (W.D. Pa. Feb. 5, 2009) (Standish, J.)

In this case, the insurer denied a theft claim stemming from the alleged vandalism of plaintiff’s vehicle. Plaintiffs filed suit, and included a count alleging that the insurer breached its fiduciary duty and duty of good faith, and that they were entitled to compensation under §8371. The insurer moved to dismiss the count, claiming that the insurer did not assume a fiduciary duty in this first party case. While acknowledging that the insurer did not owe the plaintiffs a fiduciary duty under the circumstances of the case, Judge Standish of the Western District allowed the claim to proceed since the count in question alleged numerous instances of bad faith in the insurer’s handling of the claim.

(7) *Decker v. Nationwide Ins. Co.*, 2008 Pa. Dist. & Cnty. Dec. LEXIS 23 (C.P. Lackawanna Mar. 7, 2008) (Minora, J.)

In this case, before the court on preliminary objections, Judge Minora of Lackawanna County suggested that it might be possible to raise a claim for breach of fiduciary duty against the insurance agent who sold the policy, Turano Insurance Agency. The court ruled that “it is appropriate to consider the insurance company and the insurance agent separate entities for purposes of evaluating whether Plaintiffs have a viable claim for breach of fiduciary duty against Defendant Turano.”²¹² The court noted that the agent was allegedly made aware of detailed circumstances relating to the plaintiff’s employment. Thus, the court considered it “important to determine the level of involvement Defendant Turano had in advising Plaintiffs of the appropriate insurance policy and product to fit their needs.”²¹³

(8) *Levin v. Transamerica Occidental Life Ins. Co.*, 2008 U.S. Dist. LEXIS 66243 (E.D. Pa. Aug. 20, 2008) (Joyner, J.)

In this case, discussed in §10:07(c), the plaintiff, claiming to be a beneficiary under a life insurance policy, included a count for breach of fiduciary duty in his complaint. Judge Joyner granted the insurer’s motion to dismiss that count, stating that, “[g]enerally, under Pennsylvania law, there is no common law tort for breach of fiduciary duty against an insurer.”²¹⁴ According to the court, “[L]ife insurance companies generally have no fiduciary obligation to beneficiaries of life insurance policies as their relationship is solely a matter of contract.”²¹⁵

(9) *Ross v. Metropolitan Life Ins. Co.*, 411 F. Supp. 2d 571 (W.D. Pa. 2006) (Ambrose, J.)

Plaintiff’s member of a class brought suit against MetLife alleging, inter alia, a breach of contract claim and a breach of fiduciary duty claim. MetLife moved to dismiss the breach of fiduciary duty claim. Citing the decisions in *Belmont Holdings v. Unicare* and *Connecticut Indemnity v. Markman*, Judge Ambrose of the Western District dismissed the breach of fiduciary claim, agreeing that under Pennsylvania law, “the mere fact that an insurer and an insured enter into an insurance contract does not automatically create a fiduciary relationship.”²¹⁶

In this case, where an insurer moved to enforce a class action settlement agreement against one policy owner and moved to dismiss all claims, Judge Ambrose of the Western District, quoting the *Belmont Holdings* case cited in this section, stated “I agree with this analysis. . . . The fiduciary duty claim in this case is subsumed within the breach of contract claim...”²¹⁷ The breach of fiduciary claim was dismissed as being redundant to the breach of contract claim.

²¹⁰ *Taylor v. Gov’t Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 39708, at *7 (E.D. Pa. Apr. 21, 2010).

²¹¹ *Harhai v. Travelers Cos., Inc.*, slip op., July Term, 2008, No. 03747 (Phila. Com. Pl. July 2009), slip op. at 5.

²¹² *Decker v. Nationwide Ins. Co.*, 2008 Pa. Dist. & Cnty. Dec. LEXIS 23, at *7-8 (C.P. Lackawanna Mar. 7, 2008).

²¹³ *Decker v. Nationwide Ins. Co.*, 2008 Pa. Dist. & Cnty. Dec. LEXIS 23, at *8 (C.P. Lackawanna Mar. 7, 2008).

²¹⁴ *Levin v. Transamerica Occidental Life Ins. Co.*, 2008 U.S. Dist. LEXIS 66243, at *13-14 (E.D. Pa. Aug. 20, 2008).

²¹⁵ *Id.* at *14 (citing *Benefit Trust Life Ins. Co. v. Union Nat’l Bank of Pittsburgh*, 776 F.2d 1174, 1177 (3d Cir. 1985)).

²¹⁶ *Ross v. Metro. Life Ins. Co.*, 411 F. Supp. 2d 571 (W.D. Pa. 2006) (citing *Belmont Holdings Corp. v. Unicare Life & Health Ins. Co.*, 199 U.S. Dist. LEXIS 1802 (E.D. Pa. 1999) and *Connecticut Indem. Co. v. Markman*, 1993 U.S. Dist. LEXIS 10853 (E.D. Pa. August 6, 1993)).

²¹⁷ *Ross v. Metro. Life Ins. Co.*, 411 F. Supp. 2d 571, 584.

(10) *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440 (E.D. Pa. Nov. 13, 2006) (Joyner, J.)

In this case, discussed in §10:07, the court rejected plaintiff's allegations that the insurer violated its fiduciary obligations, stating, "An insurer does not automatically owe a fiduciary duty to the insured under Pennsylvania law."²¹⁸

(11) *Daniel P. Fuss Builders-Contractors, Inc. v. Assurance Co. of America*, 2006 U.S. Dist. LEXIS 56742 (E.D. Pa. Aug. 11, 2006) (Schiller, J.)

In this case, discussed in detail in §3:04, Judge Schiller of the Eastern District observed, "numerous courts applying Pennsylvania law have held that breach of fiduciary duty claims are subsumed under statutory and/or contractual bad faith claims."²¹⁹

(12) *Toll Naval Assocs. v. Lexington Ins. Co.*, 2005 U.S. Dist. LEXIS 16393 (E.D. Pa. Aug. 10, 2005) (Yohn, J.)

This case is discussed in §10:07. In finding in favor of the property insurer, Judge Yohn of the Eastern District held:

While the defendants' alleged bad faith need not be limited to the literal act of denying a claim, and may extend the investigation of a claim, 'the essence of a bad faith claim must be the unreasonable and intentional (or reckless) denial of benefits.' *UPMC Health System*, 391 F.3d at 505-506. There was no frivolous or unfounded denial of benefits in this case, nor has plaintiff adduced clear and convincing evidence that there was an unreasonable claims investigation. Although an insurance company has an obligation to give the interest of its insured the same consideration it gives to its own interest, 'an insurer is not bound to submerge its own interests in order that the insured's interests may be made paramount, and that an insurer does not act in bad faith by investigating and litigating legitimate issues of coverage.'²²⁰

(13) *Birth Center v. St. Paul Cos., Inc.*, 727 A.2d 1144 (Pa. Super. 1999), *aff'd*, 787 A.2d 376 (Pa. 2001) (Newman, J.)

In this third party bad faith case, discussed in detail elsewhere,²²¹ the Pennsylvania Superior Court stated that "the insurer assumes a fiduciary responsibility toward the insured and becomes obligated to act in good faith and with due care in representing the interests of its insured when handling, *inter alia*, all third party claims brought against the insured."²²²

In affirming the Superior Court, the state Supreme Court held, "Where an insurer refuses to settle a claim that could have been resolved within policy limits without 'a bona fide belief. . . that it has a good possibility of winning,' it breaches its contractual duty to act in good faith and its fiduciary duty to its insured."²²³

(14) *Williams v. Hartford Cas. Ins. Co.*, 83 F. Supp. 2d 567 (E.D. Pa. 2000) (Katz, J.), *aff'd without opinion*, 2001 U.S. App. LEXIS 8687 (3d Cir. Apr. 4, 2001)

In setting forth the bad faith standard, Judge Katz of the Eastern District wrote as follows:

Pennsylvania requires that an insurer act with the utmost good faith toward its insured, . . . and it should "accord the interest of its insured the same faithful consideration it gives its own interest." . . . However, an insurer is not required actively to submerge its own interest.²²⁴

Noting that in a first party insurance claim the insurer "is not required to make the interests of its insured paramount," the court held that the insurer did not act in bad faith in handling an underinsured motorist claim.²²⁵

(15) *Pennsylvania Chiropractic Ass'n v. Independence Blue Cross*, August Term, 2000, No. 2705; PICS No. 01-1530 (Phila. July 16, 2001) (Herron, J.)

In this case, several subscriber-patients as well as several medical providers sued a health insurer for allegedly improperly denying chiropractic care in breach of contractual obligations. Included in the complaint were claims of breach of fiduciary duty on the part of the health insurer. Judge Herron of the Philadelphia Court of Common Pleas sustained the insurer's preliminary objection in the nature of a demurrer to the breach of fiduciary duty count. The court cited *Keefe*, *Belmont Holdings*, and *Garvey* above, and concluded that fiduciary duty concepts were appropriate only in the third party context, stating, "[A] breach of fiduciary duty in the insurance context is a breach of the contractual duty to act in good faith when the insurer assumes the responsibility to handle claims, control settlement or

²¹⁸ *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440, at *37 (E.D. Pa. Nov. 13, 2006) (citing *Belmont Holdings Corp. v. Unicare Life & Health Ins. Co.*, 1999 U.S. Dist. LEXIS 1802, at *10 (E.D. Pa. Feb. 5, 1999)).

²¹⁹ *Daniel P. Fuss Builders-Contractors, Inc. v. Assurance Co. of America*, 2006 U.S. Dist. LEXIS 56742, at *14 n.3 (citing *Johnson v. Northland Ins. Co.*, 2005 U.S. Dist. LEXIS 35102 (W.D. Pa. Dec. 21, 2005)).

²²⁰ *Toll Naval Assocs. v. Lexington Ins. Co.*, 2005 U.S. Dist. LEXIS 16393, at *18-19 (E.D. Pa. Aug. 10, 2005).

²²¹ *Birth Center* case is discussed in §§3:04 to §3:08 and §9:11.

²²² *Birth Center v. St. Paul*, 727 A.2d at 1155.

²²³ *Birth Center v. St. Paul*, 787 A.2d at 379 (citing *Cowden*, 134 A.2d at 229).

²²⁴ *Williams v. Hartford*, 83 F. Supp. 2d at 571 (citations omitted).

²²⁵ *Id.* at 576 (citing *Hyde Athletic Indus., Inc. v. Continental Cas. Co.*, 969 F. Supp. at 307).

take over the litigation on the insured's behalf." The court held that the breach of fiduciary duty claim duplicated the plaintiffs' claim for breach of an implied duty of good faith and was, at its base, a breach of contract claim.

(16) *Keefe v. Prudential Prop. & Cas. Co.*, 208 F.3d 218 (3d Cir. 2000)

In this case, arising out of a UM claim, the Third Circuit held that a "fiduciary duty higher than that of good faith and fair dealing does not arise out of an insurance contract until the insurer asserts a stated right under the policy to handle all claims asserted against the insured."²²⁶

(17) *Garvey v. National Grange Mutual Ins. Co.*, 1995 U.S. Dist. LEXIS 3283 (E.D. Pa. March 16, 1995) (Hutton, J.)

In this case, Judge Hutton of the Eastern District dismissed plaintiff's breach of fiduciary duty claim, holding, "Despite creative attempts by the plaintiff to turn the insurance contract into a fiduciary relationship, plaintiff's complaint here alleges nothing more than a breach of contract based on good faith and fair dealing. Counts I and III, for breach of contract and bad faith, [already] address those claims."²²⁷

CHAPTER 7 PROCEDURAL ISSUES IN BAD FAITH ACTIONS

§7:02 — Cases, Plaintiff's Pleading Found Insufficient

Alidjani v. State Farm Fire & Cas. Co., 2017 U.S. Dist. LEXIS 9387, at *7-8 (E.D. Pa. Jan. 24, 2017) (DuBois, J.) (dismissing bad faith count arising out of homeowner's claim and stating that "[t]he factual allegations in the Complaint and the attached exhibits allege, at most, that defendant's analysis of the damage to the Property and/or the Policy's coverage was incorrect. Without more, the Complaint does not sufficiently allege a claim of bad faith conduct by defendant.")

Jack v. State Farm Fire & Cas. Co., 2017 U.S. Dist. LEXIS 30136 (E.D. Pa. Mar. 3, 2017) (Baylson, J.) (finding allegations relating to bad faith count arising out of homeowner's claim were conclusory and thus insufficient, where facts alleged set out only that plaintiff had a policy, suffered a loss and that insurer refused to extend suit limitation clause period)

Meyers v. Protective Ins. Co., 2017 U.S. Dist. LEXIS 11338, at *23 (M.D. Pa. Jan. 27, 2017) (Caputo, J.) (dismissing UM-related bad faith claim because allegations established nothing more than that "Plaintiff's claim that Defendant acted in bad faith because it failed or refused to act in good faith. Such allegations are not only conclusory, but are also circular and prove nothing.")

Mittman v. Nationwide Affinity Ins. Co., 2017 U.S. Dist. LEXIS 54220, at *9 (E.D. Pa. Apr. 10, 2017) (dismissing bad faith count arising out of UIM claim where allegations simply stated, inter alia, that the investigation was done in bad faith and that the insurer delayed unreasonably, without "'describ[ing] who, what, where, when, and how the alleged bad faith occurred.")

Mondron v. State Farm Mut. Auto. Ins. Co., 2016 U.S. Dist. LEXIS 176404, at *6, *10 (W.D. Pa. Dec. 21, 2016) (Bissoon, J.) (dismissing bad faith claim that relied on "boilerplate statutory language and/or generic 'bad faith' catchphrases" and lacked allegations regarding "'any facts that describe who, what, where, when and how the alleged bad faith conduct occurred.")

Riedi v. GEICO Cas. Co., 2017 U.S. Dist. LEXIS 54952, at *6 (E.D. Pa. Apr. 11, 2017) (Stengel, J.) (dismissing bad faith count arising out of UIM claim because "legal recitations are not factual and thus not entitled to the assumption of truth. There are no facts showing how GEICO lacked a reasonable basis for its decision to not pay UIM benefits. There are no facts detailing the actions GEICO or the plaintiffs took in pursuit of the claim. Nor are there any facts specifically describing what was unfair about GEICO's denial or refusal to pay UIM benefits.")

Feingold v. State Farm Mut. Ins. Co., 2015 Phila. Ct. Com. Pl. LEXIS 232, at *7 (Phila. Aug. 12, 2015) (New, J.), *aff'd*, 153 A.3d 1117 (Pa. Super. 2016) (Mundy, J.), *appeal denied*, 160 A.3d 760 (Pa. 2016) (granting preliminary objections and dismissing bad faith claim arising out of UIM dispute, stating: "The allegations of bad faith in Plaintiffs' Complaint merely states [sic] that State Farm did not make a good faith effort to resolve or pay the UIM claim. There are no material facts pled as to how State Farm acted in bad faith . . ."; decision affirmed on grounds that there were no facts to support conclusory allegations)

Camp v. New Jersey Manufacturers Ins. Co., 2016 U.S. Dist. LEXIS 74496, at *16 (E.D. Pa. June 8, 2016) (Heffley, M.J.) (dismissing plaintiff's UIM-related bad faith claim because some of the bad faith allegations were contradicted by the actual facts pled and because some of the allegations were simply conclusory without "additional factual averments from which it could be found that NJMIC's [actions were] . . . in bad faith.")

²²⁶ *Keefe*, 203 F.3d at 228. This case is discussed in detail in §10:19.

²²⁷ *Garvey v. Nat'l Grange Mut. Ins. Co.*, 1995 U.S. Dist. LEXIS 3283, at *8-10.

Canizares v. Hartford Ins. Co. of Illinois, 2016 U.S. Dist. LEXIS 69668, at *5 (E.D. Pa. May 27, 2016) (Pratter, J.) (dismissing plaintiffs' homeowners' policy-related bad faith claim, stating that "[t]he Complaint contains six, rudimentary allegations related to the bad-faith claim, all of which contain legal conclusions which are not entitled to the assumption of truth, and that the complaint even lacked detailed dates with respect to the delay in handling claim, and "[c]onclusory allegations of this nature are not sufficient for a bad-faith claim to survive a motion to dismiss.")

Citi Gas Convenience, Inc. v. Utica Mut. Ins. Co., 2016 U.S. Dist. LEXIS 15503, at *12 (E.D. Pa. Feb. 9, 2016) (Pratter, J.) (dismissing bad faith investigation claim under commercial property policy because "Citi Gas provides no factual allegations that would support such a claim beyond conclusory statements.")

Gowton v. State Farm Fire & Cas. Co., 2016 U.S. Dist. LEXIS 84454 (W.D. Pa. June 29, 2016) (Bissoon, J.) (dismissing bad faith claim for insufficient allegation where sole allegation was that insurer acted in bad faith by refusing to pay certain property claims under policy after home was destroyed by fire)

Kiss v. State Farm Ins. Co., 2016 U.S. Dist. LEXIS 64572, at *6-7 (E.D. Pa. May 17, 2016) (Schmehl, J.) (in UIM-related bad faith claim, court concluded that the bad faith allegations were boilerplate and insufficient under *Iqbal* and *Twombly*, stating "Plaintiff's [sic] boilerplate allegations assert that defendant lacked a reasonable basis for denying plaintiffs' claim for benefits, but do not provide any factual allegations from which the Court could make a plausible inference that defendant knew or recklessly disregarded its lack of a reasonable basis for denying benefits.")

Mills v. Allstate Ins. Co., 2015 U.S. Dist. LEXIS 130862 (E.D. Pa. Sept. 29, 2015) (Baylson, J.) (finding allegations that insurer sent correspondence stating the claim was denied when it was in fact covered, that insurer failed to promptly settle, misrepresented pertinent facts, treated plaintiff with reckless indifference and had no reasonable basis to deny coverage insufficient to state a claim)

Murphy v. State Farm Mut. Auto. Ins. Co., 2016 U.S. Dist. LEXIS 125841, at *10-11 (E.D. Pa. Sept. 15, 2016) (Baylson, J.) (dismissing UIM-related bad faith claim where allegations were conclusory and simply "characterizations of the facts," not facts themselves, and thus "[t]he allegations are 'boilerplate' without any specific demonstration of delay, frivolous refusal to pay the policy proceeds, or failure to communicate with Ms. Murphy.")

Papurello v. State Farm Fire & Cas. Co., 2015 U.S. Dist. LEXIS 154536 (W.D. Pa. Nov. 16, 2015) (Conti, J.) (in putative class action bad faith claim arising out of calculation of estimated replacement costs under homeowners' policies, the court dismissed the class-wide bad faith claim as insufficient, stating that "those factual allegations fail to raise the plausible inference that defendant acted in bad faith with respect to putative class-members in violation of the implied contractual duty of good faith [and], they fail to raise the plausible inference that defendant acted in bad faith with respect to putative class members in violation of §8371.")

Ridolfi v. State Farm Mut. Auto. Ins. Co., 2015 U.S. Dist. LEXIS 156687 (M.D. Pa. Nov. 19, 2015) (Kane, J.) (concluding that allegations that insurer fraudulently provided the wrong policy limits when asked and improperly performed its investigation were conclusory and not supported by sufficient facts to state a bad faith claim, but later decision on amended complaint found allegations sufficient)

Rogowski v. Foremost Ins. Co., 2016 U.S. Dist. LEXIS 95930, at *11 (M.D. Pa. July 21, 2016) (Carlson, M.J.), *adopted by* 2016 U.S. Dist. LEXIS 111618, at *2 (M.D. Pa. Aug. 22, 2016) (Mariani, J.) (adopting recommendation to dismiss the bad faith claim relating to plaintiff's homeowner's policy where "this count of the plaintiff's complaint consists of little more than a paraphrase of the statute, coupled with a factual assertion that the defendant has breached the insurance policy in ways which are undefined, but allegedly willful and malicious.")

Soldrich v. State Farm Fire & Cas. Co., 2015 U.S. Dist. LEXIS 159125 (E.D. Pa. Nov. 25, 2015) (Leeson, J.) (dismissing §8371 claim on grounds that it contained nothing but conclusory allegations: "As in *Mozzo*, nothing in the Complaint sets forth any facts to support these conclusory allegations. For example, Plaintiff alleges that Defendant 'unreasonably delayed the handling of the Plaintiff's insurance claims,' but there are no facts alleged in the Complaint that relate to the alleged delay, such as the length of time that passed between the date when Plaintiff notified Defendant of his claims and the date that Defendant responded to them.")

West v. State Farm Ins. Co., 2016 U.S. Dist. LEXIS 106783 (E.D. Pa. Aug. 11, 2016) (Jones, J.) (granting dismissal with leave to amend where claim of bad faith "low-ball" UM offer lacked facts to support the claim and where an alleged "low-ball" offer alone is insufficient to prove bad faith)

Zinno v. Geico General Ins. Co., 2016 U.S. Dist. LEXIS 127045, at *5 (E.D. Pa. Sept. 19, 2016) (Baylson, J.) (granting without prejudice motion for judgment on pleadings as to UIM-related bad faith claim because allegations were conclusory "without further factual background and allegations", including allegation that defense expert report was in bad faith because it contradicted report of plaintiff's physicians)

Atwood v. State Farm Fire & Cas. Co., 2013 U.S. Dist. LEXIS 121319 (M.D. Pa. Aug. 27, 2013) (Rambo, J.) (“Plaintiff alleges that Defendant undertook an investigation, but fails to make any specific allegations that might constitute bad faith regarding that investigation.”)

Clark v. Progressive Advanced Ins. Co., 2013 U.S. Dist. LEXIS 60221 (E.D. Pa. Apr. 26, 2013) (allegations that plaintiffs were insured with defendant under a policy with UIM benefits, that they were injured in an accident, they complied with the policy and the insurer made an offer too low to satisfy plaintiffs were not sufficient to state a claim for bad faith)

Flynn v. Nationwide Ins. Co. of Am., 2014 U.S. Dist. LEXIS 91431, at *9 (M.D. Pa. July 7, 2014) (Mannion, J.) (“These fifteen allegations are purely conclusory legal statements, and are not factual allegations sufficient to make out plaintiff’s claim for bad faith.... For instance, plaintiffs claim that Nationwide engaged in ‘abusive claims handling’ without explaining what the abusive behavior was. Plaintiffs also make the perfunctory allegation that Nationwide’s payment offers weren’t reasonable, but does not disclose what those offers were, what his damages were, or how defendant’s offers were inadequate and unreasonable.”).

Mattia v. Allstate Ins. Co., 2014 U.S. Dist. LEXIS 86258 (E.D. Pa. June 24, 2014) (Surrick, J.) (dismissing bad faith claim for failure to state a claim because allegations were “conclusory”)

Neal v. State Farm Mut. Auto. Ins. Co., 2014 U.S. Dist. LEXIS 20017 (M.D. Pa. Feb. 18, 2014) (Kane, J.) (dismissing all but one claim of bad faith as conclusory)

Plummer v. State Farm Fire & Cas. Co., 2014 U.S. Dist. LEXIS 87570 (W.D. Pa. June 27, 2014) (Conti, C.J.) (explaining that most of the allegations “fall short because they are conclusions” and explaining that the few facts alleged were so tangentially related to a bad faith claim that it would be undue speculation to allow to proceed)

Wanat v. State Farm Mut. Auto. Ins. Co., 2013 U.S. Dist. LEXIS 183948 (M.D. Pa. Oct. 11, 2013) (Carlson, M.J.) (finding allegations of bad faith conclusory and unable to state a claim and dismissing without prejudice), adopted by, 2014 U.S. Dist. LEXIS 7016 (M.D. Pa. Jan. 21, 2014) (Brann, J.)

Warnstorff v. State Farm Auto. Ins. Co., 2014 U.S. Dist. LEXIS 83551 (M.D. Pa. June 19, 2014) (Mannion, J.) (dismissing bad faith claim without prejudice where allegations of delay and refusal to pay benefits conclusory for failing to provide time frame and failing to provide specific facts showing more than dispute over value of claim)

Smith v. State Farm Mut. Auto. Ins. Co., 506 F. App’x 133, 136 (3d Cir. 2012) (“The complaint consists of conclusory statements unsupported by facts. . . .”)

AmerisourceBergen Corp. v. Ace American Ins. Co., 2013 Phila. Ct. Com. Pl. LEXIS 249 (Phila. July 16, 2013) (Snite, J.), *aff’d*, 2014 PA Super. 198 (Pa. Super. Ct. 2014) (Jenkins, J.) (on coverage issue) (“claims expenses” clause of professional liability policy)

Currie v. State Farm Fire & Cas. Co., 2012 U.S. Dist. LEXIS 190437 (E.D. Pa. Aug. 19, 2014) (Kelly, J.) (homeowner’s policy, granted in part)

Dunn v. Scottsdale Ins. Co., 2013 U.S. Dist. LEXIS 107984 (M.D. Pa. Aug. 1, 2013) (Mannion, J.) (commercial property)

Deibler v. Nationwide Mut. Ins. Co., 2013 U.S. Dist. LEXIS 119723 (W.D. Pa. Aug. 23, 2013) (Bissoon, J.) (auto policy, UM)

Goddard v. State Farm Mut. Auto. Ins. Co., 2014 U.S. Dist. LEXIS 5974 (E.D. Pa. Jan. 16, 2014) (O’Neill, J.) (auto policy, UIM)

Hayden v. Westfield Ins. Co., 2013 U.S. Dist. LEXIS 153334 (W.D. Pa. Oct. 25, 2013) (Hornak, J.), *aff’d*, 2014 U.S. App. LEXIS 17911 (3d Cir. 2014) (Krause, J.) (homeowner’s policy)

Honesdale Volunteer Ambulance Corp., Inc. v. American Alternative Ins. Co., 2014 U.S. Dist. LEXIS 38184 (M.D. Pa. Mar. 24, 2014) (Mannion, J.) (commercial property policy)

Hayes v. American Int’l Group, 2014 U.S. Dist. LEXIS 103564 (E.D. Pa. July 29, 2014) (Hey, M.J.) (long term disability policy)

Hudgins v. Travelers Home & Marine Ins. Co., 2013 U.S. Dist. LEXIS 107775 (E.D. Pa. July 31, 2013) (Yohn, J.) (homeowner’s policy, granted in part)

Kitsock v. Baltimore Life Ins. Co., 2014 U.S. Dist. LEXIS 2155 (M.D. Pa. Jan. 8, 2014) (Schwab, M.J.) (accidental death policy)

Kojsza v. Scottsdale Ins. Co., 2014 U.S. Dist. LEXIS 5286 (M.D. Pa. Jan. 15, 2014) (Mariani, J.) (homeowner's policy)

Lincoln General Ins. Co. v. Gracie Corp. of New Jersey, 2013 Pa. Dist. & Cnty. Dec. LEXIS 190 (Chester Mar. 8, 2013) (Tunnell, J.) (surety agreement)

Lites v. Trumbull Ins. Co., 2013 U.S. Dist. LEXIS 153346 (E.D. Pa. Oct. 25, 2013) (Restrepo, J.) (auto policy, election of tort option)

Miezejewski v. Infinity Auto Ins. Co., 2014 U.S. Dist. LEXIS 7425 (M.D. Pa. Jan. 22, 2014) (Mannion, J.) (auto policy, UIM)

Moran Industries, Inc. v. Netherlands Ins. Co., 2014 U.S. Dist. LEXIS 20081 (M.D. Pa. Feb. 19, 2014) (Brann, J.) (commercial property policy)

Rowe v. Nationwide Ins. Co., 2014 U.S. Dist. LEXIS 36302 (W.D. Pa. Mar. 20, 2014) (Gibson, J.) (auto policy, UIM)

United States Fire Ins. Co. v. Kelman Bottles, 2014 U.S. Dist. LEXIS 71220 (W.D. Pa. May 23, 2014) (Schwab, J.), reconsideration denied, 2014 U.S. Dist. LEXIS 88256 (W.D. Pa. June 27, 2014) (Fisher, J.) (equipment breakdown policy)

Bremme v. State Farm Mut. Ins. Co., 2011 U.S. Dist. LEXIS 155413, at *6-7 (E.D. Pa. Sept. 29, 2011) (“Aside from conclusory statements and bald legal conclusions that are not entitled to deference at this stage of the case, the Amended Complaint contains no real factual averments to suggest that State Farm has acted unreasonably. Plaintiff’s boilerplate allegations of bad faith constitute precisely the type of claim that is insufficient under prevailing pleading standards.”)

Cacciavillano v. Nationwide Ins. Co. of Am., 2012 U.S. Dist. LEXIS 81857 (M.D. Pa. June 13, 2012) (finding that insured failed to plead any facts from which it could be concluded he could meet the legal burden presented by the Terletsky test)

Calandrello v. Sentinel Ins. Co., Ltd., 2013 U.S. Dist. LEXIS 79967, at *12-13 (M.D. Pa. June 7, 2013) (“[O]nce we parse out Plaintiffs’ conclusory statements, the factual allegations fall far short of the requirement that they must be sufficient ‘to raise a right to relief above the speculative level’”)

Clark v. Progressive Advanced Ins. Co., 2013 U.S. Dist. LEXIS 60221, at *4 (E.D. Pa. Apr. 26, 2013) (complaint dismissed where the only allegations relating to bad faith were “legal conclusions, not facts”)

Merrill v. State Farm Fire & Cas. Co., 2013 U.S. Dist. LEXIS 19660 (W.D. Pa. Feb. 13, 2013) (dismissing bad faith claim because “laundry list” of allegations were conclusory and not supported by allegations of fact)

Sypek v. State Farm Mut. Auto Ins. Co., 2012 U.S. Dist. LEXIS 83326, at *7-8 (M.D. Pa. June 15, 2012) (dismissing bad faith claim because the count was simply “conclusory allegations using boilerplate language”)

Palmisano v. State Farm Fire & Cas. Co., 2012 U.S. Dist. LEXIS 116938 (W.D. Pa. Aug. 20, 2012) (“There is simply no factual support for Plaintiffs’ conclusory allegations concerning State Farm’s alleged bad faith conduct and their averments surely do not suffice to allege a plausible claim that could sustain their burden at trial.”)

Yohn v. Nationwide Ins. Co., 2013 U.S. Dist. LEXIS 80703 (M.D. Pa. May 10, 2013) (recommending dismissal without prejudice of conclusory bad faith allegations).

§7:03 — Cases, Plaintiff’s Pleading Found Sufficient

Ridolfi v. State Farm Mut. Auto. Ins. Co., 2016 U.S. Dist. LEXIS 38344, at *10 (M.D. Pa. Mar. 24, 2016) (Carlson, M.J.) (where original complaint was dismissed as indicated in §7:01(a), court decided amended complaint stated a claim because it “goes well beyond a mere boilerplate recital of the elements of the statute” by listing chronology showing alleged delays and information about allegedly improper investigation)

Turner v. State Farm Fire & Cas. Co., 2016 U.S. Dist. LEXIS 4825 (M.D. Pa. Jan. 14, 2016) (Conaboy, J.) (finding allegations relating to fire loss claim sufficient where plaintiffs alleged that insurance existed and the insurer made no payments despite the claim having value)

First Nat’l Bank of Pennsylvania v. Transamerica Life Ins. Co., 2015 U.S. Dist. LEXIS 7854 (W.D. Pa. Jan. 23, 2015) (Eddy, M.J.) (concluding facts alleged in complaint were sufficiently specific to assert bad faith claim in that averments included that insurer did not pay amount owed under policies, that the denial was unreasonable and that the insurer knew there was no reasonable basis to deny coverage)

Hoffman v. State Farm Fire & Cas. Co., 2014 U.S. Dist. LEXIS 180870 (M.D. Pa. Dec. 10, 2014) (Carlson, M.J.), adopted by 2015 U.S. Dist. LEXIS 6701 (M.D. Pa. Jan. 21, 2015) (Brann, J.) (allowing bad faith claim to proceed as

“the complaint goes beyond a mere boilerplate recital of the elements of the statute”, as it contained detail regarding delays, investigation and the insurer’s allegations of misconduct against insureds)

Johnson v. State Farm Mut. Auto. Ins. Co., 2015 U.S. Dist. LEXIS 21786, at *12 (W.D. Pa. Feb. 24, 2015) (Lenihan, M.J.) (denying motion to dismiss on grounds that “the Complaint provides specific information as to the nature of Plaintiff Wife’s injury, the medical evidence provided, the chronology of events, the parties’ course of conduct, and the bases for Plaintiffs’ allegation of statutory bad faith. . . .”)

Kofsky v. Unum Life Ins. Co. of Am., 2014 U.S. Dist. LEXIS 122220 (E.D. Pa. Sept. 2, 2014) (denying motion to dismiss and finding that factual allegations were sufficient to state claim where complaint alleged unilateral cancellation despite plaintiff’s fulfillment of all obligations under the policy)

Lyman v. State Farm Mut. Auto. Ins. Co., 2014 U.S. Dist. LEXIS 173345 (E.D. Pa. Dec. 16, 2014) (finding bad faith allegations relating to UIM claim sufficient to state a claim because allegations included that the insurer denied claims for palliative care despite findings of IME physician and that such denial prevented plaintiff from proving her ongoing injuries and limited her UIM claim)

Lane v. State Farm Mut. Auto. Ins. Co., 2015 U.S. Dist. LEXIS 60064 (M.D. Pa. May 7, 2015) (Mariani, J.) (finding factual allegations relating to a length of time before making offer on UM claim, making offer only after plaintiff claimed bad faith, making unreasonably low offer, and declining to act on records provided for months sufficient to state a claim)

Montgomery v. Allstate Prop. & Cas. Ins. Co., 2015 U.S. Dist. LEXIS 81163 (W.D. Pa. June 23, 2015) (Lenihan, M.J.) (concluding that sufficient facts were pled in the complaint to support a bad faith claim)

Vankirk v. State Farm Mut. Auto. Ins. Co., 2015 U.S. Dist. LEXIS 62067, at *7 (W.D. Pa. May 11, 2015) (Lenihan, M.J.) (“The Court disagrees, however, with Defendant’s assertion that Plaintiff raises only conclusory allegations lacking specific factual support. To the contrary, the Amended Complaint provides specific information as to State Farm’s five-year involvement in this case, the nature of Plaintiff’s injuries, the medical evidence provided, the chronology of events, the parties’ course of conduct, and the factual bases for Plaintiff’s allegation of statutory bad faith as to Defendant’s handling of her UIM claim.”)

Clemens v. New York Central Mut. Fire Ins. Co., 2014 U.S. Dist. LEXIS 22534 (M.D. Pa. Feb. 24, 2014) (Conaboy, J.) (stating that certain paragraphs included factual allegations sufficient to state a claim)

Condi v. State Farm Ins. Co., 2013 U.S. Dist. LEXIS 120873 (M.D. Pa. Aug. 26, 2013) (Munley, J.) (finding allegations relating to how damage occurred sufficient to establish possibility that loss should have been covered, leaving open the possibility of bad faith liability).

(LA) *Municipal Revenue Service, Inc. v. Houston Cas. Co.*, 2014 U.S. Dist. LEXIS 27762 (W.D. Pa. Mar. 5, 2014) (Cohill, J.) (“These allegations constitute ‘enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s].’”)

Militello v. Allstate Prop. & Cas. Ins. Co., 2014 U.S. Dist. LEXIS 86945 (M.D. Pa. June 26, 2014) (Rambo, J.) (finding the allegations that defendant failed to pay the full amount of the claim and made representations to undervalue the claim, even though there were no allegations that the claims decision was purposefully less than the amount to which plaintiff was entitled)

Pauling v. State Farm Mut. Auto. Ins. Co., 2013 U.S. Dist. LEXIS 137950 (M.D. Pa. Sept. 26, 2013) (Conner, J.) (rejecting insurer’s motion to dismiss on failure to adequately plead facts in support of bad faith claim, instead setting forth in its discussion of the allegations a number of specific facts found in the complaint)

Rizk v. State Farm Fire & Cas. Co., 2014 U.S. Dist. LEXIS 70460 (M.D. Pa. May 21, 2014) (Caldwell, J.) (denying motion to dismiss, and finding factual averments that plaintiff heated the building sufficient to state a claim for bad faith application of policy exclusion for frozen pipes in unheated buildings)

Robinson Eye Center, LLC v. State Farm Fire & Cas. Co., 2013 U.S. Dist. LEXIS 59506 (W.D. Pa. Apr. 25, 2013) (held that plaintiff’s allegations that insurer ignored possible explanation for recent roof leak, denied coverage based on reason that had no basis and discouraged filing of a claim were sufficient to state claim for bad faith)

Morosky v. Allstate Ins. Co., 2012 U.S. Dist. LEXIS 14091, at *1 (W.D. Pa. Sept. 28, 2012) (allowing suit to proceed after finding pleading sufficient under “relatively liberal pleading standards applicable in federal court”)

Keppol v. State Farm Ins., 2013 U.S. Dist. LEXIS 10106 (E.D. Pa. Jan. 25, 2013) (holding that plaintiff’s allegations were adequate to state a claim where plaintiff alleged that “he was entitled to coverage for lost wages and that, though he submitted documentation in support of his claim, State Farm has nevertheless refused to pay him benefits in bad faith”)

§7:07 The Applicable Burden of Proof for Bad Faith Actions

(1) *Whitmore v. Liberty Mut. Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 76049 (E.D. Pa. Sept. 30, 2008) (Pratter, J.)

In this case, discussed in §10:05, Judge Pratter of the Eastern District observed that to establish bad faith, “[t]he insured must make this demonstration by clear and convincing evidence, a very significant burden indeed.”²²⁸

(2) *Blaylock v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 1098 (M.D. Pa. Jan. 7, 2008) (Caldwell, J.)

In this case, discussed in §10:07(a), in granting an insurer’s motion for summary judgment as to bad faith, Judge Caldwell of the Middle District wrote:

The plaintiff must meet this burden by clear and convincing evidence. . . . “The ‘clear and convincing’ standard requires that the plaintiff show ‘that the evidence is so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendant[] acted in bad faith.’”²²⁹

(3) *Campbell v. State Farm Mut. Auto. Ins. Co.*, 617 F. Supp. 2d 378 (W.D. Pa. 2008) (Lancaster, J.)

In this case, discussed in §7:11, Judge Lancaster of the Western District confirmed that the clear and convincing evidence standard applied to a common law bad faith claim:

In *Haugh v. Allstate Ins. Co.*, 322 F.3d 227 (3d Cir. 2003), . . . it appears clear that the court of appeals concluded that a common law bad faith claim must be established pursuant to the same evidentiary standard applicable to a statutory bad faith claim, namely, whether the evidence was clear and convincing. . . . Thus, in order to prevail plaintiff must show, by clear and convincing evidence, that defendant acted unreasonably.²³⁰

(4) *Amato v. Rockingham Cas. Co.*, 2006 U.S. Dist. LEXIS 24761 (W.D. Pa. Apr. 11, 2006) (Cercone, J.)

In this case, discussed in §10:09, the court held:

Each element of a bad faith claim must be established by evidence which is “clear, direct, weighty and convincing, so as to enable the [factfinder] to make its decision with a ‘clear conviction’”. . . . Thus, an insurer’s bad faith conduct may not be merely insinuated.²³¹

(5) *Employers Mut. Cas. Co. v. Penn Township*, 2005 U.S. Dist. LEXIS 3432 (E.D. Pa. Feb. 14, 2005) (Padova, J.)

Judge Padova of the Eastern District noted the impact of the clear and convincing evidentiary standard on an insurer’s motion for summary judgment on a bad faith count:

The clear and convincing standard requires that the insured show that “the evidence is so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not [the insurer] acted in bad faith.”. . . . “Thus, the [insured’s] burden in opposing a summary judgment motion is commensurately high in light of the substantive evidentiary burden at trial.”²³²

The court granted the insurer’s motion for summary judgment because the insured had failed to identify any evidence in the record that supported its bad faith claim, and the discovery deadline had expired.²³³

(6) *Kubrick v. Allstate Ins. Co.*, 2004 U.S. Dist. LEXIS 358 (E.D. Pa. Jan. 7, 2004) (Rufe, J.), *aff’d*, 121 F. App’x 447 (3d Cir. 2005) (Fisher, J.)

Judge Rufe of the Eastern District recently addressed the applicable burden of proof in a bad faith case:

The “clear and convincing” evidence standard places a demanding burden on plaintiffs. They have failed to come forward with the requisite evidence that is “so clear, direct, weighty and convincing” that one could reasonably find against the defendant insurer “without hesitancy” and “with a clear conviction.”²³⁴

(7) *Williams v. Hartford Cas. Ins. Co.*, 83 F. Supp. 2d 567 (E.D. Pa. 2000) (Katz, J.), *aff’d without opinion*, 2001 U.S. App. LEXIS 8687 (3d Cir. Apr. 4, 2001)

In this bad faith action arising out of a UIM claim, Judge Katz of the Eastern District discussed the “clear and convincing evidence” standard in the context of a summary judgment motion. According to the court:

²²⁸ *Whitmore v. Liberty Mut. Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 76049, at *22 (E.D. Pa. Sept. 30, 2008) (citing *Cowden v. Aetna Cas. & Sur. Co.*, 134 A.2d 223, 229 (Pa. 1957); *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. Ct. 1994)).

²²⁹ *Blaylock v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 1098, at *21 (M.D. Pa. Jan. 7, 2008) (citing *Greene v. United Servs. Auto. Ass’n*, 936 A.2d 1178 (Pa. Super. 2007) and *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356 (3d Cir. 2004)).

²³⁰ *Campbell v. State Farm Mut. Auto. Ins. Co.*, 617 F. Supp. 2d 378, 383 (W.D. Pa. 2008).

²³¹ *Amato v. Rockingham Cas. Co.*, 2006 U.S. Dist. LEXIS 24761, at *16-17 (citations omitted).

²³² *Employers Mut. Cas. Co. v. Penn Twp.*, 2005 U.S. Dist. LEXIS 3432, at *15 (E.D. Pa. Feb. 14, 2005) (citing *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 367 (3d Cir. 2004)).

²³³ Judge Padova offers the same observations in another bad faith case, *Hollingsworth v. State Farm Fire & Cas. Co.*, 2005 U.S. Dist. LEXIS 3694, at *23 (E.D. Pa. Mar. 9, 2005).

²³⁴ *Kubrick*, 2004 U.S. Dist. LEXIS 358, at *38 (citing *Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747, 752 (3d Cir. 1994)).

In order to defeat a motion for summary judgment, a plaintiff must show that a jury could find by “the stringent level of clear and convincing evidence,” . . . that the insurer lacked a reasonable basis for its handling of the claim and that it recklessly disregarded its unreasonableness.²³⁵

Finding that “there is no clear and convincing evidence by which a reasonable jury could find bad faith,” the district court granted the insurer’s motion for summary judgment as to all of the alleged acts of bad faith.²³⁶

(8) *Collins v. Allstate Ins. Co.*, 1997 U.S. Dist. LEXIS 17047 (E.D. Pa. Oct. 31, 1997) (Waldman, J.)

In this case,²³⁷ the late Judge Waldman of the Eastern District stated that “the clear and convincing standard is a stringent one, surpassed in the law only by proof beyond a reasonable doubt.”²³⁸

§7:11(a) — Cases Holding that Statute of Limitations Expired

(1) *Falo v. Travelers Pers. Ins. Co.*, 2017 U.S. Dist. LEXIS 77425 (W.D. Pa. May 22, 2017) (Schwab, J.)

Plaintiff Falo was injured in an auto accident, following which she filed suit against the other driver (Lutz), who was driving a friend’s car in the course of a robbery for which he was later imprisoned. The car owner had an auto policy with defendant Travelers. Travelers decided that it would not provide Lutz a defense and conveyed that in a letter to Lutz on 2/2/07; the case went to trial and resulted in a verdict of \$1.2M in Falo’s favor. After the verdict, Falo obtained an assignment of rights from Lutz and then filed this bad faith action in 2017. Defendant filed a motion for summary judgment. Judge Schwab of the Western District granted the motion as to the bad faith claim.

The court explained that the 2 years statute of limitations set forth in *Sikirica v. Nationwide Insurance Co.*,²³⁹ applied. Therefore, plaintiff Falo needed to bring the bad faith action no later than 2/2/09. Because she failed to do so, the claim was time barred.²⁴⁰

(2) *Scott v. Travelers Commercial Ins. Co.*, 2016 U.S. Dist. LEXIS 138728 (M.D. Pa. Oct. 6, 2016) (Schwab, M.J.)

Plaintiff Scott was involved in an auto accident in April 2009 and subsequently submitted a claim for first party benefits to his auto insurer, defendant Standard. The policy required Scott to submit to IMEs as often as the insurer requested. Scott refused to attend two separately scheduled IMEs, in October 2009 and January 2010, because Standard did not provide the names of three doctors from which he could choose one to perform the IME. Standard wrote Scott’s counsel by letter dated February 17, 2010 indicating that it would stop paying first party benefits five days after the letter. Scott filed suit in February 2014 and Standard filed a summary judgment motion. Magistrate Judge Schwab of the Middle District granted the motion as to the bad faith claim.

The court concluded that the 2-year statute of limitations applied and the time period began “to run when the insurer first provides clear and unambiguous notice of a refusal to pay under the policy.”²⁴¹ The court explained that the action was filed outside the limitations period, 4 years after the denial letter. Thus, “Scott’s claim for bad faith is barred by the statute of limitations”²⁴²

(3) *United Nat’l Ins. Co. v. Indian Harbor Ins. Co.*, 2016 U.S. Dist. LEXIS 14791 (E.D. Pa. Feb. 8, 2016) (Bartle, J.)

Plaintiff insurer Penn-America was insured by defendant Indian Harbor under a professional liability policy that applied after Penn-America had paid \$1,000,000 per claim. Two personal injury claims were made against Penn-America’s insureds and suits were filed. After resolution of these actions, the Penn-America insureds, Jackson and Peccadillos, filed separate suits against Penn-America for breach of contract and bad faith, based on conduct arising out of the personal injury litigation. Penn-America resolved these actions and then sought coverage under its own policy with Indian Harbor for amounts above the retention, but that coverage was denied, so Penn-America brought this bad faith action. Indian Harbor filed a motion for summary judgment. Judge Bartle of the Eastern District granted the motion as to the Jackson matter on statute of limitations grounds, but denied it as to the Peccadillos matter as discussed in §7:11(b).

The court concluded that the 2-year statute of limitations applied to the statutory bad faith count and that the 4-year statute of limitations applied to the common law bad faith count. Noting that the statutes of limitations on the claims begins to run with a claim denial, the court explained that Indian Harbor denied coverage on the claim relating to the

²³⁵ *Williams v. Hartford Cas. Ins. Co.*, 83 F. Supp. 2d 567, 568 (E.D. Pa. 2000) (citing *Jung v. Nationwide Mut. Fire Ins. Co.*, 949 F. Supp. 353, 356 (E.D. Pa. 1997)).

²³⁶ *Id.* at 568.

²³⁷ *Collins* is discussed further in §9:11.

²³⁸ 1997 U.S. Dist. LEXIS 17047, at *15.

²³⁹ *Sikirica v. Nationwide Insurance Co.*, 416 F.3d 214 (3d Cir.2005).

²⁴⁰ *Falo v. Travelers Pers. Ins. Co.*, 2017 U.S. Dist. LEXIS 77425, at *31 (W.D. Pa. May 22, 2017).

²⁴¹ *Scott v. Travelers Commercial Ins. Co.*, 2016 U.S. Dist. LEXIS 138728, at *14 (M.D. Pa. Oct. 6, 2016).

²⁴² *Scott v. Travelers Commercial Ins. Co.*, 2016 U.S. Dist. LEXIS 138728, at *14 (M.D. Pa. Oct. 6, 2016).

Jackson settlement on October 6, 2010. Because suit was filed on October 9, 2014, “both the statutory and common law breach of duties claims are barred by the statute of limitations with regard to the Jackson settlement.”²⁴³

(4) *Hilston v. American General Life Ins. Co.*, 2015 U.S. Dist. LEXIS 61804 (E.D. Pa. May 12, 2015) (Kearney, J.)

Plaintiff brought this bad faith suit against life insurer AGLIC after it failed to pay benefits under her father’s life insurance policy. Plaintiff brought suit both individually and as the successor trustee of her father’s trust. Plaintiff’s decedent first purchased the life insurance policy in 1995, and the following year, transferred ownership of the policy to his trust, with correspondence directed to the then-trustee, who paid premiums from trust accounts. No premium was paid in December 2008 because, plaintiff maintained, no notice of premium due was sent. Plaintiff also alleged that no notice of lapse or termination was ever sent. On March 3, 2011, the original trustee was notified that the policy had lapsed, and there was further correspondence on the issue in June 2011. Plaintiff’s decedent died in July 2012. In 2013, plaintiff sued the original trustee and subpoenaed various documents from AGLIC, which did not provide any. Plaintiff eventually became the successor trustee. Plaintiff demanded benefits under the policy on April 2, 2014, but the claim was denied on the grounds that the policy had lapsed. Plaintiff filed this bad faith suit in December 2014. AGLIC filed a motion to dismiss on statute of limitations grounds. Judge Kearney of the Eastern District granted the motion as to the claims brought as trustee and denied the motion, as discussed in §7:11(b), as to the individual claims.

The court explained that the bad faith action accrued in January 2009, when the policy was formally lapsed, but that the discovery rule tolled the statute of limitations until the 2011 correspondence with the original trustee regarding the lapse. Because the complaint was not filed within 2 years of that date, it was untimely: “[W]e find that the statute of limitations was tolled until June 15, 2011, at the latest. Because Plaintiff, as trustee, did not commence suit against AGLIC until December 23, 2014, her bad faith claim as a trustee is barred.”²⁴⁴

(5) *Hatchigian v. State Farm Ins. Co.*, 2014 U.S. Dist. LEXIS 5562 (E.D. Pa. Jan. 16, 2014) (Buckwalter, J.), *aff’d*, 574 F. App’x 103 (3d Cir. 2014) (per curiam)

Plaintiff was in an auto accident in 2007, following which he filed a bad faith action against his auto insurer, State Farm, for its handling of his wage loss claim. The parties settled the matter, State Farm issued the settlement check in December 2009, and plaintiff’s attorney and plaintiff subsequently had a disagreement about amounts due the attorney after the attorney had already signed and deposited the check according to his calculations. State Farm issued new checks, including one to both the attorney and plaintiff, in March 2010. The attorney filed suit against plaintiff in April 2010 for defamation, and the parties agreed to settle in November 2011. In January 2012, Plaintiff filed a petition to set aside the praecipe to settle, discontinue and end, which was denied in August 2013. Plaintiff then filed this suit in April 2013, alleging bad faith against State Farm. State Farm moved for summary judgment. Judge Buckwalter of the Eastern District granted the motion and the Third Circuit affirmed in a per curiam opinion.

Plaintiff contended that State Farm acted in bad faith by issuing a settlement check payable to both the attorney and himself. The court explained that State Farm issued the check in March 2010, but plaintiff did not bring this action within the 2-year statute of limitations, so the claim was time-barred: “[Plaintiff] alleges that State Farm violated the Pennsylvania Insurance Bad Faith Statute when it drafted a check payable to both [plaintiff] and [attorney] on March 29, 2010. [Plaintiff] did not bring his claim against State Farm until April 19, 2013, over three years after the alleged violation.”²⁴⁵

The Third Circuit agreed that the bad faith claim was filed untimely and rejected plaintiff Hatchigian’s argument that the statute should have been equitably tolled. The court concluded that the record “flatly contradicts” Hatchigian’s argument that State Farm “‘lulled him into inaction’ by advising him that the statute of limitations was tolled. . . .”²⁴⁶

(6) *Tertyshnaya v. Standard Sec. Life Ins. Co. of N.Y.*, 2013 Phila. Ct. Com. Pl. LEXIS 374 (Phila. Dec. 13, 2013), *for appeal*, 2014 Phila. Ct. Com. Pl. LEXIS 44 (Phila. Jan. 16, 2014) (Snite, J.)

Plaintiff’s decedent had a disability and accidental death policy with defendant insurers. When plaintiff’s decedent died in 1999, plaintiff sought benefits under the disability policy. Defendants denied coverage in 1999 because it did not provide death benefits; following the denial, plaintiff filed this bad faith action in 2010. Defendants filed a motion for summary judgment. Judge Snite of the Court of Common Pleas of Philadelphia granted the motion and then filed an opinion in support of its decision for the appeal.

Defendants contended that plaintiff’s bad faith claim was time barred. The court agreed, explaining that the statute of limitations began running in 1999, when defendants denied coverage, and thus suit had to be filed within 2 years of that date. The court rejected plaintiff’s argument that defendants fraudulently concealed the existence of the accidental death policy, finding that defendants provided evidence to support its position and that plaintiff did not contact defendants about the policy until the statute of limitations had long expired. Further, plaintiff failed to produce any

²⁴³ *United Nat’l Ins. Co. v. Indian Harbor Ins. Co.*, 2016 U.S. Dist. LEXIS 14791, at *36 (E.D. Pa. Feb. 8, 2016).

²⁴⁴ *Hilston v. Am. Gen. Life Ins. Co.*, 2015 U.S. Dist. LEXIS 61804, at *13 (E.D. Pa. May 12, 2015).

²⁴⁵ *Hatchigian v. State Farm Ins. Co.*, 2014 U.S. Dist. LEXIS 5562, at *14-15 (E.D. Pa. Jan. 16, 2014).

²⁴⁶ *Hatchigian v. State Farm Ins. Co.*, 574 F. App’x 103, 106 (3d Cir. 2014).

evidence from which it could infer active concealment of the policy and failed to produce any evidence that she attempted to learn about the existence of such a policy.²⁴⁷

(7) *Sigal v. Gen. Am. Life Ins. Co.*, 2013 U.S. Dist. LEXIS 119652 (W.D. Pa. Aug. 22, 2013) (Eddy, M.J.)

Plaintiff had disability policies with defendant insurers. He was diagnosed with coronary artery disease and as a result, eliminated one portion of his medical practice in 2004, but did not stop working completely. Defendant Paul Revere notified him by letter in 2005 that the policy did not cover his claim on the grounds that he was not totally disabled. An IME also concluded that plaintiff was not restricted in his employment. In 2010, plaintiff needed bypass surgery, following which he submitted additional information in support of his 2005 claim. Defendant denied the claim for benefits prior to surgery because the information did not show he was unable to work during that time. It then denied the claim for benefits following the surgery, again because it concluded it did not meet the definition of sickness defined in the policies. After plaintiff filed this bad faith action in 2013, defendant filed a motion to dismiss. Magistrate Judge Eddy of the Western District of Pennsylvania granted the motion as to the bad faith claim.

Defendant contended that plaintiff's claims were time barred by the statute of limitations. Plaintiff argued that the word "deny" did not appear in the 2005 or 2010 letters, so they did not trigger the statute of limitations. Further, the plaintiff maintained that the 2005 letter was equivocal insofar as it indicated additional information could be submitted and the decision could be appealed.

Applying the 2 year statute of limitations, the court explained that a statutory bad faith action "accrues at the point where the insurer first provides definite notice of its decision as to the benefits requested."²⁴⁸ The court concluded that the bad faith claims accrued in 2005 on "the date of the initial benefits determination,"²⁴⁹ and on the date of the 2010 letter. The lack of the word "deny" in the letters was irrelevant because it was clear from the language in the letter that defendant was, in fact, denying benefits. Further, the 2005 letter following the IME also indicated that the information provided did not satisfy the policy requirements. Even if a decision could not be considered final if there was a right to appeal, the statute had long since passed the deadline for such appeal.

The court also rejected plaintiff's attempt to reconstitute the earlier claims by connecting them to the 2010 claim. Plaintiff's decision not to appeal the 2005 decision meant that it was time barred from challenging the decision in this suit and the court would not undermine the purpose of statutes of limitations. All of the bad faith claims were time barred.

(8) *American Collision & Auto. Ctr., Inc. v. Windsor-Mt. Joy Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 139490 (E.D. Pa. Sept. 27, 2012) (Gardner, J.)

Several members of the Galati family provided funds for down payment on a boat. Following the purchase, one family member obtained insurance protecting the boat against loss by fire with defendant insurer. Subsequently, the boat was damaged by fire. The law enforcement investigators concluded that the fire was started by a vagrant. The insurer denied the claim. That family member filed suit against the insurer alleging he was entitled to coverage and that coverage had been improperly denied. The matter proceeded to trial, and a jury returned a verdict in favor of the insurer. This bad faith suit, by the other family members and the loss payee, followed. Defendant insurer filed a motion to dismiss on the grounds that the bad faith count was barred by the statute of limitations. Judge Gardner of the Eastern District granted the motion and dismissed the complaint with prejudice.

The court noted that a two-year statute of limitations applied. The court grouped all of the allegations of bad faith into three subsets and addressed each in turn. With respect to the allegations that the insurer acted in bad faith in investigating the claim and denying coverage, the court measured the accrual of the cause of action from the time of the denial. The claim had been denied on March 27, 2007. Because suit was not filed until December 2010, it was untimely.

The court also addressed allegations of bad faith relating to defendant insurer's actions in the first suit. The court, as explained in discussion of this case in §10:21, found that such allegations could not provide a basis for a bad faith cause of action, so it concluded that such allegations were also barred by the statute of limitations, as measured from the time of the claim denial: "Therefore, I conclude that defendant's conduct during the Philadelphia County Action is subject to the same statute of limitations period that began to run upon defendant's initial refusal to pay policy benefits. . . . Accordingly, plaintiffs' claim that defendant acted in bad faith during the course of litigation is also barred by the statute of limitations."²⁵⁰

The third subset of bad faith allegations related to defendant insurer's refusal to respond to requests for information by plaintiffs following the original litigation. The court found these allegations likewise barred by the statute of limitations because they arose out of the original denial of benefits. The court explained that once a claim has been denied, additional or subsequent denials do not provide new basis for a bad faith claim and do not provide new accrual

²⁴⁷ *Tertyshnaya v. Standard Sec. Life Ins. Co. of N.Y.*, 2014 Phila. Ct. Com. Pl. LEXIS 44, at *15 (Phila. Dec. 16, 2013).

²⁴⁸ *Sigal v. Gen. Am. Life Ins. Co.*, 2013 U.S. Dist. LEXIS 119652, at *17 (W.D. Pa. Aug. 22, 2013).

²⁴⁹ *Sigal v. Gen. Am. Life Ins. Co.*, 2013 U.S. Dist. LEXIS 119652, at *20 (W.D. Pa. Aug. 22, 2013).

²⁵⁰ *American Collision & Auto. Ctr., Inc. v. Windsor-Mt. Joy Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 139490, at *22 (E.D. Pa. Sept. 27, 2012) (footnote omitted).

dates for the statute of limitations.²⁵¹ The court concluded that plaintiffs' requests for information "stem solely and precisely from the original denial of coverage" Therefore, this conduct is subject to the same limitations period which commenced following defendants' initial refusal to pay policy benefits on [the] claim."²⁵²

(9) *Lloyd's London v. United Fin. Cas. Co.*, 2012 U.S. Dist. LEXIS 89992 (E.D. Pa. June 28, 2012) (Schiller, J.)

The driver of an oversized load drove under a bridge that was shorter than his load, causing damage to the truck and cargo. The driver sought coverage from his insurer, Lloyd's, who then proceeded in a subrogation action against the company that owned the escort car that drove ahead of the truck. United Financial, the insurer for the escort car denied coverage; Lloyd's obtained a judgment and then filed an action (presumably as assignee of rights under the policy) against United Financial for breach of contract and bad faith. Defendant United Financial filed a motion to dismiss. Judge Schiller of the Eastern District granted the motion as to the bad faith claim.

The court explained that the two-year statute of limitations for bad faith claims under §8371 began "to run when the insurer first provides definite notice of a refusal to provide coverage."²⁵³ Because United Financial denied coverage on August 13, 2009, the statute of limitations ran two years later than that—on August 13, 2011. Plaintiff filed the complaint on March 20, 2012, so the claim was time-barred.

(10) *Leporace v. N.Y. Life & Annuity*, 2011 U.S. Dist. LEXIS 147056 (E.D. Pa. Dec. 21, 2011), *reconsideration denied*, 2012 U.S. Dist. LEXIS 8019 (E.D. Pa. Jan. 24, 2012) (Baylson, J.)

Plaintiff had a disability policy with New York Life. In June 1997, he submitted a claim for benefits, and the claim was approved. Plaintiff received monthly benefits through May 2005, at which point New York Life maintained that plaintiff was no longer disabled, and thus not eligible for benefits. In March 2010, plaintiff requested that his benefits be reinstated, but his claim was denied insofar as it sought benefits from 2005 through 2010. Plaintiff filed suit in March 2011, alleging bad faith. New York Life filed a motion to dismiss, arguing that the claim was time barred. Judge Baylson of the Eastern District granted the motion to dismiss on the claim that New York Life acted in bad faith with respect to the denial in May 2005, and the failure to pay subsequent benefits stemming from that decision. Judge Baylson subsequently denied plaintiff's motion for reconsideration.

The court noted that the two-year tort statute of limitations applied to the statutory bad faith claim and that the bad faith claim accrued when benefits were terminated.²⁵⁴ Because plaintiff claimed New York Life acted in bad faith in terminating coverage in May 2005, and in failing to pay subsequent benefits, the court concluded that the bad faith claim accrued in May 2005. Suit was filed more than two years after that decision, so it was time barred.

(11) *CRS Auto Parts, Inc. v. Nat'l Grange Mut. Ins. Co.*, 645 F. Supp. 2d 354 (E.D. Pa. 2009) (Buckwalter, J.), *aff'd*, 312 F. App'x 483 (3d Cir. 2009) (McKee, J.)

CRS, an auto parts supplier, obtained an insurance binder from Turley, acting as an agent of National Grange Mutual Insurance Company. Two CRS employees were involved in an accident during the course of their employment, and worker's compensation claims were submitted to National Grange. A dispute existed as to whether Turley had authority to issue a binder on behalf of National Grange, leading the insurer to deny the claims. CRS filed suit against National Grange alleging a breach of contract, bad faith, and fraud.

National Grange filed a motion for summary judgment, arguing that the claims by CRS were barred by the statute of limitations. Citing *Ash v. Continental*, Judge Buckwalter acknowledged that §8371 had a two-year statute of limitations.

Citing *Haugh v. Allstate*, the court concluded that a common law bad faith claim was subject to a four-year statute of limitations. The court held that the claim was barred under either bad faith theory. The court found that National Grange gave notice of its denial of coverage on August 26, 2003, and CRS did not file its federal court action asserting statutory bad faith until April 28, 2008.

Defendant unequivocally gave notice of its denial of coverage on August 26, 2003. Under well-established jurisprudence, the bad faith claim accrued on that date. While plaintiff alleges several continuing denials of coverage, such as failure to adequately investigate and failure to acknowledge the authority of its agent, these acts relate back to the initial denial and do not give rise to separate counts of bad faith. Ultimately, plaintiff did not file its federal court action first setting forth its bad faith claim until April 28, 2008, more than four and a half years after the accrual date. As such, regardless of whether the court applies a two or four year limitations period, plaintiff's bad faith claim is facially time-barred.²⁵⁵

²⁵¹ *American Collision & Auto. Ctr., Inc. v. Windsor-Mt. Joy Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 139490, at *19-20 (E.D. Pa. Sept. 27, 2012) (footnote omitted) (quoting *CRS Auto Parts, Inc. v. Nat'l Grange Mut. Ins. Co.*, 645 F. Supp. 2d 354, 365 (E.D. Pa. 2009)).

²⁵² *American Collision & Auto. Ctr., Inc. v. Windsor-Mt. Joy Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 139490, at *24 (E.D. Pa. Sept. 27, 2012) (footnote omitted) (quoting *CRS Auto Parts, Inc. v. Nat'l Grange Mut. Ins. Co.*, 645 F. Supp. 2d 354, 372 (2009)).

²⁵³ *Lloyd's London v. United Fin. Cas. Co.*, 2012 U.S. Dist. LEXIS 89992, at *6 (E.D. Pa. June 28, 2012).

²⁵⁴ *Leporace v. N.Y. Life & Annuity*, 2011 U.S. Dist. LEXIS 147056, at *11, 13 (E.D. Pa. Dec. 21, 2011).

²⁵⁵ *CRS Auto Parts, Inc. v. Nat'l Grange Mut. Ins. Co.*, 645 F. Supp. 2d 354, 366 (E.D. Pa. 2009).

CRS invoked the discovery rule to argue that its cause of action arose after the denial of an appeal which was taken. The court rejected this argument, reiterating that the accrual date occurred when the plaintiff was fully advised of the claim denial in August 2003.

CRS also alleged that the insurer was liable for separate acts of bad faith that included acts within the federal lawsuit, and in a related federal declaratory judgment action. According to the plaintiff, such bad faith acts included threatening prosecution, intentionally losing files, and misrepresenting facts to CRS and the court during a related declaratory judgment action. Citing *Precision Door Co., Inc. v. Meridian Mutual Insurance Co.*,²⁵⁶ the court rejected these arguments:

At their core, both the declaratory judgment action and the current litigation stem solely and precisely from the original denial of coverage by defendant to plaintiff and from the parties' efforts to determine whether that denial was proper. As such, any alleged bad faith actions taken by Defendant during such litigation relate directly to and are subsumed by the bad faith claim arising from the initial denial of coverage. Although evidence of such continuing bad faith litigation tactics might have been admissible to prove the underlying bad faith claim were it not time-barred, such evidence does not create a separate claim of bad faith triggering the running of separate statute of limitations.²⁵⁷

(12) *Gardner v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 42471 (W.D. Pa. June 12, 2007) (Lancaster, J.), *aff'd*, 544 F.3d 553 (3d Cir. 2008) (Padova, J.)

This case arose from State Farm's denial of coverage under a rental exclusion in a homeowner's insurance policy issued to the policyholder, Harper. State Farm sent a letter to Harper on April 4, 2003 denying coverage for an August 2002 slip and fall sustained on Harper's property by a third party. Harper had not advised State Farm that he had been renting out the property. In March 2004, the injured party passed away from other causes. In August 2004, Gardner, as administratrix of the estate, filed a negligence action against Harper. Harper never responded to the complaint. In May 2006, Gardner obtained a default judgment against Harper in the negligence action. In June 2006, after a damages assessment, the trial court entered judgment against Harper for \$1,664,757.52 plus costs and interest.

On April 8, 2005, counsel for Gardner filed a writ of summons in Allegheny County entitled *Harper v. State Farm*. At the time the writ was filed, Harper had not assigned his rights to Gardner, nor had he authorized Gardner's counsel to act on his behalf. On June 22, 2005, Harper assigned his rights and claim to Gardner. On June 29, 2005, Gardner's counsel served the writ on State Farm. State Farm removed the matter to federal court. On September 14, 2005, Gardner, as the assignee of Harper, filed a complaint against State Farm, which included counts for breach of contract and bad faith. State Farm moved for summary judgment.

Judge Lancaster of the Western District held that State Farm's coverage interpretation was correct and that there was no duty to defend or indemnify Harper in connection with the slip and fall. With respect to the bad faith count, the district court found that it was barred by the two-year statute of limitations. Citing *Adamski*, the court held that the statute of limitations for bad faith began to run when a cause of action accrues, which occurred when State Farm denied Harper coverage on April 4, 2003. Although the complaint was not filed until September 2005, the plaintiff argued that it should relate back to when the writ was filed in April 2005. However, the court found that Harper had not authorized Gardner or her counsel to act on his behalf, and the rights were not assigned until June 22, 2005. The court held that Harper's cause of action for bad faith accrued on or shortly after the April 4, 2003 denial letter, and the September 14, 2005 complaint was filed untimely.

The Third Circuit, in an opinion authored by Senior Judge Padova, sitting by designation, affirmed the district court decision. The court agreed with the district court that the April 2005 filing of the writ of summons did not toll the statute of limitations that continued to run until Harper assigned his right to Gardner in June of 2005:

Harper's assignment of his claims against State Farm to Appellant after the statute of limitations had run was legally ineffective to save the claims from the statute of limitations bar. Thus, we affirm the District Court's dismissal of the negligence and statutory bad faith claims on statute of limitations grounds.²⁵⁸

In a separate footnote, the court rejected Gardner's argument that the April 2003 letter was not a clear and unambiguous denial of coverage, and that there was no proof that the denial letter was actually mailed and received. The court found that the plain language of the letter was a clear and unambiguous denial, and that Harper did not deny receiving it. The court further stated:

While we do not know the exact date on which Harper received the letter, the few days of uncertainty are inconsequential given that Harper did not assign his claims to Appellant until more than two

²⁵⁶ *Precision Door Co., Inc. v. Meridian Mut. Ins. Co.*, 2005 U.S. Dist. LEXIS 17999 (E.D. Pa. Aug. 23, 2005), discussed in this Section and §10:21.

²⁵⁷ *CRS Auto Parts, Inc. v. Nat'l Grange Mut. Ins. Co.*, 645 F. Supp. 2d 354, 375 (E.D. Pa. 2009).

²⁵⁸ *Gardner v. State Farm Fire & Cas. Co.*, 544 F.3d 553, 563 (3d Cir. 2008).

months after the statute of limitations had expired, making the precise date on which the statute began to run immaterial to our analysis.²⁵⁹

(13) *Romeo v. UNUMProvident Corp.*, 2008 U.S. Dist. LEXIS 10199 (E.D. Pa. Feb. 11, 2008) (Yohn, J.)

The insured claimed that she was disabled and unable to return to work after being injured in a 1994 motor vehicle accident. In 1995, the insured began receiving monthly disability benefits from her disability carrier. On March 3, 2001, the insured received a letter from the insurer dated February 28, 2001 advising that no further benefits were due under the claim because of a finding that the insured was not disabled from her sedentary occupation. The insurer invited the insured to submit additional information for further consideration of the claim or to send a written request for an appellate review. The insured appealed the determination and also forwarded additional medical information to the insurer. The insurer issued a letter upholding the claim denial on July 6, 2001.

In early 2004, the insured sent in additional medical information, and as a result, her claim was reopened by the insurer, effective December 18, 2003. The insurer determined that the insured was entitled to disability insurance benefits beginning March 18, 2004. The insured believed the insurer to have been considering paying her benefits from March 2001 to March 2004, and therefore sent the insurer medical reports dating back to 2001. The company did not agree to make such payments. Further disputes over benefits arose, with the company ultimately agreeing to pay benefits subject to a reservation of rights while the parties litigated the coverage dispute.

The insured filed suit on June 15, 2006, alleging breach of contract and bad faith as a result of the termination of insurance benefits from March 2001 to March 2004. The insurer filed a motion for summary judgment asserting that the statute of limitations had expired as to insured's breach of contract and bad faith claims. Judge Yohn of the Eastern District agreed with the insurer and found that the breach of contract and bad faith claims accrued on March 3, 2001 for purposes of the statute of limitations and were time-barred. The court held that a bad faith claim "accrues when the insured first learned that the insurance company was denying coverage."²⁶⁰ According to the court, that occurred with the denial letter of March 3, 2001.

The insured argued that the applicable limitations periods did not begin to run on that date because the insurer suggested that it would review the termination of benefits or would reopen the claim if the insured submitted additional evidence of disability. The court found this argument unpersuasive, observing that the insured's own complaint stated that from the insurer's March 3, 2001 letter, she became aware the insurer "failed in the performance of its obligations under the contract, mainly, the obligation to compensate plaintiff for disability benefits from March 2001 to March 2004" and "unreasonabl[y] and in bad faith" stopped paying disability benefits. Therefore, the court held that the insured's causes of action for both breach of contract and bad faith accrued on March 3, 2001, and "the limitations period with respect to her bad faith claim expired on March 3, 2003."²⁶¹

(14) *Campbell v. State Farm Mut. Auto. Ins. Co.*, 617 F. Supp. 2d 378 (W.D. Pa. 2008) (Lancaster, J.)

Campbell was a passenger in an automobile driven by Heathcock that was involved in a single car accident. There was a question as to whether the Heathcock vehicle was insured by State Farm. State Farm believed it had canceled the Heathcock policy prior to the date of the accident. Campbell asserted a liability claim against Heathcock. On August 9, 2002, State Farm advised Heathcock that it was denying coverage of the accident due to the cancellation of the policy.

On January 27, 2004, Campbell instituted a lawsuit against Heathcock. A default judgment was entered. On August 10, 2005, a non-jury trial on the issue of damages was held, resulting in a judgment of approximately \$144,000 on November 15, 2005. On April 17, 2006, Heathcock assigned his claims against State Farm to Campbell. Campbell filed a lawsuit on June 1, 2006, alleging common law bad faith, and statutory bad faith under §8371.

Judge Lancaster of the Western District granted State Farm's Motion for Summary Judgment as to the statutory bad faith claim, finding that it was time-barred.

In *Sikirica v. Nationwide Ins. Co.*, the Court of Appeals for the Third Circuit predicted that . . . the Pennsylvania Supreme Court would find that a statute of limitations begins to run when a cause of action arises or accrues which, in a bad faith claim, is when coverage is denied. . . . Here, there is no dispute that defendant denied Mr. Heathcock coverage by letter dated August 9, 2002.

Further, it is well established that, upon assignment of a claim, the assignee obtains no greater rights than the insured . . .

Therefore, Mr. Heathcock's claim for bad faith, which is now plaintiff's claim by virtue of the assignment, accrued on August 9, 2002. This suit was filed more than two (2) years later. Accordingly, plaintiff's claim for bad faith pursuant to 42 Pa.Cons.Stat. §8371 is untimely. . . .²⁶²

²⁵⁹ *Gardner v. State Farm Fire & Cas. Co.*, 544 F.3d 553, 563 n.5 (3d. Cir. 2008).

²⁶⁰ *Romeo v. UNUMProvident Corp.*, 2008 U.S. Dist. LEXIS 10199, at *9-10 (E.D. Pa. Feb. 11, 2008).

²⁶¹ *Romeo v. UNUMProvident Corp.*, 2008 U.S. Dist. LEXIS 10199, at *19-20 (E.D. Pa. Feb. 11, 2008).

²⁶² *Campbell v. State Farm Mut. Auto. Ins. Co.*, 617 F. Supp. 2d 378, 382 (W.D. Pa. 2008).

Plaintiff Campbell argued that a bad faith action could not have been instituted before final judgment was rendered, by virtue of the “no action clause” in the policy that provided that no lawsuit could be instituted until the amount of damages due an insured was determined by judgment after trial. The court rejected this argument, stating,

In *Apaluci v. Agora Syndicate, Inc.*, the Court of Appeals for the Third Circuit . . . predicted that the Pennsylvania Supreme Court would hold that “no action” clauses do not preclude suits by an insured against an insurer who has allegedly breached a contractual duty to defend.²⁶³

(15) *McCullough v. Northwestern Mut. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 95134 (W.D. Pa. Oct. 24, 2007) (Cercone, J.)

The disability insurer denied plaintiff’s claim in writing on January 28, 2002 because its investigation revealed that the plaintiff’s activities demonstrated an ability to function normally in spite of any claimed symptoms and limitations. In its denial letter, the insurer indicated that the plaintiff could appeal the denial and submit additional documentation for review within thirty days.

On February 1, 2002 the plaintiff appealed the denial. On February 5, 2002, the insurer upheld the denial, but advised that a second review was available if desired. The plaintiff requested a second review, and on June 6, 2002, the insurer again upheld the denial at the second level of review. The plaintiff did not contact the insurer again until June 25, 2003, when he asked that it reconsider his appeal of the denial of disability benefits. The insurer indicated that it would consider new information, and also gave the plaintiff the opportunity to file a new claim for a different period of disability. The plaintiff submitted additional medical information, which was reviewed. The insurer concluded that the plaintiff failed to demonstrate that his medical condition prevented him from performing the principal duties of his occupation.

On January 5, 2005, the plaintiff filed a complaint against the insurer, alleging breach of contract and bad faith. The insurer filed for summary judgment on the plaintiff’s bad faith claim on grounds that it was barred by the applicable two-year statute of limitations.

The insurer argued that the plaintiff’s cause of action arose on January 28, 2002, the date the insurer denied the claim. The insurer contended that although the plaintiff took full advantage of the review process, he could have instituted an action once his claim was initially denied, and therefore the statute of limitation began to run on January 28, 2002. The plaintiff responded that his cause of action did not accrue until the insurer clearly and unequivocally denied his claim. In the plaintiff’s view, since the insurer continued to analyze his claim well into 2002, and even revisited his claim in 2004, his cause of action for bad faith did not accrue until the insurer denied his claim following reconsideration of his appeal in 2004. Judge Cercone of the Western District disagreed with the plaintiff, finding his position “contrary to both Pennsylvania and Third Circuit law.”²⁶⁴ The court held that the insurer’s January 2002 denial letter “unambiguously informed Plaintiff that his claim for disability benefits under the insurance policy was denied and his file closed,”²⁶⁵ so that “Plaintiff’s bad faith claim is barred by the two-year statute of limitations.”²⁶⁶

(16) *Loughren v. United Servs. Auto. Ass’n*, No. GD03-24533 (Court of Common Pleas of Allegheny County June 8, 2005) (Folino, J.), appeal denied without opinion, 2007 Pa. LEXIS 971 (Pa. May 1, 2007)

Loughren was permanently injured in an automobile accident with an underinsured motorist on August 3, 1993. He had an auto policy with USAA that include d \$1.2 million in UIM coverage. Plaintiff made a claim to USAA before August 3, 1995 and indicated that his claim was worth more than the policy limits. In response, on October 12, 2001, USAA offered \$200,000 in coverage. Following consideration by a panel of arbitrators on February 6, 2003, the arbitrators valued Loughren’s claim at \$4 million. USAA then paid the policy limits.

Loughren filed a bad faith suit against USAA on December 5, 2003. Loughren’s complaint alleged that USAA acted in bad faith when it failed to pay promptly the UIM benefits to which he claimed he was entitled. USAA filed a motion for summary judgment on the grounds that the claim was barred by the two-year statute of limitations. In a non-reported slip opinion, Judge Folino of the Court of Common Pleas of Allegheny County granted the insurer’s motion.

The court’s decision focused on when Loughren’s bad faith claim accrued. Loughren argued that the statute of limitations did not begin to run until the arbitrators awarded an amount over the policy limits, because it was that “excess” award that established that USAA had acted in bad faith in its earlier \$200,000 offer. However, his complaint alleged that the bad faith at issue was USAA’s low offer to settle the claim and the court held that the date of the allegedly low offer was the appropriate time at which the statute of limitations commenced running. According to the court, it was at that time that USAA allegedly acted in bad faith, and it allegedly continued acting in bad faith until it paid the policy limits. The court found support in Pennsylvania Superior Court precedent:

²⁶³ *Campbell v. State Farm Mut. Auto. Ins. Co.*, 617 F. Supp. 2d 378, 382 (W.D. Pa. 2008).

²⁶⁴ *McCullough v. Northwestern Mut. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 95134, at *7 (W.D. Pa. Oct. 24, 2007).

²⁶⁵ *McCullough v. Northwestern Mut. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 95134, at *9 (W.D. Pa. Oct. 24, 2007).

²⁶⁶ *McCullough v. Northwestern Mut. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 95134, at *9-10 (W.D. Pa. Oct. 24, 2007).

The Superior Court noted, in *Adamski*, that the fact that the insurer *continued* to deny coverage to the insured did not somehow extend the statute of limitations. The Superior Court noted that “such a construction has been sagaciously rejected by all legal authority that has considered it.” *Id.* at 1041. Similarly, in the case before me, the fact that Defendant USAA continued to decline to pay the policy limits after October 12, 2001 did not somehow extend the running of the statute of limitations.²⁶⁷

The court rejected Loughren’s argument that the bad faith claim did not accrue until payment under the policy had been made:

In the case before me, Plaintiff Michael C. Loughren argues that the statute of limitations on his bad faith claim begins to run not when the insurer commits bad faith, but rather when the insurer makes payment under the insurance contract (after the UIM arbitration) on the underinsured motorist claim. This approach, however, has been rejected by the Superior Court. . . . Likewise, in the case before me, the bad faith claim accrued when the insurer committed bad faith, not when the arbitration panel in the contract action ruled favorably to the insured.²⁶⁸

The court held that plaintiff’s claim alleging bad faith in the refusal to pay the policy limits accrued when the insurer refused to pay the policy limits.²⁶⁹ The court declined to adopt Loughren’s argument that the bad faith claim could not have accrued until the arbitration award which established the value of the claim. The court ruled that this argument conflicted with the legal standards for bad faith claims:

Plaintiff’s bad faith claim, in effect, is that back in October 2001, the insurer refused to pay its \$1.2 million policy limits, even though *any* reasonable person (including any reasonable UIM arbitration panel) would have paid the \$1.2 million limits at that time. That is why the insurer’s action is bad faith: because it is refusing to make a payment that every reasonable person would have made at that time. Plaintiff’s bad faith claim does not depend on the finding of any particular arbitration panel, because it was apparent to any reasonable person that the policy limits were due.²⁷⁰

(17) *National Recovery Agency, Inc. v. AIG Domestic Claims, Inc.*, 2006 U.S. Dist. LEXIS 27889 (M.D. Pa. May 9, 2006) (Smyser, M.J.)

Plaintiffs National Recovery Agency (NRA) and Diversified Billing Services (DBS), companies in the debt collection business, purchased an errors and omissions insurance policy from Illinois National. They were sued by a third party, Forward Thinking Inc., and tendered the suit to the insurer for defense and indemnity. When the insurer denied the third party claim for defense and indemnification, plaintiffs filed a declaratory judgment action and bad faith claim against Illinois National.

Magistrate Judge Smyser of the Middle District allowed the insurer to amend its answer to assert a statute of limitations defense. Then, applying the two-year statute of limitations under *Haugh*, the court held that the claim of NRA was time-barred. Illinois National provided clear notice by letter dated November 9, 2000 that it would not defend or indemnify NRA, and NRA did not commence the bad faith action until January 6, 2005.²⁷¹

NRA contended that when Forward Thinking filed an amended complaint, and Illinois National denied the defense again on October 1, 2004, such act constituted a separate and distinct act of bad faith that was not barred by the statute of limitations. Citing *Adamski*, however, the court denied this argument, stating, “The defendants’ denial of coverage and a defense to NRA in 2004 was a reaffirmation of its earlier denial in 2000.”²⁷²

With respect to plaintiff DBS, the court held that its bad faith claim was not barred by the statute of limitations, because DBS was not named in the original third party complaint.

(18) *Jones v. Harleysville Mut. Ins. Co.*, 900 A.2d 855 (Pa. Super. 2006) (Del Sole, P.J.)

A property insured by Harleysville was damaged by fire on August 1, 1999. On July 27, 2000, Harleysville issued a letter to the insured denying the claim, stating that a decision was based upon the defenses of arson, misrepresentation and fraud. The insured was ultimately arrested and charged with arson, but was acquitted in October 2001. Thereafter, Harleysville was notified that the plaintiffs would be resubmitting a claim for property loss. In a letter dated March 25, 2002, Harleysville advised the plaintiff that it was conducting an additional investigation and was ordering a copy of the criminal trial transcript. In July 2002, Harleysville wrote a letter affirming its previous decision. The plaintiff filed a bad faith count against Harleysville on November 6, 2002.

The Superior Court upheld a dismissal of the plaintiffs’ bad faith claim based on the statute of limitations. The plaintiff argued that Harleysville had thrown plaintiffs “off guard” when it reopened its investigation. Applying the two-year statute of limitations, the Superior Court rejected plaintiffs’ argument:

²⁶⁷ *Loughren v. United Servs. Auto. Ass’n*, No. GD03-24533 (Court of Common Pleas Allegheny County June 8, 2005), slip op. at 5-6.

²⁶⁸ *Loughren v. United Servs. Auto. Ass’n*, No. GD03-24533 (Court of Common Pleas Allegheny County June 8, 2005), slip op. at 6.

²⁶⁹ *Loughren v. United Servs. Auto. Ass’n*, No. GD03-24533 (Court of Common Pleas Allegheny County June 8, 2005), slip op. at 7-8.

²⁷⁰ *Loughren v. United Servs. Auto. Ass’n*, No. GD03-24533 (Court of Common Pleas Allegheny County June 8, 2005), slip op. at 7.

²⁷¹ *National Recovery Agency, Inc. v. AIG Domestic Claims, Inc.*, 2006 U.S. Dist. LEXIS 27889, at *21 (M.D. Pa. May 9, 2006).

²⁷² *National Recovery Agency, Inc. v. AIG Domestic Claims, Inc.*, 2006 U.S. Dist. LEXIS 27889, at *26 (M.D. Pa. May 9, 2006).

We cannot agree that the actions of Harleysville had any impact on appellants' ability to seek recourse for the denial of coverage under the policy. The actions referred to by the trial court taken by Harleysville following Jones' acquittal could not have lulled appellants from pursuing their rights under the policy when the applicable limitation period under the policy had expired before the criminal trial was completed. The limitation period expired in August of 2001, and the actions taken by Harleysville referred to by appellants and the trial court were not undertaken until sometime after Jones' acquittal in October of 2002. We have already held that the criminal proceeding did not act to extend the limitations period due to any actions by Harleysville and we cannot see how any actions taken by Harleysville after the expiration of the limitations period "threw Jones off guard" as to her duties under the policy.²⁷³

(19) Precision Door Co., Inc. v. Meridian Mut. Ins. Co., 2005 U.S. Dist. LEXIS 17999 (E.D. Pa. Aug. 23, 2005) (Brody, J.)

Precision Door was insured under a liability policy issued by Meridian Mutual Insurance Company. Precision Door was providing construction services for a general contractor, L.F. Driscoll Company, Inc. Under the terms of its contract with Driscoll, Precision Door was required to provide insurance coverage for Driscoll. A former Precision Door employee instituted an action against Driscoll for injuries sustained at a construction site. Driscoll tendered the complaint to Precision Door, which was contractually obligated to indemnify it.

Precision Door, in turn, tendered the complaint to Meridian. On September 5, 2001, Meridian forwarded a letter indicating that it was conducting an investigation of the claim, and was reserving the right to assert any and all defenses it might have under the applicable policy as to the underlying action. On October 23, 2001, Driscoll issued a joinder complaint against Precision Door. Precision Door filed a breach of contract and bad faith action against Meridian, alleging that the insurer improperly refused to tender the proceeds of the policy on September 5, 2001, and failed to respond to a demand by Precision Door for coverage on the claim raised in the joinder complaint.

In addressing statute of limitation issues, Judge Brody of the Eastern District applied a two-year statute of limitations. In determining whether the statute had run, the court stated, "[A] court must first determine the date on which the right to institute and maintain suit arose and then determine whether a party was unable to reasonably discover that he or she had been injured such that the statute of limitations should be tolled."²⁷⁴

The court cited *Adamski* and *Sikirica*, both cited in this Section, and held that the statute of limitations began to run on September 5, 2001. Precision Door argued that the statute did not begin to run at that time because Precision Door was not yet injured. The court rejected this argument, stating:

Precision Door did not have the liberty of waiting to bring suit until two years after the Court of Common Pleas decided that the provision requiring Precision Door to procure insurance coverage for Driscoll and the contract between Precision Door and Driscoll was enforceable. To the extent that Precision Door could sue Meridian for bad faith refusal to pay the proceeds of the policy to Driscoll that right existed as of Meridian's failure to tender on September 5, 2001, and the statute of limitations began to run on that date.²⁷⁵

Precision Door argued that even if it were injured on September 5, 2001, the statute of limitations must be tolled by the discovery rule until Precision Door learned of its injury. Since the September 5, 2001 letter did not expressly refuse to tender, the court held that it may not have given Precision Door sufficient notice. However, the court ruled that by October 23, 2001, when Driscoll filed the joinder complaint, Precision Door "definitely knew or reasonably should have known of the refusal to tender."²⁷⁶ The court held that, even accepting that argument, the statute was only tolled until October 23, 2001, and the bad faith action was filed more than two years after that date.

Lastly, Precision Door asserted independent factual bases for its bad faith claim. Citing *Adamski* and *Sikirica*, the court held that Precision Door was not entitled to "separate initial and continuing refusals to provide coverage into distinct acts of bad faith."²⁷⁷ The court held that all but one of the alleged additional acts stemmed from Meridian's original denial of coverage, and were thus time barred. The court permitted the allegations which were not related to the original denial of coverage to proceed.

(20) Green v. Altman, 2004 U.S. Dist. LEXIS 19145 (E.D. Pa. Sept. 21, 2004) (Surrick, J.)

In this case, Judge Surrick of the Eastern District applied the two year statute of limitations in finding that plaintiff's §8371 claim was time-barred. In so holding, the court recognized that Pennsylvania applied the "occurrence rule" with respect to when a statute of limitations begins to run:

²⁷³ *Jones v. Harleysville Mut. Ins. Co.*, 900 A.2d 855, 858-59 (Pa. Super. 2006), *reargument denied*, 2006 Pa. Super. LEXIS 1583 (Pa. Super. May 2, 2006).

²⁷⁴ *Precision Door Co., Inc. v. Meridian Mut. Ins. Co.*, 2005 U.S. Dist. LEXIS 17999, at *10 (E.D. Pa. Aug. 23, 2005).

²⁷⁵ *Precision Door Co., Inc. v. Meridian Mut. Ins. Co.*, 2005 U.S. Dist. LEXIS 17999, at *13 (E.D. Pa. Aug. 23, 2005).

²⁷⁶ *Precision Door Co., Inc. v. Meridian Mut. Ins. Co.*, 2005 U.S. Dist. LEXIS 17999, at *16 (E.D. Pa. Aug. 23, 2005).

²⁷⁷ *Precision Door Co., Inc. v. Meridian Mut. Ins. Co.*, 2005 U.S. Dist. LEXIS 17999, at *18 (E.D. Pa. Aug. 23, 2005) (citing *Adamski v. Allstate Ins. Co.*, 738 A.2d 1033, 1042 (Pa. Super. 1999)).

“A claim under Pennsylvania law accrues at ‘the occurrence of the final significant event necessary to make the claim sueable.’ . . . Under the occurrence rule the statutory period commences upon the happening of the alleged breach of duty.”²⁷⁸

The court ruled that the plaintiff “should have reasonably been aware of the alleged conduct which served as the basis for the claims against State Farm” more than two years prior to the suit being filed, and therefore the claim was barred.²⁷⁹

(21) *Simon Wrecking Co., Inc. v. AIU Ins. Co.*, 350 F. Supp. 2d 624 (E.D. Pa. 2004) (Brody, J.)

Between 1974 and 1979 Simon Wrecking Company was insured under comprehensive general liability policies issued by CNA, Liberty Mutual and AIU. All of the policies contained nearly identical “pollution exclusion” clauses. In November 1996, Simon received a notice from the U.S. Environmental Protection Agency that it may have incurred a liability in connection with a site it owned, formerly operated by a chemical company. In February 1997, Simon notified AIU, Liberty Mutual and CNA of the receipt of the EPA notice and made a request for defense and coverage for claims arising in connection with the notice.

In October 1997, both AIU and Liberty Mutual wrote to Simon and advised that coverage was being denied based upon the pollution exclusion clause in each respective policy. In December 2000, CNA issued a letter to Simon reserving its rights under the policy, and asking Simon for additional information. In July 2002, Simon learned that a lawsuit had been initiated against it in connection with the clean up of the site. Simon wrote a letter dated July 30, 2002 to all of the insurers requesting that they defend Simon in the underlying lawsuit, reimburse Simon for legal costs incurred since 1998, and further requesting that the insurers’ “reservations or coverage decisions be reexamined” in light of the Pennsylvania Supreme Court’s decision in *Sunbeam Corp. v. Liberty Mutual Ins. Co.*²⁸⁰

In December 2002, a formal complaint was filed against Simon. In February 2003, CNA responded to Simon’s July 30, 2002 letter, and requested further information. In March 2003, Liberty Mutual responded to Simon’s July 30, 2002 letter, stating that it had denied coverage in 1997, and therefore a suit by Simon would be barred by the statute of limitations. AIU did not respond to Simon’s July 30, 2002 letter.

Simon filed an action for declaratory judgment, breach of contract and bad faith against AIU, Liberty Mutual and CNA. The insurers moved for summary judgment on all counts.

Relying heavily upon *Adamski v. Allstate Ins. Co.*,²⁸¹ Judge Brody of the Eastern District granted the motion for summary judgment as to bad faith filed by Liberty Mutual and AIU, but denied the motion filed by CNA. According to the court, *Adamski* required the court to determine when Simon was first put on notice that the insurance company defendants were denying coverage. The court held that CNA’s letter was not a denial of coverage, but was merely a reservation of rights and a request for more information. Therefore, the court concluded that the statute of limitations did not begin running with respect to Simon’s claim against CNA.

With respect to the claims against AIU and Liberty Mutual, the court held that the denial letters by those companies were sufficient to put Simon on notice that the claim was being denied, and therefore the statute of limitations began running at the date of the denial letters.

Simon argued that the insurance company defendants committed additional separate and distinct acts of bad faith subsequent to the initial denials of coverage. First, Simon argued that the insurers acted in bad faith when they failed to provide coverage after the actual complaint was filed in December 2002. The court rejected this argument with respect to AIU and Liberty Mutual, finding that their denials “put Simon on notice that they would not cover any claims arising from the contamination at the Malvern site.”²⁸² Simon also argued that the insurers should have reconsidered their coverage position in light of the *Sunbeam Corporation* decision. The court rejected this argument noting, “In Pennsylvania intervening changes in law do not revive actions that have already been barred by the running of the statute of limitations.”²⁸³ According to the court, “The two-year statute of limitations for these claims would have run in October 1999, long before the Pennsylvania Supreme Court decided *Sunbeam* in 2001.”²⁸⁴

As an interesting aside, the court denied the insurer’s motions for summary judgment with respect to the breach of contract claim, which was governed by a four-year statute of limitations. The court held that Simon had a reasonable argument that the contractual statute of limitations did not begin running until actual performance was due under the contract, which would have been when the lawsuit was filed.

(22) *Lang v. Continental Assurance Co.*, 2002 U.S. App. LEXIS 24536 (3d Cir. Dec. 4, 2002) (Barry, J.)

The plaintiff began receiving benefits under a disability policy in 1987. In May 2000 he instituted a lawsuit alleging, among other claims, that the insurer breached the contract and acted in bad faith by not providing cost of

²⁷⁸ *Green v. Altman*, 2004 U.S. Dist. LEXIS 19145, at *13-14 (E.D. Pa. Sept. 21, 2004) (citations omitted).

²⁷⁹ *Green v. Altman*, 2004 U.S. Dist. LEXIS 19145, at *28-29 (E.D. Pa. Sept. 21, 2004) (citations omitted).

²⁸⁰ 781 A.2d 1189 (Pa. 2001).

²⁸¹ 738 A.2d 1033 (Pa. Super. 1999).

²⁸² *Id.*

²⁸³ *Id.* at 634.

²⁸⁴ *Id.*

living increases to his benefits. The district court dismissed the complaint as being barred by the applicable statute of limitations. In an unpublished opinion, the Third Circuit affirmed.

Expressly relying upon *Adamski v. Allstate*, the Third Circuit held that the statute of limitations began running in December 1989, when the plaintiff was informed that the insurer would not be providing the cost of living adjustment. The court held that the harm to the plaintiff occurred at that time, and the plaintiff was not entitled to “separate initial and continuing refusals to provide coverage into distinct acts of bad faith.”²⁸⁵

(23) Sun Co., Inc. v. Brown & Root-Braun, Inc., 2000 Dist. LEXIS 17765 (E.D. Pa. Dec. 8, 2000) (Newcomer, J.)

In a third party case, where the insurer failed to respond to the insured’s written demand that it tender a defense, it was held that the period of limitation for a bad faith claim begins to run shortly after the date of the insured’s letter.

§7:11(b) — Cases Holding That Statute of Limitations Had Not Expired

(1) Katzenmoyer v. Allstate Ins. Co., 2012 U.S. Dist. LEXIS 123483 (E.D. Pa. Aug. 30, 2012) (Shapiro, J.)

In this case involving a third party excess verdict, discussed in §7:10, Judge Shapiro of the Eastern District held that the four-year statute of limitations begins to run at the time of the excess verdict, and not when the liability insurer rejected a pre-trial settlement demand. According to the court, “Although Pennsylvania law is unclear on this issue, it seems unlikely the Pennsylvania Supreme Court would adopt a rule requiring plaintiffs to file bad faith suits within 4 years of a failure to settle without an explicit, unambiguous denial of coverage.”²⁸⁶

(2) Butler v. Scottsdale Ins. Co., 2009 U.S. Dist. LEXIS 8461 (E.D. Pa. Feb. 5, 2009) (Davis, J.)

In February 2006, Scottsdale Insurance Company denied a defense and indemnity to its insured in a third-party lawsuit filed by the plaintiff, Butler. Scottsdale later rescinded its denial of coverage on September 7, 2006, pending further investigation. The insured assigned its rights to Butler who on September 19, 2008, sued Scottsdale, alleging breach of contract, common law bad faith and statutory bad faith under §8371. Scottsdale moved to dismiss the bad faith claim on grounds that (1) the two-year statute of limitations barred the §8371 claim, and (2) Pennsylvania does not recognize a common law cause of action for bad faith.

Scottsdale argued that the statute of limitations on the bad faith claim began to run when it denied coverage on February 27, 2006. However, the district court did not agree based on Scottsdale rescinding its denial of coverage on September 7, 2006:

In light of the rescission of the initial denial, there was no denial of coverage that could have formed the basis for a bad faith claim. Scottsdale has failed to cite any decision where a statutory bad faith claim was held to have accrued on the date of the initial denial despite subsequent rescission of the initial denial. Due to Scottsdale’s rescission of its initial denial, we cannot say that “definite” or “clear” notice of denial was provided to Service Plus on February 27, 2006. Any statute of limitations defense is therefore not apparent on the fact of the Complaint, and Scottsdale’s motion to dismiss Butler’s statutory bad faith claim must fail.²⁸⁷

As to the common law bad faith claim, the court disagreed with Scottsdale that Pennsylvania did not recognize any such action. Citing cases such as *Birth Center v. St. Paul*,²⁸⁸ the court stated that “Pennsylvania does recognize a common law cause of action for bad faith based in contract.”²⁸⁹ According to the court, the statute of limitations for a common law bad faith claim was four years, and even if Butler’s common law bad faith claim accrued on February 27, 2006, it would have been timely when commenced on September 19, 2008.²⁹⁰

(3) Bonsu v. Jackson Nat’l Life Ins., 2007 U.S. Dist. LEXIS 79267 (M.D. Pa. Oct. 11, 2007) (Conner, J.)

Jackson National filed a motion for partial summary judgment based upon the two-year statute of limitations for bad faith claims. The original *pro se* complaint, which was timely filed, did not allege a bad faith count. The amended *pro se* complaint, however, did include a bad faith count that Jackson National argued was time-barred. The *pro se* plaintiff argued that the original complaint gave adequate notice of his bad faith claim even though it did not contain a formal count for bad faith. Judge Conner of the Middle District agreed with the *pro se* plaintiff, reasoning that the required liberal reading of the original complaint provided notice of the bad faith claim via the allegation that Jackson National did not investigate the matter, as it said it would, before denying the claim. Thus, Judge Conner denied Jackson National’s motion for partial summary judgment.

²⁸⁵ *Lang v. Continental Assurance Co.*, 2002 U.S. App. LEXIS 24586, at *6 (citing *Adamski v. Allstate Ins. Co.*, 738 A.2d at 1042).

²⁸⁶ *Katzenmoyer v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 123483, at *11-12 (E.D. Pa. Aug. 30, 2012).

²⁸⁷ *Butler v. Scottsdale Ins. Co.*, 2009 U.S. Dist. LEXIS 8461, at *8 (E.D. Pa. Feb. 5, 2009) (citing *Compare Nat’l Recovery Agency, Inc. v. AIG Domestic Claims, Inc.*, 2006 U.S. Dist. LEXIS 27889, at *9 (M.D. Pa. May 9, 2006)).

²⁸⁸ 567 Pa. 386, 787 A.2d 376, 386 (Pa. 2001).

²⁸⁹ *Butler v. Scottsdale Ins. Co.*, 2009 U.S. Dist. LEXIS 8461, *9-10 (E.D. Pa. Feb. 5, 2009) (citations omitted).

²⁹⁰ *Id.* at *10.

(4) *Hatchigian v. Hartford Ins. Co.*, 2003 U.S. Dist. LEXIS 15666 (E.D. Pa. Aug. 13, 2003) (Buckwalter, J.)

Plaintiff was listed as an insured under his wife's insurance policy. Following an automobile accident that left him unable to work, plaintiff filed a claim with the defendant insurer for lost wages. Approximately one year after plaintiff filed his claim, the insurer paid plaintiff \$6,009.60 and sent him a letter stating that it considered the claim closed. Thereafter, the insurer conceded that it owed plaintiff an additional \$468.80, which it paid. Plaintiff then sent the insurer a letter demanding an additional payment of \$7,628.60. The insurer never answered the letter.

Plaintiff filed suit against the insurer, asserting claims for bad faith, breach of contract and intentional infliction of emotional distress. The insurer moved to dismiss the claims, arguing that plaintiff's statutory bad faith claim under §8371 was barred by the applicable two-year statute of limitations, and because he failed to file his action within two years of the mailing date of either the original check for \$6,009.60 or the additional check for \$468.80. Plaintiff argued that the statute of limitations did not begin to run until 45 days after the insurer received his letter demanding the additional payment, because the unfair claims regulations²⁹¹ required defendant to respond within 45 days.

Judge Buckwalter of the Eastern District agreed with the plaintiff. Although when the insurer issued its first payment it indicated that "this matter was closed," the court held that when the insurer sent the subsequent check, "its actions demonstrated that the matter was not closed."²⁹² According to the court,

This additional check lent support to [plaintiff's] argument that he could not have known Hartford acted in bad faith until 45 days after his request for additional payment. This confusion demonstrates that the discovery rule may be applicable in this case, and the date that the statute of limitations began to run is a question of fact for a jury to determine.²⁹³

In addition, according to the court, the plaintiff's complaint could be read to assert a claim for contractual bad faith for a breach of the duty of good faith and fair dealing, which, the court ruled, could be governed by a four-year statute of limitations.

(5) *Haugh v. Allstate Ins. Co.*, 322 F.3d 227 (3d Cir. 2003) (Greenberg, J.)

In September 1993, Uher struck and severely injured Haugh in an automobile accident. Uher was insured with Allstate, with liability policy limits of \$15,000. Allstate's claims adjuster, after conducting an investigation, concluded that Uher was not liable for the accident, and so informed Haugh's attorney. Haugh's attorney disputed that conclusion, and wrote a letter in March 1994 stating that his client would be willing to settle the claim for the \$15,000 limits, but that the offer would automatically be revoked within thirty days if not accepted. Within that thirty-day window, Allstate rejected the settlement offer. In May 1994, Haugh's counsel advised that the offer to settle for the policy limits was withdrawn.

Haugh filed suit against Uher in July 1994. In September 1995 the insurer reversed its position, and offered to settle the case with Haugh for \$15,000. This offer was rejected, and in March 1998 a verdict was rendered in Haugh's favor for \$740,000. After the verdict, Uher assigned to Haugh the right to any potential bad faith claims against Allstate in exchange for Haugh's promise to refrain from executing on the judgment against Uher. Haugh, as Uher's assignee, filed a bad faith action against Allstate in October 1999, asserting a common law bad faith action, as well as a §8371 action. Judge Lancaster of the Western District ruled that the plaintiff's claim was barred by the applicable two-year statute of limitations that accrued in May 1994 when Haugh's counsel advised that he was withdrawing the offer to settle.

On appeal, the Third Circuit, in an opinion by Judge Greenberg, reversed. The court ruled that Haugh's right to bring a common law bad faith action would be governed by the four-year contractual statute of limitations, and thus was not time barred.

With respect to Haugh's §8371 bad faith claim, the Third Circuit ruled that the two-year tort statute of limitations applied, but disagreed with the district court as to when the statute of limitations began to run. The Third Circuit noted the existence of legal authority "holding that an insured's claim for its insurer's bad faith refusal to settle does not accrue until the excess judgment in the underlying case becomes final."²⁹⁴ Without adopting that precedent, the court ruled that the "discovery rule" would apply to the tolling of the statute of limitations, and that "in 1994 Haugh had no way of knowing that four years later he would prevail in his action against Uher and that Uher thereafter would execute an assignment agreement with him so that he would be in a position . . . to sue Allstate for bad faith."²⁹⁵ The court held that the question of when Uher knew or should have known of Allstate's breach of fiduciary obligation was a matter to be determined by the trier of fact.

²⁹¹. See *infra* §§8:02-8:04.

²⁹². *Hatchigian*, 2003 U.S. Dist. LEXIS 15666, at *10.

²⁹³. *Id.* at *10-11.

²⁹⁴. *Haugh v. Allstate*, 322 F.3d 227, 231 (S.D. Cal. 1950) (citing among other cases, *Torrez v. State Farm Mut. Auto. Ins. Co.*, 705 F.2d 1192, 1202 (10th Cir. 1982)). In *Sikirica v. Nationwide Ins. Co.*, 416 F. 3d 214 (3d Cir. 2005), discussed in this section, the Third Circuit observed that this statement in *Haugh* was non-binding dicta.

²⁹⁵. *Haugh v. Allstate*, 322 F.3d 227, 233 (S.D. Cal. 1950).

(6) *Kubrick v. Allstate Ins. Co.*, PICS Case No. 02-1160 (E.D. Pa. July 15, 2002) (Waldman, J.)

In this case, the plaintiff asserted that the defendant insurer inordinately delayed payment of UIM benefits. The late Judge Waldman of the Eastern District held that because the statute of limitations for a bad faith action premised on delay of payment of benefits did not begin to run until the date payment was finally made, the plaintiff's claims were not time barred.

§7:15 — Cases, Federal Jurisdiction Allowed

(1) *Koerner v. GEICO Cas. Co.*, 2017 U.S. Dist. LEXIS 75856 (M.D. Pa. May 18, 2017), later proceeding at 2017 U.S. Dist. LEXIS 91836 (M.D. Pa. June 14, 2017) (Conaboy, J.)

This bad faith action arose out of the parties' inability to resolve Plaintiff's UM claim. Plaintiff initially filed an action alleging only a contract count. After she amended her complaint to include a bad faith count, defendant removed. Plaintiff filed a motion to remand contending that the initial complaint was removable and hence the later removal was untimely. Judge Conaboy of the Middle District of Pennsylvania denied the motion. The court's decision granting the subsequent motion to dismiss is discussed at §§3:12 and 12:02.

The initial complaint did not set forth a specific amount of damages, stating only that she was entitled to UM coverage under her policy and that her damages were in excess of the mandatory arbitration amount. The contract in effect at the time of the accident provided for \$15,000 in UM coverage. The court concluded:

the type of boilerplate language contained here in the Complaint and cover sheet does not allow a defendant to conduct an objective calculation of damages that would have provided notice of an amount in controversy in excess of \$75,000. . . . Furthermore, to accept Plaintiff's conclusions would be to support the proposition that the basis for removal is apparent and must take place whenever a plaintiff seeks compensation for unspecified injuries in general terms and/or when the state court filing cover sheet indicates damages in excess of the policy limits.²⁹⁶

Plaintiff also contended that defendant should have known the case was removable after she provided responses to defendant's written discovery requests, prior to the amended complaint. Although the court concluded that discovery responses could be an "other paper" for purposes of the removal statute, in this case, those responses were not specific enough to put defendant on notice of damages in excess of the policy limits: "Considered in the proper factual and legal context, Plaintiff has not provided a basis to conclude that medical records supplied in response to a request for production of documents makes the amount in controversy ascertainable—the documents do not "make it unequivocally clear and certain that federal jurisdiction lies."²⁹⁷

Finally, the court explained that the punitive damages requested in connection with the bad faith count were statutorily available and under the case law rendered the amount in controversy met: "Therefore, federal court jurisdiction is proper irrespective of the amount of uninsured motorist coverage in Plaintiff's insurance policy and the precise amount of coverage is not relevant to the removal/remand question at hand."²⁹⁸

(2) *Pecko v. Allstate Ins. Co.*, 2016 U.S. Dist. LEXIS 129569 (E.D. Pa. Sept. 22, 2016) (Pratter, J.)

Plaintiff Pecko filed a breach of contract and bad faith action in state court when she and her homeowner's insurer, defendant Allstate, could not resolve her homeowner's claim. After Allstate removed to federal court, plaintiff filed a motion to remand. Judge Pratter of the Eastern District denied the motion.

Peck contended that because she filed her action as an arbitration matter, with damages capped at \$50,000, the case did not meet the amount in controversy requirement. The court disagreed for three reasons. First, the court explained that on appeal from an arbitration award, Pecko's damages would no longer be capped, so there would be no limit to her recovery. Second, the court noted that Pecko had attached invoices totaling over \$135,000 to her complaint, which showed that "Allstate has met its heightened burden to prove to a legal certainty that the amount in controversy exceeds \$75,000. . . ."²⁹⁹ Finally, the court concluded that the bad faith claim allowed for recovery of punitive damages, which it

must consider . . . when calculating the amount in controversy unless the claim for punitive damages is frivolous. . . . Here, Ms. Pecko's claim for punitive damages is not frivolous because they are provided for by 42 Pa. Cons. Stat. §8371. . . . While a claim for punitive damages alone is too speculative to push the amount in controversy over the jurisdictional threshold . . . the Court finds that, in conjunction with estimated damages of \$136,905.20, Ms. Pecko's claim for punitive damages weighs in favor of a determination that the amount in controversy requirement is met.³⁰⁰

A subsequent decision in this case is discussed in §§8:04(b) and 10:07(b).

²⁹⁶. *Koerner v. GEICO Cas. Co.*, 2017 U.S. Dist. LEXIS 75856, at *11 (M.D. Pa. May 18, 2017).

²⁹⁷. *Koerner v. GEICO Cas. Co.*, 2017 U.S. Dist. LEXIS 75856, at *14 (M.D. Pa. May 18, 2017).

²⁹⁸. *Koerner v. GEICO Cas. Co.*, 2017 U.S. Dist. LEXIS 75856, at *16 (M.D. Pa. May 18, 2017).

²⁹⁹. *Pecko v. Allstate Ins. Co.*, 2016 U.S. Dist. LEXIS 129569, at *8 (E.D. Pa. Sept. 22, 2016).

³⁰⁰. *Pecko v. Allstate Ins. Co.*, 2016 U.S. Dist. LEXIS 129569, at *9 (E.D. Pa. Sept. 22, 2016).

(3) *West Chester Univ. Found. v. MetLife Ins. Co. of Conn.*, 2016 U.S. Dist. LEXIS 15437 (E.D. Pa. Feb. 9, 2016), dismissed on other grounds, 2016 U.S. Dist. LEXIS 66480 (E.D. Pa. May 20, 2016) (Jones, J.)

Plaintiff filed this bad faith action after defendant MetLife sold a particular type of life policy to plaintiff's donors to facilitate donations. After defendant removed the action, plaintiff filed a motion to remand. Judge Jones of the Eastern District denied the motion.

The primary issue was the amount in controversy. The court looked to the fact that plaintiff could recover attorney's fees under §8371, although the amount could not be determined, in concluding that defendant had met the amount in controversy requirement. The court also looked at the potential to recover punitive damages under the statute, noting that they could be aggregated with the compensatory damages claim in the suit. The court calculated the compensatory portion of the award to be \$57,000. The court concluded: "Based on this Court's calculation of the compensatory damages at issue, however, it is not necessary to hypothesize about such an award; with compensatory damages at \$57,000, even just a 1:1 ratio of punitive to compensatory damages will exceed the amount in controversy."³⁰¹

(4) *Sloan v. Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 56666 (E.D. Pa. Apr. 29, 2015) (Stengel, J.)

Plaintiff filed this breach of contract and bad faith suit against her homeowner's insurer, defendant Liberty, in state court. After defendant removed, plaintiff filed a motion to remand. Judge Stengel denied the motion.

Noting that the amount in controversy was the only issue in determining whether the court had diversity jurisdiction, the court explained that it must "measure the amount not by the low end of an open-ended claim, but by a reasonable reading of the value of rights being litigated."³⁰² The court decided that it could not conclude to a legal certainty that plaintiff could not recover the amount in controversy. The court looked to the fact that the breach of contract and bad faith counts each separately sought recovery of an amount not in excess of \$50,000. It also explained that the bad faith count sought punitive damages and attorney's fees, each of which would be considered in determining the amount in controversy and that these requests "could easily put the amount in controversy over the jurisdictional limit."³⁰³ The court noted that "an award of punitive damages of just over two times the claimed compensatory damages in this case would put the plaintiff's claim over the \$75,000.000 threshold."³⁰⁴

The court also noted that a plaintiff's refusal to stipulate to limit damages would not affect the determination: "[W]hether the plaintiff has refused to stipulate and limit her damages to less than \$75,000, has no effect on this determination. Even if a plaintiff states that her claims fall below the threshold, a court must look to see if the plaintiff's actual monetary demands in the aggregate exceed the threshold, irrespective of whether the plaintiff states that the demands do not."³⁰⁵

(5) *Chester v. Utica First Ins. Co.*, 2017 U.S. Dist. LEXIS 12096 (W.D. Pa. Jan. 30, 2017) (Fischer, J.)

Plaintiff filed this bad faith complaint after defendant insurer refused to defend plaintiff in the underlying action, the nature of which was not described. After defendant removed the case, plaintiff sought remand. Judge Fischer of the Western District denied the motion; Judge Fischer's opinion, as it relates to defendant's motion to dismiss is discussed in §9:17.

The court explained in short order that the action met the requirements for subject matter jurisdiction under §1332, because the parties were of diverse citizenship and the amount in controversy exceeded \$75,000. The court focused its discussion on the allegations of a bad faith, which included such averments as a disclaimer prior to suit, a faulty investigation and refusal to reassess the coverage position with new information. The court also found no conflict between the defendant's position in the state court action and the coverage position in the declaratory judgment action. As a result of all of the factors enunciated in *Reifer* weighing in favor of the court's exercise of discretion, except the convenience of the parties, the court concluded "that a fair balancing of all of these considerations does not counsel the Court to decline to exercise jurisdiction over this matter."³⁰⁶

(6) *Tube City IMS Corp. v. Allianz Global Risks U.S. Ins. Co.*, 2014 U.S. Dist. LEXIS 165654 (W.D. Pa. Nov. 3, 2014) (Mitchell, M.J.), adopted by 2014 U.S. Dist. LEXIS 164495 (W. D. Pa. Nov. 25, 2014) (Cercone, J.)

Plaintiff suffered losses when a part in the furnace system fractured and shut down the manufacturing facility for a period of time. Thereafter, it sought coverage for the damage and for the shut-down from Allianz under its boiler and machinery policy. When Allianz denied coverage, plaintiff filed this bad faith action in state court. After Allianz removed, plaintiff filed a motion to remand. Magistrate Judge Mitchell recommended that the court deny the motion; Judge Cercone subsequently adopted the report and recommendation without discussion.

³⁰¹ *West Chester Univ. Found. v. MetLife Ins. Co. of Conn.*, 2016 U.S. Dist. LEXIS 15437, at *11 (E.D. Pa. Feb. 9, 2016) (citations omitted).

³⁰² *Sloan v. Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 56666, at *3 (E.D. Pa. Apr. 29, 2015).

³⁰³ *Sloan v. Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 56666, at *5 (E.D. Pa. Apr. 29, 2015).

³⁰⁴ *Sloan v. Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 56666, at *3 (E.D. Pa. Apr. 29, 2015).

³⁰⁵ *Sloan v. Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 56666, at *5 (E.D. Pa. Apr. 29, 2015).

³⁰⁶ *Chester v. Utica First Ins. Co.*, 2017 U.S. Dist. LEXIS 12096, at *3 (W.D. Pa. Jan. 30, 2017).

In its motion to remand, plaintiff contended that the court should abstain from exercising jurisdiction because the legal issues were to be decided only under state law. The court noted that plaintiff sought declaratory judgment, as well as set forth claims for breach of contract, bad faith, and negligent and intentional misrepresentation, and the case law did not address abstention in this situation, only where there was simply a declaratory judgment claim. The court concluded that no matter what abstention test was applied, federal jurisdiction was appropriate, and “therefore, the Court should retain jurisdiction....”³⁰⁷

(7) *Brown v. Liberty Mut. Fire Ins. Co.*, 2006 U.S. Dist. LEXIS 76139 (E.D. Pa. Oct. 19, 2006) (Stengel, J.)

The plaintiffs filed an action in state court against automobile insurer, Liberty Mutual Group. Upon learning that the policy was insured by a different group, Liberty Mutual Fire Insurance Company (“Liberty Fire”), plaintiffs then filed a second lawsuit alleging two counts, breach of contract and bad faith, and demanding in excess of \$50,000 for each of the two claims. Liberty Fire removed the second case to federal court, and plaintiff sought a remand.

Plaintiffs argued that the case against Liberty Fire was so related to the initial lawsuit that it was not properly removed. Judge Stengel of the Eastern District rejected this argument. According to the court, if the face of a complaint demonstrates that there is diversity of citizenship among the parties and the amount in controversy exceeds \$75,000, then the federal court was required to exercise its jurisdiction. According to the court, “cases that are properly within the federal courts jurisdiction after removal ‘may not be remanded for discretionary reasons not authorized by the controlling statute.’”³⁰⁸ The court held that plaintiff’s demand of \$50,000 for each of the two claims satisfied the amount in controversy requirement. According to the court, “federal courts have a ‘virtually unflagging obligation . . . to exercise the jurisdiction given them.’”³⁰⁹

According to the court, the mere fact that the federal court action was related to the pending state court action did not give the court discretion to remand the matter back to state court.

(8) *Craker v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 47342 (W.D. Pa. May 3, 2011) (Lancaster, C.J.)

Plaintiffs filed suit in state court alleging breach of contract and bad faith in connection with a UIM claim with policy limits of \$400,000. The insurer, State Farm, removed to federal court. Plaintiffs filed a motion to remand, which Chief Judge Lancaster of the Western District of Pennsylvania denied.

The relevant policy provision set forth that should insured and insurer fail to agree to an amount to recover on a UIM claim, the insured must file suit in a location having jurisdiction over the insurer and any other parties who might be liable for any damages. Plaintiffs contended that the language of the policy gave them the sole right to choose a forum because it operated as a waiver of State Farm’s right to remove. The court disagreed with plaintiffs’ interpretation of the provision, finding instead that the provision “govern[ed] the type of dispute resolution available...rather than the location thereof. . . . As such, the clause could not reasonably be interpreted to waive State Farm’s right to remove an action filed by the Crakers [plaintiffs] in state court.”³¹⁰

Further, the court found that the provision did not operate to waive State Farm’s right to object to the plaintiffs’ choice of forum because the policy language did not so state:

State Farm does not agree in the policy to “submit” to the jurisdiction of any court. . . . Although the policy directs the Crakers to file a lawsuit “in a state or federal court that has jurisdiction” the policy does not go on to indicate that State Farm forfeits its right to object to the jurisdiction of the court selected by the Crakers. Because State Farm does not submit to the jurisdiction of the court selected by the Crakers, and because State Farm retains its right to challenge the jurisdiction of the court selected by the Crakers, we conclude that the policy language cannot be reasonably interpreted to constitute a waiver of State Farm’s right to remove.³¹¹

(9) *Hutton v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 3395 (W.D. Pa. Jan. 13, 2011) (McVerry, J.)

Husband and wife plaintiffs filed a personal injury action against the driver of a vehicle alleged to have caused a car accident, injuring the wife. While the personal injury action was pending, plaintiffs filed suit against State Farm, their own auto insurer, alleging breach of contract for failing to pay their UIM claim, and bad faith. State Farm removed the case to federal court, where plaintiffs filed a motion to remand. Judge McVerry of the Western District denied the motion to remand.

³⁰⁷ *Tube City IMS Corp. v. Allianz Global Risks U.S. Ins. Co.*, 2014 U.S. Dist. LEXIS 165654, at *16 (W.D. Pa. Nov. 3, 2014).

³⁰⁸ *Brown v. Liberty Mut. Fire Ins. Co.*, 2006 U.S. Dist. LEXIS 76139, at *5 (E.D. Pa. Oct. 19, 2006) (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345 n.9 (1976)).

³⁰⁹ *Brown v. Liberty Mut. Fire Ins. Co.*, 2006 U.S. Dist. LEXIS 76139, at *10 (citing *Ryan v. Johnson*, 115 F.3d 193, 195 (3d Cir. 1997)).

³¹⁰ *Craker v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 47342, at *8 (W.D. Pa. May 3, 2011).

³¹¹ *Craker v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 47342, at *9 (citation to *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207 (3d Cir. 1991) (where Third Circuit found express waiver of right to object to insured’s choice of forum in policy language) omitted).

Plaintiffs argued that, although diversity of citizenship existed and the amount in controversy requirement was met, the case should be remanded and consolidated with the pending personal injury action in the interests of judicial economy. The court held that judicial economy was not a valid reason to deprive State Farm of the federal forum to which it was entitled:

As State Farm correctly points out, “judicial economy” is not a valid basis for remanding a case. To the contrary, Defendant has a legal right under the removal statute to proceed in this forum, and the Court has a legal duty to exercise its jurisdiction to preside over this case. . . . In *Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578 (E.D. Pa. 1985), the Court rejected a motion to remand a similar personal injury case, so that it could be consolidated with a companion case in state court. The Court explained: “defendants have exercised their right to remove, and I cannot deprive them of a federal forum simply because remand to state court may promote judicial efficiency.” *Id.* at 583. The same result is required in this case.³¹²

(10) *Espinosa v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 28957 (E.D. Pa. Apr. 16, 2007) (McLaughlin, J.)

In this case, also discussed in §7:16, federal jurisdiction was denied, but the court discussed principles applicable to allowing jurisdiction. Judge McLaughlin of the Eastern District remanded the case to state court, because it involved a property damage claim worth approximately \$9,000. The case was filed in Philadelphia and designated as being subject to compulsory arbitration, in that she sought as damages “an amount not in excess of \$50,000.” The court made it clear that it was basing its decision on the *ad damnum* clause; otherwise, the court held, the punitive damage claim would cause the damages to exceed \$75,000:

Considered without reference to the *ad damnum* clauses, Ms. Espinosa’s complaint would involve an amount in controversy greater than \$75,000. Although Ms. Espinosa’s compensatory claim is for only \$9,183.10, her claim for punitive damages puts the amount in controversy over the jurisdictional limit. Where punitive damages are available under state law, and where the claim for punitive damages is not “patently frivolous and without foundation,” then the amount in controversy will usually be satisfied.³¹³

The insurer argued that such a ruling was unfair because the plaintiff might amend her complaint to increase the claim for damages to exceed \$75,000, after the expiration of the year long period for removing a diversity case.³¹⁴ The court acknowledged that possibility, and suggested that, in that event, the insurer could seek an equitable exception to the one-year time period.³¹⁵

(11) *Hook v. Progressive Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 68985 (M.D. Pa. Aug. 18, 2008) (Jones, J.)

Hook had settled his UIM claim with his insurer for \$25,000, but alleged breach of contract and bad faith with respect to claims handling. Hook demanded compensatory and consequential damages, interest, costs and attorney’s fees, and punitive damages “in an amount in excess of forty thousand dollars.” The insurer removed the action to federal court and filed a motion to dismiss. In determining whether federal diversity jurisdiction was proper, the court stated, “Because Hook has not specifically averred in the complaint that the amount in controversy is less than the jurisdictional minimum, this action will be remanded only if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount.”³¹⁶ In assessing the amount in controversy, the court felt that since the bad faith claim allowed damages for interest and punitive damages, applying even a multiplier of two added at least \$50,000 to the amount in controversy given that Hook’s insurance claim was settled at \$25,000. Further, the court stated, recoverable attorney fees “could easily total thousands, if not tens of thousands, of dollars.”³¹⁷ Therefore, according to the court, “even assuming arguendo that Hook’s breach of contract claim is worth nothing, it appears likely that the value of his bad faith claim alone could exceed the jurisdictional minimum.”³¹⁸

(12) *Scanlin v. Utica First Ins. Co.*, 426 F. Supp. 2d 243 (M.D. Pa. 2006) (Kosik, J.)

In this case, Judge Kosik of the Middle District held that a garnishment action in the context of an alleged third party bad faith case may be removable to federal court. The court noted that in Pennsylvania insurance coverage issues may be litigated in a garnishment action, and bad faith claims against a tort defendant’s insurer may also be raised in a garnishment action.³¹⁹ The court permitted removal in light of the fact that the insured had assigned his rights to the plaintiff. The court concluded that the garnishment action was a distinct “civil action” and was properly removed.

³¹² *Hutton v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 3395, at *2-3 (W.D. Pa. Jan. 13, 2011).

³¹³ *Espinosa v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 28957, at *6 (citing *Golden v. Golden*, 382 F.3d 348, 356 (3d Cir. 2004)).

³¹⁴ See 28 U.S.C. §1446(b).

³¹⁵ *Espinosa v. Allstate*, 2007 U.S. Dist. LEXIS 28957, at *18 (citing *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 427 (5th Cir. 2003)).

³¹⁶ *Hook v. Progressive Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 68985, at *6 (M.D. Pa. Aug. 18, 2008).

³¹⁷ *Hook v. Progressive Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 68985, at *7-10.

³¹⁸ *Hook v. Progressive Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 68985, at *9-10.

³¹⁹ *Scanlin v. Utica First Ins. Co.*, 426 F. Supp. 2d 243, 249-50 (M.D. Pa. 2006) (citing *Helms v. Chandler*, 223 A.2d 30 (Pa. 1966) and *Shearer v. Reed*, 428 A.2d 635 (Pa. Super. 1981)).

(13) *Morris v. Bankers Life & Cas. Co.*, 2012 U.S. Dist. LEXIS 23952 (E.D. Pa. Feb. 23, 2012) (Stengel, J.)

Plaintiff brought this breach of contract and bad faith action when she could not resolve a life insurance dispute with Bankers following her son's death. After Bankers removed the case, plaintiff filed a motion to remand on the grounds that there was no subject matter jurisdiction. Judge Stengel of the Eastern District denied the motion.

At issue was whether the amount in controversy was met. The court explained that plaintiff must show, to a "legal certainty" that she could not recover more than \$75,000 in order to succeed in remanding the case. According to the court, she could not. The court noted that both of the counts in her complaint sought damages of \$25,000, plus attorney's fees and delay damages. The bad faith count also sought punitive damages, which were included in the amount in controversy calculation, and even assuming a low ratio of punitive damages to compensatory damages, the amount in controversy would be met: "Punitive damages are considered part of the amount in controversy. . . . In fact, an award of punitive damages of just over two times the claimed compensatory damages in this case would put the plaintiff's claim over the \$75,000.00 threshold."³²⁰ Finally, attorney's fees would also be included in the calculation: "In a case such as this one, involving a statutory claim of bad faith, the claim for attorney's fees and punitive damages could easily put the amount in controversy over the jurisdictional limit."³²¹

Plaintiff's attempt to stipulate that she would recover less than \$75,000 in damages "has no effect on this determination[]" of the jurisdictional limit.³²²

(14) *Hyjurick v. Commonwealth Land Title Ins. Co.*, 2012 U.S. Dist. LEXIS 59087 (M.D. Pa. Apr. 27, 2012) (Munley, J.)

Plaintiff purchased property, and at that time, also purchased title insurance from Commonwealth. Some time later, when a dispute arose over whether the seller was the sole owner of the property, plaintiff sought coverage from Commonwealth. Commonwealth apparently never rendered a decision on the issue, and plaintiff filed two suits: the first was filed in state court, seeking declaratory judgment that she was entitled to coverage; the second was this bad faith action against Commonwealth and its parent company, Fidelity. The defendant insurers filed a motion to dismiss. Judge Munley of the Middle District granted the motion in part and denied it in part.

Defendant insurers argued that the court should abstain from hearing the case because there were parallel proceedings ongoing in state court. The court disagreed, denying the motion to dismiss in this regard. The court explained that while there was overlap with the factual underpinnings of the case (including use of the term "bad faith" among the factual allegations in the state court complaint), the causes of action were separate, with the state court action focused on contractual issues and the federal court action on bad faith. Additionally, the court noted that if plaintiff were to recover on her state court contract claim, that alone would not resolve the bad faith claim, so the court could grant the relief sought independently of the outcome of the state court case: "A plaintiff can maintain a bad faith claim even when her breach of contract claim is unresolved or unsuccessful. . . . Thus, defendants are incorrect in their assertion that 'it is indisputable that this Court cannot grant the relief requested in this action unless the Title Claim is covered by the Title Policy.'³²³

(15) *Denicola v. Progressive Direct Ins. Co.*, 2009 U.S. Dist. LEXIS 51372 (M.D. Pa. June 16, 2009) (Munley, J.)

Denicola's policy with Progressive provided \$250,000 in UIM coverage. A UIM arbitration award of \$500,000 was molded to the \$250,000 policy limits. Denicola then filed suit in state court against Progressive alleging it delayed and raised spurious defenses, amounting to bad faith. Progressive removed the case. Denicola filed a motion to remand, which was denied by Judge Munley of the Middle District.

Because Denicola did not specifically limit the amount in controversy to under the jurisdictional threshold in her complaint, according to the court, "the case must be dismissed or remanded if it appears to a legal certainty that the plaintiff cannot recover more than the jurisdictional amount of \$75,000."³²⁴ The court held that Denicola's interest on the amount of the claim from the date that the claim was made could exceed \$40,000 and acknowledged that the insurer "cites to many bad faith cases where the attorney's fees were substantial and exceeded the \$75,000 jurisdictional threshold."³²⁵ Moreover, the court observed, "a request for punitive damages will generally satisfy the amount in controversy requirement because it cannot be stated to a legal certainty that the value of the plaintiff's claim is below the statutory minimum."³²⁶ The motion to remand was denied.

³²⁰ *Morris v. Bankers Life & Cas. Co.*, 2012 U.S. Dist. LEXIS 23952, at *4 (E.D. Pa. Feb. 23, 2012) (citation and footnote omitted).

³²¹ *Morris v. Bankers Life & Cas. Co.*, 2012 U.S. Dist. LEXIS 23952, at *5 (E.D. Pa. Feb. 23, 2012).

³²² *Morris v. Bankers Life & Cas. Co.*, 2012 U.S. Dist. LEXIS 23952, at *5 (E.D. Pa. Feb. 23, 2012).

³²³ *Hyjurick v. Commonwealth Land Title Ins. Co.*, 2012 U.S. Dist. LEXIS 59087, at *22-23 (M.D. Pa. Apr. 27, 2012) (citation to record omitted; citing *Doylestown Elec. Supply Co. v. Md. Cas. Ins. Co.*, 942 F. Supp. 1018, 1019-20 (E.D. Pa. 1996); *Winterberg v. CNA Ins. Co.*, 868 F. Supp. 713, 722 (E.D. Pa. 1994); *Adamski v. Allstate Ins. Co.*, 738 A.2d 1033, 1039 n.5 (Pa. Super. 1999)).

³²⁴ *Denicola v. Progressive Direct Ins. Co.*, 2009 U.S. Dist. LEXIS 51372, at *4 n.1 (M.D. Pa. June 16, 2009).

³²⁵ *Id.* at *5.

³²⁶ *Id.*

(16) *Ramberger v. Gov't Employee Ins. Co.*, 2009 U.S. Dist. LEXIS 45572 (M.D. Pa. May 29, 2009) (Munley, J.)

After GEICO denied plaintiff's medical benefit claim, the plaintiff filed suit in state court, alleging insurance bad faith. GEICO removed the case to federal court, and the plaintiff filed a motion to remand. Judge Munley of the Middle District denied the motion to remand. Noting that "the defendant's burden is to establish that the amount in controversy exceeds the statutory threshold,"³²⁷ the court elaborated:

The defendant's burden depends on whether the plaintiff's complaint specifically limits the amount in controversy. In cases such as the instant case, where the plaintiff's complaint does limit the amount in controversy to a sum below the jurisdictional threshold for a proper removal, the removing party must prove to a legal certainty that the amount in controversy exceeds the statutory threshold.

Where the plaintiff's complaint does not specifically limit the amount in controversy below the jurisdictional threshold, the case must be dismissed or remanded if it appears to a legal certainty that the plaintiff cannot recover more than the jurisdictional amount of \$75,000.³²⁸

Plaintiff's complaint specified an amount of damages with a "cumulative amount of \$70,000."³²⁹ The plaintiff urged the court to look no further than the complaint. However, the court held that it "may also examine the notice of removal to determine the amount in controversy,"³³⁰ and must "look to see if plaintiff's actual monetary demands in the aggregate exceed the threshold, irrespective of whether the plaintiff states that the demands do not."³³¹ According to the court:

[P]laintiffs may limit their claims to avoid federal subject matter jurisdiction. . . . There is, however, a broad good faith requirement in a plaintiff's complaint with respect to the amount in controversy. . . . Good faith in this context is entwined with the "legal certainty" test, so that a defendant will be able to remove the case to federal [court] by showing to a legal certainty that the amount in controversy exceeds the statutory minimum [sic].³³²

Looking to GEICO's notice of removal, the court considered that GEICO stated that it had paid \$90,000 in medical bills submitted by plaintiff, in an attempt to resolve the matter without further litigation. Plaintiff's counsel had responded to GEICO that the matter could not be resolved because plaintiff sought treble damages.³³³ GEICO argued that three times \$90,000 was \$270,000, well above the jurisdictional threshold. Additionally, GEICO had sent correspondence to plaintiff seeking a stipulation that she would not seek more than \$70,000 in total damages, but plaintiff failed to timely respond. The court noted further that plaintiff's complaint violated the Pennsylvania Rules of Civil Procedure by demanding \$70,000 because the rules "prohibit a plaintiff from setting forth a specific sum for relief with regard to unliquidated damages."³³⁴ The court ruled that GEICO met its burden of proving to a legal certainty that the amount in controversy exceeded the jurisdictional threshold and denied plaintiff's motion to remand.

(17) *Fleeger v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 20705 (W.D. Pa. Mar. 16, 2009) (Gibson, J.)

Fleeger alleged breach of contract and bad faith with respect to an underlying claim for UIM benefits. The amount sought by Fleeger under the policy itself was \$15,000. On cross-motions for summary judgment, the court, on its own, addressed the question of its diversity jurisdiction under 28 U.S.C. §1332. The court concluded that jurisdiction was proper in light of Fleeger's §8371 bad faith claim. Noting that Section 1332(a) provides that the statutory amount in controversy must be determined "exclusive of interest and costs," the court held, "Since the interest and costs available under §8371 are a part of a statutory cause of action, however, they are not treated as excluded 'interest and costs' within the meaning of §1332(a), and are considered to be a part of the amount in controversy in this case."³³⁵ Furthermore, the court found that federal jurisdiction existed because §8371 permitted an award of punitive damages which were properly considered in determining whether the amount-in-controversy requirement is satisfied. Because "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal,"³³⁶ the court held that federal jurisdiction existed.

³²⁷ *Ramberger v. Gov't Employee Ins. Co.*, 2009 U.S. Dist. LEXIS 45572, at *3 (M.D. Pa. May 29, 2009) (citing *Frederico v. Home Depot*, 507 F.3d 188, 195 (3d Cir. 2007)).

³²⁸ *Id.* at *3-4.

³²⁹ *Id.* at *4.

³³⁰ *Id.* at *5.

³³¹ *Id.* at *5 (quoting *Morgan v. Gay*, 471 F.3d 469, 475 (3d Cir. 2006)).

³³² *Id.* at *5-6.

³³³ *Id.* at *6-7.

³³⁴ *Id.* at *7 (citing Pa. R. Civ. P. 1021(b) ("Any pleading demanding relief for unliquidated damages shall not claim any specific sum.")).

³³⁵ *Fleeger v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 20705, at *8-9 (W.D. Pa. Mar. 16, 2009) (citing 28 U.S.C. §1332(a); *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1046 (3d Cir. 1993); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S. Ct. 586, 82 L. Ed. 845 (1938)).

³³⁶ *Fleeger v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 20705, at *9 (W.D. Pa. Mar. 16, 2009).

(18) *Webb v. Discover Prop. & Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 95431 (M.D. Pa. Nov. 24, 2008) (Munley, J.)

In this UIM bad faith claim, Judge Munley of the Middle District upheld the insurer's removal based upon plaintiff's punitive damages claim. The court agreed with the defendants' argument "that because plaintiff seeks punitive damages, the amount in controversy threshold has been met."³³⁷ Removal was appropriate, the court ruled, stating, "Where an appropriate claim for punitive damages is made, the amount in controversy requirement is generally met 'because it cannot be stated to a legal certainty that the value of the plaintiff's claim is below the statutory minimum.'"³³⁸

(19) *Marchky v. Motorists Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 63364 (W.D. Pa. Aug. 18, 2008) (Schwab, J.)

This UIM coverage and bad faith action was initially filed in state court but removed to federal court by the insurer. The insureds filed a motion to remand. Citing the United States Supreme Court case, *Colorado River Water Conservation District v. United States*,³³⁹ the insured argued that due to increased demands on the federal courts due to removal of UM and UIM cases previously handled by arbitration, the federal court could decline to exercise its jurisdiction under such "exceptional circumstances." Judge Schwab of the Western District disagreed, and denied the motion for remand. According to the court, "In order for the Colorado River Doctrine to apply, there must be some concurrent or parallel proceeding. Here, there is no other action pending in state court, and thus, a critical factor justifying abstention under *Colorado River*, the need to avoid piecemeal litigation, does not exist here."³⁴⁰

(20) *Miller v. Progressive Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 32074 (M.D. Pa. Apr. 17, 2008) (Munley, J.)

In this case, where the insured alleged improper handling of a UIM claim, the plaintiff's breach of contract count demanded a sum in excess of \$50,000. The insured had also made a prior settlement demand of \$200,000, the policy limit. The bad faith count included a demand for punitive damages, interest, and attorney's fees. Judge Munley held that removal was proper, stating, "In combination with the actual damages claimed, the presence of punitive damages means that the jurisdictional minimum has been met."³⁴¹

(21) *Kidd v. Prudential Ins. Co. of America*, 2008 U.S. Dist. LEXIS 2934 (M.D. Pa. Jan. 15, 2008) (Blewitt, M.J.)

Plaintiff alleged that the life insurance policy which defendant insurer issued to decedent had a death benefit in the amount of \$35,000. Plaintiff alleges that the insurer breached the insurance contract and acted in bad faith by denying benefits. The insurer removed to federal court, and the plaintiff did not seek a remand. Raising the jurisdiction issue on its own, the court found that the diversity jurisdictional threshold of \$75,000 was satisfied because the plaintiff sought \$35,000 on her breach of contract claim, and sought in excess of \$50,000 on her bad faith claim. According to the court, "In our case, the policy's death benefit is alleged to be only \$35,000. However, if Plaintiff were to succeed on her breach of contract and bad faith claims, it is possible that she would receive more than the diversity jurisdictional threshold amount."³⁴²

(22) *Ketz v. Northern Ins. Co.*, 2007 U.S. Dist. LEXIS 43245 (M.D. Pa. June 14, 2007) (Munley, J.)

The plaintiffs brought a two-count complaint alleging breach of contract and bad faith, claiming in excess of \$50,000 for each count. The defendant insurer removed, and the plaintiffs challenged removal. The insurer argued that the amount sought in each of the plaintiffs' counts could be aggregated to meet the jurisdictional threshold, and Judge Munley of the Middle District agreed. Finding that "the plaintiffs' claims for breach of contract and bad faith are distinct," the court concluded that "[t]he aggregation of the claims creates an amount in controversy, exclusive of interest and costs, in excess of \$100,000."³⁴³ In evaluating the worth of the case, the court noted that the plaintiff had made a settlement demand prior to litigation of \$200,000.

(23) *Javorski v. Nationwide Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 53480 (M.D. Pa. Aug. 2, 2006) (Conaboy, J.)

In this case, Judge Conaboy of the Middle District held that the matter was properly removed because punitive damages were sought:

While the general federal rule is to decide the amount in controversy from the complaint itself, when the amount is not specified, the amount in controversy is not measured by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated. . . . If

³³⁷ *Webb v. Discover Prop. & Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 95431, at *5 (M.D. Pa. Nov. 24, 2008).

³³⁸ *Id.* at *5-6.

³³⁹ 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

³⁴⁰ *Marchky v. Motorists Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 63364, at *3-4 (W.D. Pa. Aug. 18, 2008).

³⁴¹ *Miller v. Progressive Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 32074, at *7 (M.D. Pa. Apr. 17, 2008).

³⁴² *Kidd v. Prudential Ins. Co. of Am.*, 2008 U.S. Dist. LEXIS 2934, at *2-3 (M.D. Pa. Jan. 15, 2008).

³⁴³ *Ketz v. Northern Ins. Co.*, 2007 U.S. Dist. LEXIS 43245, at *8-9 (M.D. Pa. June 14, 2007).

punitive damages are sought, a court may include them in the amount in controversy unless the demand is “patently frivolous and without foundation. . . .”³⁴⁴

(24) *Silberg v. Employers Mut. Cas. Co.*, 2001 U.S. Dist. LEXIS 404 (E.D. Pa. Jan. 22, 2001) (Green, J.)

In a case arising out of an automobile accident, the plaintiffs instituted a lawsuit in federal court, alleging that the defendant insurer acted in bad faith. The insurer moved to dismiss, alleging that the complaint did not meet the requisite \$75,000 amount in controversy. The plaintiffs argued that their claim for punitive damages, attorney’s fees and interest satisfied the jurisdictional amount. Judge Green of the Eastern District agreed, holding, “I am unable to say to a legal certainty that Plaintiffs will be unable to recover an amount in excess of \$75,000. . . .”³⁴⁵

(25) *Kurtz v. American Motorist Ins. Co.*, 1995 U.S. Dist. LEXIS 5902 (E.D. Pa. May 1, 1995) (Hutton, J.)

The Eastern District stated in this case that the sum claimed in the plaintiff’s complaint governs the computation of damages, as long as it is made in good faith. The district court noted that plaintiff’s complaint claimed, in both Counts I and II, damages in excess of \$20,000, that Count III claimed punitive damages in the amount of \$1 million, and that Count IV sought damages under §8371. Thus, the court determined that it could not determine to a “legal certainty” that the amount pled in plaintiff’s complaint was less than the jurisdictional minimum.

§7:16 — Cases, Federal Jurisdiction Denied

(1) *Minnisale v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 179485 (E.D. Pa. Dec. 20, 2013) (Baylson, J.)

Plaintiffs filed suit following a failure to resolve a claim with their homeowner’s insurer, defendant State Farm. Defendant removed the action, following which plaintiffs filed a motion to remand. Judge Baylson of the Eastern District of Pennsylvania granted the motion.

While the ultimate reason for remanding the case lay with the untimeliness of removal, the court addressed the calculation of the amount in controversy. The court noted that plaintiffs had refused to admit that their total damages did not exceed the amount in controversy, but the court refused to use such a fact in rendering its evaluation of the amount in controversy: “[A] plaintiff’s limitation of damages sought in a complaint, alone, is insufficient to show remand is warranted. . . . It stands to reason that a refusal to so stipulate is also insufficient to demonstrate original jurisdiction.”³⁴⁶ The court noted that the evidence provided showed that the coverage claim was worth approximately \$55,000, the amount of plaintiffs’ estimate, and therefore, the possibility of punitive damages and attorney’s fees would provide a basis for the court to find the case met the amount in controversy requirement: “Since Plaintiffs are able to recover, in addition to the \$55,315 estimate for consequential damages, punitive damages and attorney’s fees, and Pennsylvania law does not cap those damages, it is more likely than not that Plaintiffs can recover more than \$75,000.”³⁴⁷

(2) *Martino v. Hartford Ins. Co. of Illinois*, 2014 U.S. Dist. LEXIS 57066 (E.D. Pa. Apr. 24, 2014) (Joyner, J.)

Plaintiff filed this breach of contract and bad faith suit after the parties failed to resolve her UIM claim. After defendant removed, plaintiff filed a motion to remand. Judge Joyner of the Eastern District of Pennsylvania granted the motion.

Defendant contended that the UIM policy limits were \$250,000, and the amount of possible punitives, fees and interest pushed the amount in controversy further over the \$75,000 jurisdictional limit. Plaintiff contended that the complaint specifically limited recovery to an amount less than \$50,000, and that she had requested arbitration in state court, which required an amount in controversy less than \$50,000. The court concluded that although the amount sought in an *ad damnum* clause is not solely determinative, defendant “has not proven to a legal certainty that Plaintiff may recover more than the threshold amount. . . . In her complaint, Plaintiff has expressly limited her damages to \$50,000. A plaintiff may limit her damages to avoid federal jurisdiction.”³⁴⁸ The court also rejected defendant’s argument that plaintiff may be able to recover more than the amount in controversy limit on appeal from an arbitration: “As of the date of removal, Plaintiff’s damages are explicitly limited to \$50,000.00 by her Complaint and submission to the Pennsylvania arbitration process, and future appeals, are merely speculative, not legally certain.”³⁴⁹ Finally, the court refused to find jurisdiction simply because plaintiff would not sign a stipulation limiting damages, because “[t]he lack of stipulation does not undermine the limited damages apparent in Plaintiff’s complaint.”³⁵⁰

³⁴⁴ *Javorski v. Nationwide Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 53480, at *14-17 (M.D. Pa. Aug. 2, 2006).

³⁴⁵ *Silberg v. Employers Mut. Cas. Co.*, 2001 U.S. Dist. LEXIS 404, at *12.

³⁴⁶ *Minnisale v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 179485, at *6 (E.D. Pa. Dec. 20, 2013) (citations omitted).

³⁴⁷ *Minnisale v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 179485, at *12 (E.D. Pa. Dec. 20, 2013).

³⁴⁸ *Martino v. Hartford Ins. Co. of Ill.*, 2014 U.S. Dist. LEXIS 57066, at *6-7 (E.D. Pa. Apr. 24, 2014).

³⁴⁹ *Martino v. Hartford Ins. Co. of Ill.*, 2014 U.S. Dist. LEXIS 57066, at *7 (E.D. Pa. Apr. 24, 2014).

³⁵⁰ *Martino v. Hartford Ins. Co. of Ill.*, 2014 U.S. Dist. LEXIS 57066, at *7 (E.D. Pa. Apr. 24, 2014).

(3) *Rutherford v. Progressive N. Ins. Co.*, 2008 U.S. Dist. LEXIS 99350 (E.D. Pa. Dec. 9, 2008) (McLaughlin, J.)

Rutherford sought underinsured motorist benefits from Progressive; his policy limit was \$15,000. Progressive denied the claim, and Rutherford filed suit. Progressive removed the case, and Rutherford sought remand. Judge McLaughlin of the Eastern District granted the remand.

The civil cover sheet to Rutherford's complaint stated that the amount in controversy in his suit was \$50,000 or less, and sought compulsory arbitration in state court. The court held that "the language of the complaint's cover sheet and the consequent referral to state court compulsory arbitration serve to limit the amount in controversy."³⁵¹ No allegations in the complaint contradicted the cover sheet's limitation of the amount in controversy. Citing other pertinent case law, the court held that where a plaintiff had expressly limited his claims to below the jurisdictional threshold for compulsory arbitration, that limitation would be given effect by Pennsylvania law and so allow the plaintiff "to avoid the amount in controversy threshold' for federal diversity jurisdiction."³⁵²

(4) *Espinosa v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 28957 (E.D. Pa. Apr. 16, 2007) (McLaughlin, J.)

In this case, Judge McLaughlin of the Eastern District addressed a motion to remand where the defendant insurer had attempted to use request for admissions as a basis for removing the case. The plaintiff filed a breach of contract and bad faith action in connection with a property damage claim worth approximately \$9,000. The case was filed in Philadelphia and designated as being subject to compulsory arbitration, in that she sought as damages "an amount not in excess of \$50,000." Counsel for the insurer forwarded plaintiff requests for admissions asking her to admit that the total damages being sought in the case did not exceed \$75,000. The plaintiff denied the request, stating that she could not state with certainty what bad faith damages would be, and "any damages which would total in excess of these amounts would be near speculation." Based upon the answer to the request for admissions, Allstate removed the matter to federal court.

Applying the test enunciated in *Samuel-Bassett v. KIA Motors America*,³⁵³ the court held that Allstate had the burden of proving "to a legal certainty that the amount in controversy exceeds the statutory minimum."³⁵⁴ Judge McLaughlin ruled that on the face of the complaint, based upon the *ad damnum* clause seeking less than \$50,000, the case was not removable based on the face of the complaint. According to the court, the Third Circuit decision in *Morgan v. Gay*³⁵⁵ held that a plaintiff may limit a monetary claim in order to avoid a federal amount in controversy threshold. Because the claim was subject to compulsory arbitration pursuant to 42 Pa.C.S.A. §7361, the court held that "Pennsylvania law . . . gives legal effect to the *ad damnum* clause in Ms. Espinosa's complaint."³⁵⁶ By virtue of the compulsory arbitration law, the court reasoned, the plaintiff was entitled to limit her monetary claim per the jurisdictional limit.

The insurer argued that, notwithstanding the language on the face of the complaint, diversity jurisdiction was established by virtue of plaintiff's response to requests for admissions. The court ruled that the responses, which were unequivocal, did not establish the amount in controversy:

Because Ms. Espinosa denied Allstate's requested admissions and because Allstate has not moved to challenge the sufficiency of that denial, her responses are not admissions for purposes of Rule 36 and therefore are not conclusive evidence of the amount in controversy here.³⁵⁷

The insurer argued that such a ruling was unfair because the plaintiff might amend her complaint to increase the claim for damages to exceed \$75,000, after the expiration of the year long period for removing a diversity case.³⁵⁸ The court acknowledged that possibility, and suggested that, in that event, the insurer could seek an equitable exception to the one-year time period.³⁵⁹ The court made it clear that it was basing its decision on the *ad damnum* clause and operation of Pennsylvania law. Otherwise, the court held, the punitive damage claim would cause the damages to exceed \$75,000.³⁶⁰

(5) *Kapton v. Ohio Cas. Ins. Co., Inc.*, 2014 U.S. Dist. LEXIS 53168 (W.D. Pa. Apr. 17, 2014) (Mitchell, M.J.)

Plaintiff was working along a highway when he was stuck by an automobile. Plaintiff submitted a UIM claim to his auto insurer, defendant Ohio Casualty. When the parties could not resolve plaintiff's UIM claim, plaintiff filed this

³⁵¹ *Rutherford v. Progressive N. Ins. Co.*, 2008 U.S. Dist. LEXIS 99350, at *5-6 (E.D. Pa. Dec. 9, 2008).

³⁵² *Rutherford v. Progressive N. Ins. Co.*, 2008 U.S. Dist. LEXIS 99350, at *6-7 (E.D. Pa. Dec. 9, 2008).

³⁵³ *Samuel-Bassett v. KIA Motors Am.*, 357 F.3d 392, 398 (3d Cir. 2004).

³⁵⁴ *Espinosa v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 28957, at *3-4 (E.D. Pa. Apr. 16, 2007).

³⁵⁵ *Morgan v. Gay*, 471 F.3d 469, 474-75 (3d Cir. 2006).

³⁵⁶ *Espinosa v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 28957, at *11 (E.D. Pa. Apr. 16, 2007).

³⁵⁷ *Espinosa v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 28957, at *14 (E.D. Pa. Apr. 16, 2007).

³⁵⁸ See 28 U.S.C. §1446(b).

³⁵⁹ *Espinosa v. Allstate*, 2007 U.S. Dist. LEXIS 28957, at *18 (E.D. Pa. Apr. 16, 2007) (citing *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 427 (5th Cir. 2003)).

³⁶⁰ *Espinosa v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 28957, at *6 (E.D. Pa. Apr. 16, 2007) (citing *Golden v. Golden*, 382 F.3d 348, 356 (3d Cir. 2004)).

suit alleging breach of contract and bad faith against Ohio Casualty, and violation of the Unfair Trade Practices and Consumer Protection Law against two of its claims representatives. Defendants removed the action and plaintiff filed a motion to remand. Magistrate Judge Mitchell of the Western District of Pennsylvania granted the motion to remand.

Defendants contended that the claims representatives were fraudulently joined, and diversity jurisdiction existed between plaintiff and Ohio Casualty. Plaintiff responded that the claims representatives were properly joined based on the claims of misfeasance under the UTPCPL. The allegations against the claims representatives included: a refusal to consider documents submitted for evaluation of the UIM claim; refusal to communicate; performance of an inadequate investigation; failure to provide copy of the policy; and forcing plaintiff to litigate; and improperly delaying the handling of the claim. Plaintiffs set forth 4 subsections of the statute allegedly violated by these defendants. The court concluded that it could not render a decision on whether the alleged conduct constituted misfeasance or nonfeasance, so the presence of the individual defendants destroyed diversity jurisdiction:

Defendants argue that their conduct may give rise to nonfeasance, but not misfeasance as Plaintiff suggests. For the court to make a determination whether Defendants' conduct rose to the level of misfeasance would be improperly be invoking an assessment of the claim under Rule 12(b)(6), or a merits determination, which is prohibited by applicable case law at this juncture. Because misfeasance, for purposes of the UTPCPL, may exist where an adjuster conducts or fails to conduct a post-loss investigation in an unfair or unreasonable manner, there is a possibility that the state court would find that Plaintiff's complaint states a cause of action against either of the insurance adjusters. The Defendants have not met its substantial burden of persuading this court that they have been fraudulently joined for the sole purpose of divesting this court of subject matter jurisdiction.³⁶¹

(6) *Hennessy v. Allstate Ins. Co.*, 2014 U.S. Dist. LEXIS 51066 (E.D. Pa. Apr. 14, 2014) (Stengel, J.)

Plaintiff was seriously injured in an accident when he was assisting at the scene of an earlier auto accident. When the tortfeasor involved in the earlier accident's auto insurer, Allstate, refused to settle for the policy limits, the case proceeded to trial and plaintiff was awarded an excess verdict. That tortfeasor assigned his rights against Allstate to plaintiff. Plaintiff then filed this bad faith action against Allstate and several individual defendants. Plaintiff asserted claims for breach of contract, bad faith, unfair trade practices, and negligence. After Allstate removed the action, plaintiff filed a motion to remand. Judge Stengel of the Eastern District of Pennsylvania granted the motion.

The individual defendants included the agent who sold the the Allstate policy to the tortfeasor. Three others appear to have been Allstate adjusters or employees who sent allegedly misleading letters regarding the state of the investigation and failed to inform the tortfeasor that plaintiff was willing to settle for the policy limits. The court found that analysis of each cause of action against the individual defendants was beyond the scope of the jurisdictional question, but found that there were viable claims against the non-diverse defendants, so remand was required: "Assuming as I must, however, that all of these factual allegations are true, and resolving any uncertainty about Pennsylvania's controlling substantive law in favor of the plaintiff, I find that there is more than enough of a reasonable basis in fact or colorable ground supporting the claims against the individual defendants."³⁶²

(7) *Brewer v. GEICO*, 2014 U.S. Dist. LEXIS 7531 (W.D. Pa. Jan. 22, 2014) (Fischer, J.)

After plaintiff was injured in a motorcycle accident, he filed a claim with his insurer, defendant GEICO. When the parties could not resolve the UM claim, plaintiff filed this bad faith suit. After GEICO removed, plaintiff filed a motion to remand. Judge Fischer of the Western District of Pennsylvania granted the motion.

Plaintiff alleged that the amount in controversy was not met, so the court did not have subject matter jurisdiction. GEICO contended that it had a good faith belief that based on the addition of the bad faith claim, the amount in controversy was met. The court agreed with plaintiff. The court found the burden was on defendant to meet the requirement and that "an averment of good faith [calculation of amount in controversy] is not sufficient, without more, to show that removal was permitted. . . ."³⁶³ The policy provided only \$15,000 in UM limits, so the court found that it would have to conclude the bad faith claim was worth more than \$60,000 in order to meet the requirement. Defendant did not submit evidence to support its position as to the extent of plaintiff's injuries or of what attorney's fees might be. The fact punitive damages were available did not allow defendant to rely on this fact when it had the burden of proving jurisdiction: "Defendant has made no effort to demonstrate that the bad faith claim here even approaches \$60,000, let alone is in excess of that sum."³⁶⁴

³⁶¹ *Kapton v. Ohio Cas. Ins. Co., Inc.*, 2014 U.S. Dist. LEXIS 53168, at *13-14 (W.D. Pa. Apr. 17, 2014).

³⁶² *Hennessy v. Allstate Ins. Co.*, 2014 U.S. Dist. LEXIS 51066, at *8-9 (E.D. Pa. Apr. 14, 2014).

³⁶³ *Brewer v. GEICO*, 2014 U.S. Dist. LEXIS 7531, at *14 (W.D. Pa. Jan. 22, 2014).

³⁶⁴ *Brewer v. GEICO*, 2014 U.S. Dist. LEXIS 7531, at *17 (W.D. Pa. Jan. 22, 2014).

**(8) *A.S. Blue, Inc. v. OneBeacon Ins. Co.*, 2013 U.S. Dist. LEXIS 74270 (M.D. Pa. May 28, 2013)
(Mannion, J.)**

In this commercial property insurance dispute, plaintiff filed suit against several insurers, including defendant OneBeacon. After the defendant insurers removed the case, plaintiff filed a motion to remand. Judge Mannion of the Middle District granted the motion.

Plaintiff contended that because insurer OneBeacon was a Pennsylvania corporation, diversity jurisdiction did not exist. Defendant insurers argued that OneBeacon was merely a nominal party as it was the parent company of another defendant insurer. The court rejected defendants' argument, noting that "there is a significant lack of clarity about this alleged corporate structure and who may be the proper defendants in this action. In great measure, this emanates from the defendants [sic] own insurance documentation and confusing correspondence sent to their insureds."³⁶⁵ The court explained that several of the letters attached to the opposition brief referenced OneBeacon and instructed plaintiff to provide information to "OneBeacon Claims." The court also noted that the applicable policy was issued on OneBeacon letterhead.

**(9) *Kochmer v. Fidelity Nat'l Title Ins. Co.*, 2013 U.S. Dist. LEXIS 56603 (M.D. Pa. Apr. 19, 2013)
(Mariani, J.)**

Plaintiffs filed this breach of contract action against their insurer. Their complaint alleged entitlement to attorneys' fees due to the defendant insurer's "bad faith in failing to respond to Plaintiff's [sic] repeated demands for recovery under the Owner's Title Insurance Policy." The insurer removed the action; Plaintiffs filed a motion to remand. Judge Mariani of the Middle District granted the motion to remand.

Because plaintiffs alleged "bad faith" in the wherefore clause of the complaint, defendant insurer proceeded on the assumption that plaintiffs were inartfully attempting to plead a §8371 claim. Plaintiffs' motion to remand contended that the phrase was not intended to set forth a cause of action and that they intended to proceed only on a breach of contract claim. The court concluded that because the policy limit was below the amount in controversy, there was no basis for federal jurisdiction.

(10) *Schatzberg v. State Farm Mut. Auto. Ins. Co.*, 877 F. Supp. 2d 232 (E.D. Pa. July 12, 2012) (Pratter, J.)

Plaintiff filed suit against defendant alleging that defendant was attempting to drive plaintiff out of business by falsely accusing him of fraudulent billing. Among the counts in the complaint was a statutory bad faith claim. Defendant filed a motion to dismiss all but one of the counts. Judge Pratter of the Eastern District granted the motion as to the bad faith claim.

Following the court's decision to dismiss most of the counts of the complaint, it turned to the question of whether there was federal jurisdiction over the bad faith claim. The court decided not to exercise its jurisdiction over the bad faith claim, because it did not have any common nucleus of operative fact with the remaining defamation claim. Having concluded that it would not exercise its discretion to hear the bad faith claim, it dismissed the claim.

**(11) *Ozanne v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 48611 (W.D. Pa. May 5, 2011)
(McVerry, J.)**

Plaintiff, a Pennsylvania citizen, was in an auto accident, and applied for UIM benefits from her auto insurer, State Farm, after the policy limits of the other driver proved insufficient to compensate her for her injuries. After the parties were unable to resolve their UIM dispute, plaintiff filed suit against State Farm to recover such benefits. Plaintiff received a \$1 million jury verdict at trial against State Farm, which was molded to reflect her \$250,000 policy limits. Thereafter, plaintiff initiated suit in state court against State Farm and State Farm's claims adjuster. Plaintiff alleged that State Farm acted in bad faith in violation of §8371 and that the claims adjuster, also a Pennsylvania citizen, violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL) in his handling of the claim.

State Farm, an Illinois resident, removed the case to federal court, arguing that jurisdiction was proper because the claims adjuster had been fraudulently joined solely for the purpose of destroying diversity jurisdiction. Both defendants filed a motion to dismiss the UTPCPL claim. Plaintiff filed a motion to remand, arguing that the court had no subject matter jurisdiction. Judge McVerry of the Western District agreed with plaintiff, granting the motion to remand and denying defendants' motion to dismiss as moot.

The court noted that it was a high burden for a defendant to show that another defendant has been fraudulently joined: "Joinder is fraudulent 'where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no intention in good faith to prosecute the action against the defendant or seek a joint judgment.'"³⁶⁶ The UTPCPL permitted cause of actions based on misfeasance, but not based on nonfeasance, such as the nonpayment of benefits. Plaintiff alleged that the claims adjuster had stated that hers was a "test case" that State Farm wanted to try before a jury, and that, rather than the analysis of the claim, was the reason for the failure to settle.

³⁶⁵ *A.S. Blue, Inc. v. One Beacon Ins. Co.*, 2013 U.S. Dist. LEXIS 74270, at *6 (M.D. Pa. May 28, 2013).

³⁶⁶ *Ozanne v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 48611, at *8 (W.D. Pa. May 5, 2011) (quoting *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990)).

Noting that there was case law to support both parties' positions, the court found that it was required to resolve questions about how to interpret the case law in plaintiff's favor, thus concluding that the claim against the adjuster was colorable, destroying diversity jurisdiction:

Contrary to Defendants' argument, Pennsylvania courts have recognized that a colorable UTPCPL claim may exist against an insurance adjuster. *See, e.g., Grossi v. Travelers Ins. Co.*, 2010 U.S. Dist. LEXIS 9929 (W.D. Pa. Feb. 5, 2010). . . . To determine the merits of Defendants' underlying claim would exceed the scope of the Court's current task, *i.e.*, to evaluate subject matter jurisdiction, and such an analysis is improper at this stage of the proceeding. Accordingly, Plaintiff's Motion will be granted, and this matter remanded. . . .³⁶⁷

(12) *Marino v. GEICO Gen. Ins. Co.*, 2010 U.S. Dist. LEXIS 144476 (W.D. Pa. Apr. 26, 2010) (Schwab, J.)

Plaintiff was in an auto accident with an uninsured motorist, following which plaintiff filed a personal injury action. Plaintiff also filed this action for breach of contract and bad faith against his auto insurer, GEICO, for its alleged failure to pay UM benefits. After GEICO removed the action, plaintiff filed a motion to remand, arguing that the two actions should be consolidated, which would deprive the district court of diversity jurisdiction. Judge Schwab of the Western District granted plaintiff's motion. The court concluded that plaintiff's interest in pursuing the two actions together outweighed any risks to GEICO, particularly where the causes of action were based in state law.

(13) *Grossi v. Travelers Ins. Co.*, 2010 U.S. Dist. LEXIS 9929 (W.D. Pa. Feb. 5, 2010) (Ambrose, J.)

In this alleged bad faith case, plaintiff sued both his insurer and the insurance claims adjuster. Defendants removed the case from state court on diversity grounds. Plaintiff filed a motion to remand, arguing that one of the defendants, insurance adjuster Sharkey, was a Pennsylvania citizen like plaintiff, so the case belonged in state court. Defendants contended that the case should remain in federal court because Sharkey was fraudulently joined. Judge Ambrose of the Western District disagreed with the insurer, and granted the motion to remand.

The claim set forth against Sharkey was under Unfair Trade Practices and Consumer Protection Law, for alleged misfeasance in handling her UIM claim. Defendants claimed that contrary to the allegations, Sharkey had no involvement with the UIM claim, so there could not be a colorable claim against her. The court rejected the defense arguments. The court held that "[m]erely because Sharkey's involvement ended at some point in the parties' history does not decisively divorce her conduct from Plaintiff's alleged injury."³⁶⁸ The court found that the UTPCPL cause of action was colorable, and thus could not be dismissed:

"If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court." *Boyer*, 913 F.2d at 111. At a minimum, based on the facts alleged and applicable law, there exists a possibility that a state court would find a cause of action against Sharkey. Accordingly, she was not fraudulently joined, and no diversity of citizenship exists.³⁶⁹

(14) *Dunfee v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 49955 (E.D. Pa. June 27, 2008) (Baylson, J.)

In this case involving a property damage insurance coverage claim, Count I of the insureds' complaint alleged breach of contract, and the accompanying ad damnum clause demanded judgment "in an amount not in excess of \$50,000 together with interest, costs, and damages for delay." Count II of the complaint alleged bad faith, with the ad damnum clause seeking judgment for punitive damages, counsel fees, and interest on plaintiff's claim equal to the prime interest rate plus three percent, in "an amount not in excess of \$50,000." The insurer removed the case to federal court based on diversity jurisdiction, and the plaintiffs then moved to remand the case back to state court on grounds that the amount in controversy did not exceed the requisite \$75,000.

The plaintiffs argued that federal jurisdiction was not present because both counts in the complaint specifically sought damages "not in excess of \$50,000." The plaintiffs also argued that the state court complaint was subject to compulsory arbitration so that damages were capped at \$50,000 under the local rules. The insurer argued that the amount in controversy could exceed \$75,000 in light of the punitive damages claim and claim for attorneys' fees. The insurer further argued that although compulsory arbitration prevents the amount in controversy from exceeding \$50,000, the plaintiffs could recover more than \$75,000 by appealing that arbitration award and proceeding to trial; or amend the complaint to remove the ad damnum clauses, or remove the case from arbitration after the one-year limitations period for federal removal has expired.

Judge Baylson of the Eastern District agreed with the plaintiffs and granted remand. In reaching its decision, the court applied the "legal certainty" test as the standard to be applied in amount in controversy challenges. To satisfy this standard, the court noted, "it must be evident to a legal certainty that the plaintiff cannot recover an amount

³⁶⁷ *Ozanne v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 48611, at *13-14 (W.D. Pa. May 5, 2011).

³⁶⁸ *Grossi v. Travelers Ins. Co.*, 2010 U.S. Dist. LEXIS 9929, at *4 (W.D. Pa. Feb. 5, 2010).

³⁶⁹ *Grossi v. Travelers Ins. Co.*, 2010 U.S. Dist. LEXIS 9929, at *6 (W.D. Pa. Feb. 5, 2010) (quoting *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990)).

greater than the \$75,000 required for diversity jurisdiction.”³⁷⁰ The court explained that under the legal certainty test, if the complaint expressly limits the amount in controversy to an amount below the jurisdictional minimum, three main rules are to be followed by the court. First, the court “must look to see if the plaintiff’s actual demands in the aggregate exceed the threshold,” even if the plaintiff states the claims fall below \$75,000. Second, “a plaintiff, if permitted by state laws, may limit her monetary claims to avoid the amount in controversy threshold.”³⁷¹ And third, “the proponent seeking removal must prove to a legal certainty that the amount in controversy exceeds the statutory threshold.”³⁷² Applying these rules, the court concluded that the insurer had not met its burden to allow removal.

(15) *Kenia v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 5547 (M.D. Pa. Jan. 25, 2008) (Jones, J.)

The plaintiff insured initiated a bad faith action against Nationwide in the Court of Common Pleas of Luzerne County. The complaint also named several Nationwide claim representatives as defendants, and included a count alleging violation of the Pennsylvania Unfair Trade Practices and Consumer Protection law (“UTPCPL”).³⁷³ Nationwide removed the case to federal court, alleging that there was diversity of citizenship between plaintiff and Nationwide, and further alleging that the joinder of the non-diverse claim representatives was fraudulent. Plaintiff moved to remand the matter back to Luzerne County. Judge Jones of the Middle District granted plaintiff’s motion, finding that, at the pleading stage, there were at least colorable claims of UTPCPL violations against the claims representatives:

If a non-diverse party has been joined as a defendant, a “removing defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined.” . . . Joinder is fraudulent if there is no “reasonable basis in fact or colorable ground supporting the claim against the joined defendant.” . . . Defendants have not satisfied their “heavy burden” of showing that any Defendants were fraudulently joined. . . . Without addressing the merits of any claim, we find that Plaintiff’s Complaint advances at least one claim that is not “wholly insubstantial or frivolous,” that is, the allegation that the insurance adjuster employees violated the UTPCPL.³⁷⁴

The insurer argued that the UTPCPL was limited to “sellers,” rendering insurance adjusters outside the meaning of the statute. The insurer further argued that the plaintiff failed to allege “justifiable reliance” as an element of a UTPCPL claim. The court rejected both arguments and remanded the case back to state court.

(16) *Marsico v. UNUM Group*, 2007 U.S. Dist. LEXIS 87471 (W.D. Pa. Nov. 28, 2007) (Schwab, J.)

The plaintiff alleged that the insurer breached a disability insurance policy and acted in bad faith when it denied his disability insurance claim. The plaintiff further alleged that the physician retained by the insurer to perform an independent medical examination conspired with the insurer and/or committed malpractice by failing to exercise due care in conducting his examinations and preparing and submitting his report. The IME physician, Dr. Burstein, was included as a co-defendant. The insurer removed the matter to federal court, taking the position that Dr. Burstein was fraudulently joined.

Judge Schwab of the Western District remanded the case for lack of complete diversity because the co-defendant was a Pennsylvania citizen along with the plaintiff. The Court stated that upon review of the plaintiff’s complaint, “it appears that plaintiff has set forth, in good faith, reasonable bases in fact and colorable claims against Dr. Burstein, and that Dr. Burstein has not been fraudulently joined in an effort to defeat diversity of citizenship. Thus, complete diversity jurisdiction does not exist.”³⁷⁵

(17) *Punzak v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 28574 (E.D. Pa. Apr. 16, 2007) (McLaughlin, J.)

This opinion by Judge McLaughlin of the Eastern District is virtually identical to the opinion in *Espinosa v. Allstate Insurance Company*, discussed in this section in the print edition of the book.

(18) *Jenkins v. Texas Int’l Life Ins.*, 2007 U.S. Dist. LEXIS 14238 (W.D. Pa. Feb. 28, 2007) (Schwab, J.)

In this case, Judge Schwab of the Western District remanded a breach of contract and bad faith action where counsel for the plaintiff filed a declaration stating that “to the best of my knowledge and information that the amount in controversy in this matter is not presently nor can be reasonably expected to meet or exceed the jurisdictional amount of \$75,000.”³⁷⁶ The court held that the declaration limited plaintiff’s relief, and further noted that the defendant insurer “can use that declaration in state court to preclude plaintiff from seeking an amount greater than \$75,000.”³⁷⁷

³⁷⁰ *Dunfee v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 49955, at *8 (E.D. Pa. June 27, 2008).

³⁷¹ *Dunfee v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 49955, at *22 (E.D. Pa. June 27, 2008).

³⁷² *Dunfee v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 49955, at *23 (E.D. Pa. June 27, 2008).

³⁷³ 73 Pa. Stat. Ann. §2:01-1 et seq. See §2:09.

³⁷⁴ *Kenia v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 5547, at *5-7 (M.D. Pa. Jan. 25, 2008) (citations omitted).

³⁷⁵ *Marsico v. UNUM Grp.*, 2007 U.S. Dist. LEXIS 87471, at *6-7 (W.D. Pa. Nov. 28, 2007).

³⁷⁶ *Jenkins v. Texas Int’l Life Ins.*, 2007 U.S. Dist. LEXIS 14238, at *2 (W.D. Pa. Feb. 28, 2007).

³⁷⁷ *Jenkins v. Texas Int’l Life Ins.*, 2007 U.S. Dist. LEXIS 14238, at *3-4 (W.D. Pa. Feb. 28, 2007).

(19) *Howard v. Allstate Ins. Co.*, 2006 U.S. Dist. LEXIS 71915 (E.D. Pa. Sept. 28, 2006) (Stengel, J.)

Plaintiff insured filed an action for breach of contract and bad faith. Both counts sought damages “not in excess of \$50,000,” the arbitration limit, and the civil cover sheet listed damages as \$50,000 or less and designated the case for arbitration. Allstate removed the case, and the plaintiff moved for remand. Citing the *Samuel-Bassett* decision, Judge Stengel of the Eastern District defined the standard: “If a defendant cannot show to a ‘legal certainty’ that the amount in controversy exceeds the statutory minimum, the court must grant the motion to remand.”³⁷⁸

The insurer argued that there was a split of authority within the Third Circuit but, citing the *Samuel-Bassett* decision, Judge Stengel disagreed. He ruled that the insurer could not meet its burden of establishing to a legal certainty that the amount in controversy exceeded \$75,000 because the plaintiff’s damages were capped at \$50,000 under the compulsory arbitration statute.³⁷⁹

The insurer also relied on the fact that it sent requests for admissions to the plaintiff asking the plaintiff to admit or deny that damages did not exceed \$75,000. The plaintiff admitted that it could not state with certainty that if bad faith damages were awarded that the damages would exceed the threshold. According to the court, “Plaintiff’s refusal to speculate that damages could exceed \$50,000 will not confer diversity jurisdiction.”³⁸⁰

(20) *Brownstein v. Allstate Ins. Co.*, 2006 U.S. Dist. LEXIS 94577 (E.D. Pa. Nov. 16, 2006) (Diamond, J.)

The plaintiff brought a two-count complaint alleging breach of contract and bad faith. She alleged that each count did not exceed \$50,000, the Philadelphia County arbitration limit. The plaintiff conceded that the amount in controversy did not exceed \$75,000. Finding the defendant insurer could not meet its burden of showing to a legal certainty that the amount in controversy exceeded \$75,000, Judge Diamond remanded the matter to state court.

(21) *Augustine v. Chubb Grp. of Ins. Cos.*, 2005 U.S. Dist. LEXIS 15977 (E.D. Pa. July 27, 2005) (Newcomer, S.J.)

In this case, the court ruled, “My colleagues have repeatedly held that such an ad damnum clause limits a plaintiff’s right of recovery to \$50,000 and thus prevents removal.”³⁸¹ The court rejected the insurer’s argument that it should be entitled to aggregate the various plaintiffs’ claims to meet the jurisdictional amount.

(22) *O’Toole v. State Farm Fire & Cas. Co.*, 2004 U.S. Dist. LEXIS 9426 (E.D. Pa. May 20, 2004) (Kauffman, J.)

The insurer sought to remove the case from the Court of Common Pleas of Philadelphia County. Judge Kauffman, of the Eastern District, remanded the case to state court. He reasoned that “[s]ince each of the counts in the Complaint specifically seeks damages ‘not in excess of \$50,000,’ the case was designated for compulsory arbitration in the Court of Common Pleas, where the total amount of damages recoverable is capped at \$50,000 pursuant to 42 Pa. Cons. Stat. §7361.”³⁸² He agreed with the earlier decision that “the theoretical possibility that plaintiff could recover an amount in excess of \$50,000 on appeal from arbitration was too remote to confer federal jurisdiction.”³⁸³ Remand was appropriate, he held, “[b]ecause it appears to a legal certainty that Plaintiff’s claim is for less than the jurisdictional amount.”³⁸⁴

(23) *Barnes v. State Farm Mut. Auto. Ins. Co.*, 2004 U.S. Dist. LEXIS 7200 (E.D. Pa. Apr. 7, 2004) (Surrick, J.)

The plaintiff filed her complaint in the Court of Common Pleas of Philadelphia seeking benefits under her insurance policy, including treble damages, interest, costs, and attorneys’ fees in excess of \$50,000. The insurer filed a petition for removal based upon diversity jurisdiction, and the case was removed to the Eastern District of Pennsylvania. The plaintiff subsequently filed a petition for remand, challenging whether the amount in controversy was satisfied.

Although the court acknowledged that punitive damages, attorneys’ fees and costs are included in determining the amount in controversy, it permitted the parties to engage in limited discovery to determine if the amount in controversy was satisfied. According to the court, where the complaint does not seek a precise amount of damages, the court “may look to the notice of removal, stipulations, and discovery evidence to determine the value of the claim at issue.”³⁸⁵ Following the conclusion of the limited discovery, the court concluded that the insurer failed to establish that the amount in controversy was satisfied, particularly in light of the fact that it did not offer any “evidence as to the

³⁷⁸ *Howard v. Allstate Ins. Co.*, 2006 U.S. Dist. LEXIS 71915, at *3 (E.D. Pa. Sept. 28, 2006).

³⁷⁹ 42 Pa.C.S.A. §7361 (2006).

³⁸⁰ *Howard v. Allstate Ins. Co.*, 2006 U.S. Dist. LEXIS 71915, at *6 (E.D. Pa. Sept. 28, 2006).

³⁸¹ *Howard v. Allstate Ins. Co.*, 2006 U.S. Dist. LEXIS 71915, at *8 (E.D. Pa. Sept. 28, 2006).

³⁸² *O’Toole v. State Farm Fire & Cas. Co.*, 2004 U.S. Dist. LEXIS 9426, at *2-3 (E.D. Pa. May 20, 2004).

³⁸³ *O’Toole v. State Farm Fire & Cas. Co.*, 2004 U.S. Dist. LEXIS 9426, at *3 (E.D. Pa. May 20, 2004) (citing *Connelly v. Schleaf*, 2002 U.S. Dist. LEXIS 1831 (E.D. Pa. Jan. 30, 2002)).

³⁸⁴ *O’Toole v. State Farm Fire & Cas. Co.*, 2004 U.S. Dist. LEXIS 9426, at *3 (E.D. Pa. May 20, 2004).

³⁸⁵ *Barnes*, 2004 U.S. Dist. LEXIS 7200, at *4.

amount of attorney's fees and punitive damages that could be awarded in this case," which was the "bulk of any recovery."³⁸⁶

(24) *Kahhan v. Mass. Cas. Ins. Co.*, 2001 U.S. Dist. LEXIS 18561 (E.D. Pa. Nov. 14, 2001) (Yohn, J.)

The addition of a third party, such as an agent/broker, can sometimes defeat diversity jurisdiction.

In *Kahhan*, the plaintiff-insured sued the insurer alleging breach of contract, bad faith and deceit. The insurer removed the case to federal court and subsequently filed a counterclaim against plaintiff alleging, *inter alia*, fraudulent misrepresentation in the application process. The counterclaim prompted the insured to move to join the agent who sold the policy, because the plaintiff contended that the agent was liable for any misrepresentations or omissions in her application. Judge Yohn of the Eastern District allowed the joinder of the agent because the court found no evidence that plaintiff intended to join the additional defendant solely to defeat federal jurisdiction. Denial of plaintiff's petition to join the additional defendant would force plaintiff to litigate two lawsuits at the same time, thereby injuring her, according to the court. Additionally, equitable considerations of judicial economy favored permitting plaintiff to join the additional defendant. Consequently, the court granted plaintiff's petition to join the additional defendant and remanded the case to state court.

(25) *Henderson v. Nationwide Mut. Ins. Co.*, 169 F. Supp. 2d 365 (E.D. Pa. 2001) (Green, J.)

In a case arising out of a stolen automobile, plaintiff filed in federal court a breach of contract and bad faith action claiming damages "in excess of \$100,000." The defendant insurer challenged federal court jurisdiction, claiming that the complaint did not establish the requisite \$75,000 amount in controversy. Noting that the plaintiff claimed that the insurer acted in bad faith on account of plaintiff's race, Judge Green of the Eastern District court held that if the plaintiff proved the allegation, "he may be entitled to compensatory and/or consequential damages in excess of \$75,000."³⁸⁷ Concluding that it was unable to "say to a legal certainty" that plaintiff would be unable to recover an amount in excess of \$75,000, the court allowed the case to proceed.³⁸⁸

(26) *Antonetz v. Royal Ins. Co.*, 2000 U.S. Dist. LEXIS 9666 (E.D. Pa. July 5, 2000) (Reed, J.)

In this case, Judge Reed ordered the insurer to file proof to show that the amount in controversy had been met. The court held a hearing at which evidence was presented. Holding that "removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand," the court ruled that the insurer did not produce sufficient evidence to substantiate the claim of bad faith and thus did not meet its burden in establishing the amount in controversy.³⁸⁹

(27) *Irving v. Allstate Indemnity Co.*, 97 F. Supp. 2d 653 (E.D. Pa. 2000) (Reed, J.)

The plaintiff policyholder's complaint alleged breach of contract and bad faith on the part of the insurance company, Allstate. The original *ad damnum* clause in the complaint stated the damages would not exceed \$50,000, but the plaintiff's reply to new matter later alleged that the claimed damages would exceed \$50,000. The complaint also requested punitive damages, attorney's fees, interest and costs under §8371. Allstate removed the case to federal court, alleging that the amount in controversy exceeded \$75,000.

Judge Reed of the Eastern District remanded the case back to state court. Applying the "preponderance of evidence" standard, the court held that the burden was on the insurer to establish that the amount in controversy exceeded the jurisdictional minimum. Although the court acknowledged that attorney's fees, costs, interest and punitive damages are included in the calculation of the amount in controversy, the court nonetheless held that the insurer must establish by evidence produced on the record the amount of the claim.

(28) *Chaparro v. State Farm Ins. Co.*, 1999 U.S. Dist. LEXIS 16428 (E.D. Pa. Oct. 12, 1999) (Kauffman, J.)

The plaintiffs, an insured and his chiropractor, alleged that State Farm improperly refused to pay the insured's medical expenses, in violation of the Motor Vehicle Financial Responsibility Law, and §8371. The insurer removed the action to federal court, and the plaintiffs filed a motion to remand.

Judge Kauffman of the Eastern District applied the "reasonable probability" test – *i.e.*, whether the defendant "has shown that a reasonable jury likely could value Plaintiffs' losses at over \$75,000."³⁹⁰ The parties agreed that the plaintiffs' unpaid medical bills amounted to approximately \$10,000. The court held that "a reasonable jury could not award punitive damages of \$65,000," and therefore granted plaintiffs' motion to remand.³⁹¹

³⁸⁶ *Id.*

³⁸⁷ *Henderson v. Nationwide*, 169 F. Supp. 2d 365, 368.

³⁸⁸ *Id.* at 369.

³⁸⁹ *Antonetz v. Royal Ins. Co.*, 2000 U.S. Dist. LEXIS 9666, at *9.

³⁹⁰ *Chaparro v. State Farm Ins. Co.*, 1999 U.S. Dist. LEXIS 16428, at *11 (E.D. Pa. Oct. 12, 1999).

³⁹¹ *Chaparro v. State Farm Ins. Co.*, 1999 U.S. Dist. LEXIS 16428, at *12 (E.D. Pa. Oct. 12, 1999).

(29) *Lerch v. Maryland Ins. Grp.*, 1995 U.S. Dist. LEXIS 844 (E.D. Pa. Jan. 25, 1995) (Waldman, J.)

In this case, the late Judge Waldman of the Eastern District noted that where punitive or incidental damages comprise the bulk of the purported amount in controversy, a plaintiff's claim should receive close scrutiny to ensure that the jurisdictional threshold is not circumscribed. The court found that plaintiff's claim did not meet the amount in controversy requirement. Even accepting plaintiff's treble damage claim of \$13,500 as correct, the court stated that this was a straight-forward case that would not warrant trebled attorney's fees of \$75,000, noting that \$25,000 in attorney's fees would represent 167 hours at \$150 per hour, equaling more than five trial weeks, for a case that should only last one day. Despite the presence of plaintiff's §8371 claim, the court concluded to a "legal certainty" that plaintiffs would not recover more than the jurisdictional minimum.

(30) *Fine v. State Farm Fire & Cas. Co.*, 1993 U.S. Dist. LEXIS 7682, (E.D. Pa. June 11, 1993) (Bechtle, J.)

In *Fine v. State Farm*, the Eastern District reasoned that although the compensatory damages alleged in the complaint would most likely fall below what was then the \$50,000 federal threshold, the plaintiffs' claim for punitive damages under §8371 prevented the court from concluding to a "legal certainty" that the amount in controversy did not satisfy the jurisdictional minimum.

§7:18(a) Cases Discussing Evidentiary Burden in Opposing Summary Judgment

(1) *Monaghan v. Travelers Prop. & Cas. Co. of Am.*, 2014 U.S. Dist. LEXIS 82368 (M.D. Pa. June 16, 2014) (Munley, J.)

In the course of Judge Munley's opinion denying summary judgment in this first party medical benefits auto claim, the court stated:

The plaintiff agrees with defendant that she must establish a bad faith claim by "clear and convincing" evidence rather than the typical "preponderance of the evidence." Plaintiff proceeds to state in her brief that sufficient evidence exists to create a genuine issue of material fact. This assertion by the plaintiff does not indicate that she seeks to apply a different burden of proof but merely that she believes that the evidence is sufficient to create a genuine issue of fact. Plaintiff has set forth the correct burden of proof and we find nothing to contradict that in her also asserting that no genuine issue of material fact exists. Accordingly, we shall examine the record to determine if sufficient evidence exists to establish the existence of a genuine issue of material fact as to whether plaintiff can prove bad faith by clear and convincing evidence. *See Nw. Mut. Life Ins. Co. v. Babayan*, 430 F.3d at 129 (explaining that "[i]n deciding a motion for summary judgment, the court is required to take the heightened standard of proof into account."³⁹²).

(2) *Sadel v. Berkshire Life Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 8993 (E.D. Pa. Jan. 31, 2011) (Goldberg, J.), *aff'd*, 2012 U.S. App. LEXIS 6455 (3d Cir. Mar. 30, 2012) (Rendell, J.)

In this case discussed in §§10:13(c) and 10:15, the plaintiff-insured submitted an expert report in opposing defendant insurer's motion for summary judgment. In nonetheless granting the insurer's motion, the court held that simply providing an expert opinion was not alone sufficient to preclude summary judgment where that opinion could not support a jury verdict:

The mere presence of an expert opinion supporting the non-moving party's position does not necessarily defeat a summary judgment motion; rather, there must be sufficient facts in the record to validate that opinion. . . . When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.³⁹³

The Third Circuit affirmed, in an opinion by Judge Rendell. While not specifically addressing the expert's report, it concluded that "we agree with the District Court that Sadel has presented no evidence to support his claim that Berkshire acted in bad faith in investigating his claim or refusing to pay benefits."³⁹⁴

(3) *Bybel v. Metro. Life Ins. Co.*, 2010 U.S. Dist. LEXIS 122367 (E.D. Pa. Nov. 18, 2010) (Stengel, J.)

In discussing the evidentiary burden in analyzing a summary judgment motion, Judge Stengel of the Eastern District stated: "In evaluating a motion for summary judgment, the reviewing court must consider the plaintiff's arguments in light of her high evidentiary burden at trial."³⁹⁵

³⁹² *Monaghan v. Travelers Prop. & Cas. Co. of Am.*, 2014 U.S. Dist. LEXIS 82368, at *9-10 (M.D. Pa. June 16, 2014) (citations to record omitted).

³⁹³ *Sadel v. Berkshire Life Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 8993, at *34 (E.D. Pa. Jan. 31, 2011) (citations omitted).

³⁹⁴ *Sadel v. Berkshire Life Ins. Co. of Am.*, 2012 U.S. App. LEXIS 6455, at *10 (3d Cir. Mar. 30, 2012).

³⁹⁵ *Bybel v. Metro. Life Ins. Co.*, 2010 U.S. Dist. LEXIS 122367, at *28 (E.D. Pa. Nov. 18, 2010) (citing *Serino v. Prudential Ins. Co. of Am.*, 706 F. Supp. 2d 584 (E.D. Pa. 2009)).

(4) *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 12992 (W.D. Pa. Feb. 16, 2010) (McVerry, J.), *aff'd*, 410 F. App'x 484 (3d Cir. 2011) (Greenberg, J.)

In this case discussed in §§10:07(a) and 10:15, State Farm denied Lockhart's auto theft claim after a fraud investigation. Lockhart filed a suit alleging statutory bad faith and breach of contract. State Farm filed a motion for summary judgment, which Judge McVerry of the Western District granted, concluding that there was no bad faith as a matter of law.

In opposing the insurer's motion for summary judgment, Lockhart pointed to certain facts in the investigatory record that might have weighed in his favor, and argued that those facts precluded summary judgment. Those facts included that State Farm acknowledged that there was no clear motive, considering Lockhart's successful career and ties to the community, that an e-mail after the conclusion of the investigation indicated that State Farm did not want to pay a second fraudulent claim (it had paid claim for theft under similar circumstances several years earlier), a comment by one of State Farm's employees that Lockhart was "mean," and Lockhart's expert's testimony that State Farm must examine its investigation in the light most favorable to the insured. Despite those asserted facts, the court rejected the insured's arguments, finding that "a reasonable factfinder could not conclude by clear and convincing evidence that State Farm acted in bad faith."³⁹⁶

The Third Circuit affirmed the district court's opinion. In the decision, the panel noted that the district court had not erred in failing to credit the report of Lockhart's expert, Garvin, in the summary judgment proceedings. The court rejected Lockhart's argument that the district court had improperly rendered a decision on Garvin's credibility, finding that Garvin's report rendered an opinion on the legal issue the court was to decide:

Yet the District Court, and we for that matter, no more was assisted by Garvin's opinion on the bad faith issue than a court when considering a motion to suppress evidence seized in a search pursuant to a warrant would be assisted by expert testimony on the issue of whether the court that issued the search warrant had probably cause to do so.³⁹⁷

(5) *Hampton v. GEICO Gen. Ins. Co.*, 759 F. Supp. 2d 632 (W.D. Pa. 2010) (Lenihan, M.J.), *adopted by*, 759 F. Supp. 2d 632 (W.D. Pa. 2010) (Ambrose, J.)

In this case granting summary judgment in favor of insurer GEICO, Magistrate Judge Lenihan of the Western District explained:

The standard of proof required to establish a statutory bad faith claim against an insurer under Pennsylvania law is clear and convincing evidence. . . . "The 'clear and convincing' standard requires that the plaintiff show 'that the evidence is so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendants acted in bad faith.'" Accordingly, GEICO's summary judgment motion as to Plaintiff's bad faith claim must be evaluated with the clear and convincing evidence standard in mind. . . .³⁹⁸

(6) *Spinelli v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 22191 (E.D. Pa. Mar. 18, 2009) (Schiller, J.)

In this case discussed in §10:11, Judge Schiller of the Eastern District granted summary judgment in favor of the insurer, noting,

The clear and convincing standard raises the insured's burden in opposing a summary judgment motion "because the court must view the evidence presented in light of the substantive evidentiary burden at trial." Furthermore, since the essence of a bad faith claim is the denial of benefits without good reason, an insurer is entitled to summary judgment if it can show a reasonable basis for its actions.³⁹⁹

(7) *Bottke v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 4203 (E.D. Pa. Jan. 22, 2009) (Schiller, J.)

In this case, discussed in §10:07(b), Judge Schiller of the Eastern District granted summary judgment in favor of the insurer, holding:

The burden rests with the insured to show bad faith by clear and convincing evidence. To satisfy this standard, the insured must present evidence "so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendants acted in bad faith." The clear and convincing standard raises the insured's burden in opposing a summary judgment motion "because the

³⁹⁶ *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 12992, at *21 (W.D. Pa. Feb. 16, 2010).

³⁹⁷ *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 410 F. App'x 484, 487 (3d Cir. 2011).

³⁹⁸ *Hampton v. GEICO Gen. Ins. Co.*, 759 F. Supp. 2d 632, 644-45 (W.D. Pa. 2010) (quoting *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 367 (3d Cir. 2004) and citing *Employers Mut. Cas. Co. v. Loos*, 476 F. Supp. 2d 478, 491 (W.D. Pa. 2007), *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. Ct. 1994), and *Northwestern Mut. Life Ins. Co. v. Babayan*, 430 F.3d 121, 137 (3d Cir. 2005)).

³⁹⁹ *Spinelli v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 22191, at *19-20 (E.D. Pa. Mar. 18, 2009) (citations omitted).

court must view the evidence presented in light of the substantive evidentiary burden at trial.” Furthermore, since the essence of a bad faith claim is the denial of benefits without good reason, an insurer is entitled to summary judgment if it can show a reasonable basis for its actions.⁴⁰⁰

(8) *Rhodes v. USAA Cas. Ins. Co.*, Superior Court of Pennsylvania, Mem. Slip Op., No. 156 WDA 2007 (Pa. Super. Jan. 31, 2008), appeal denied, 958 A.2d 1048 (Pa. 2008)

In this non-precedential memorandum opinion from the Superior Court,⁴⁰¹ discussed in §9:13, the Superior Court reversed a trial court entry of summary judgment in favor of an insurer. With respect to the standard of proof, the Superior Court wrote as follows:

We note initially that, contrary to the trial court’s implication, the Rhodeses were not required to prove their claim by clear and convincing evidence in order to survive summary judgment. The clear and convincing evidence standard would apply at trial, not at the summary judgment stage of the proceedings. To survive summary judgment, the Rhodeses were required to satisfy a less stringent standard: Establishment of a question of material fact for resolution by the fact-finder.⁴⁰²

However, the court noted that it had been permissible for the trial court to grant summary judgment if it concluded that the plaintiffs “were unable to produce any evidence to support the second prong of the two-part test for bad faith on the part of an insurer.”⁴⁰³ However the court reversed the grant of summary judgment because the trial court made improper credibility determinations.

(9) *Wedemeyer v. United States Life Ins. Co.*, 2007 U.S. Dist. LEXIS 15742 (E.D. Pa. Mar. 6, 2007) (Dalzell, J.)

In this case, discussed in §§10:07 and 10:11, in deciding a summary judgment in favor of the insurer, Judge Dalzell of the Eastern District wrote as follows:

A statutory bad faith claim has two elements: (1) “the insurer lacked a reasonable basis for denying benefits” and (2) “the insurer knew or recklessly disregarded its lack of a reasonable basis. . . .” The plaintiff insured has the burden of proving each element by clear and convincing evidence, and mere insinuation does not suffice. . . . Thus, as the late Judge Rosenn summarized the Pennsylvania jurisprudence for our Court of Appeals, the plaintiff must show “that the evidence is so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendants acted in bad faith.” *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 367 (3d Cir. 2004). . . . Because a plaintiff must satisfy the clear and convincing evidentiary burden at trial, “[her] burden in opposing a summary judgment motion is commensurately high.” *Id.*⁴⁰⁴

(10) *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440 (E.D. Pa. Nov. 13, 2006) (Joyner, J.)

In opposing summary judgment, the plaintiff provided to the court an expert opinion that argued that the insurer acted in bad faith and violated the UIPA. The court held that the proffered expert’s opinion that the company acted in bad faith constituted an “improper (and inadmissible) opinion on the ultimate legal issue of whether defendants acted in bad faith.”⁴⁰⁵ According to the court, “[Plaintiff’s expert] offers only a fact-starved conclusion rather than a reasoned opinion. And since an expert’s opinion ‘does not necessarily defeat a summary judgment motion when it is unsupported by sufficient facts,’ it certainly will not when it is not supported by a single fact.”⁴⁰⁶ This case is discussed in §10:07.

(11) *Monarch, Inc. v. St. Paul Prop. & Liab. Ins. Co.*, 2004 U.S. Dist. LEXIS 14803 (E.D. Pa. July 29, 2004) (Kauffman, J.)

In a case granting summary judgment on a bad faith claim in favor of an insurer,⁴⁰⁷ Judge Kauffman of the Eastern District set forth the applicable summary judgment standard as follows:

“Since plaintiff’s burden at trial [on bad faith claims] is higher than preponderance of evidence, plaintiff’s burden in opposing summary judgment is also higher.” *McCabe v. State Farm Mutual Automobile Insurance Company*, 36 F. Supp. 2d 666, 670 (E.D. Pa. 1999). Summary judgment will be

⁴⁰⁰ *Bottke v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 4203, at *12 (E.D. Pa. Jan. 22, 2009).

⁴⁰¹ Under Pennsylvania Superior Court rules, memorandum opinions are generally not citable as precedent. See Superior Court Operating Procedures, §§65.37; *Chaaf v. Kaufman*, PICS No. 04- 0628 (Pa. Super. Apr. 2004). This practice has been the subject of some criticism. See e.g. H. Grezlak, “The Shadow Law,” *Pennsylvania Law Weekly*, November 1, 1999, p. 1; Melissa Nann, “Still No Citing Allowed,” *The Legal Intelligencer*, April 28, 2004, p. 1. Pa. Rule Appellate Pro. 3519 allows a party to request publication within 14 days after an unpublished memorandum has been filed.

⁴⁰² *Rhodes v. USAA Casualty Ins. Co.*, Superior Court of Pennsylvania, Mem. Slip Op., No. 156 WDA 2007 (Pa. Super. Jan. 31, 2008), slip op. at 13, *appeal denied*, 958 A.2d 1048 (Pa. 2008).

⁴⁰³ *Id.* at 13-14.

⁴⁰⁴ *Wedemeyer v. United States Life Ins. Co.*, 2007 U.S. Dist. LEXIS 15742, at *27-28 (some citations omitted).

⁴⁰⁵ *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440, at *47 n.32 (E.D. Pa. Nov. 13, 2006).

⁴⁰⁶ *Id.* (citing *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 595 (E.D. Pa. 1999)).

⁴⁰⁷ This case is discussed in §10:19.

granted against a bad faith claimant if “there is no clear and convincing evidence that the insurer’s conduct was unreasonable and that it knew or recklessly disregarded its lack of a reasonable basis in denying the claim.” *Bostick v. ITT Hartford Group, Inc.*, 56 F. Supp. 2d 580, 587 (E.D. Pa. 1999).⁴⁰⁸

(12) *Williams v. Hartford Cas. Ins. Co.*, 83 F. Supp. 2d 567 (E.D. Pa. 2000), *aff’d without opinion*, 2001 U.S. App. LEXIS 8687 (3d Cir. Apr. 4, 2001) (Katz, J.)

In this case involving a UIM claim, the plaintiff-insured alleged that the insurer acted in bad faith in delaying the investigation of plaintiffs’ claim, delaying its first settlement offer and then making an unreasonably low settlement offer, and otherwise violating Pennsylvania regulations. The Eastern District, per Judge Katz, held that, “The plaintiff must establish bad faith by clear and convincing evidence. . . . Accordingly, in opposing a summary judgment motion, the plaintiff’s burden of proof also rises to the clear and convincing standard.”⁴⁰⁹ According to the court,

In order to defeat a motion for summary judgment, a plaintiff must show that a jury could find by “the stringent level of clear and convincing evidence,” . . . that the insurer lacked a reasonable basis for its handling of the claim and that it recklessly disregarded its unreasonableness.⁴¹⁰

Finding that “there is no clear and convincing evidence by which a reasonable jury could find bad faith,” the district court granted the insurer’s motion for summary judgment as to all of the alleged acts of bad faith.⁴¹¹ Interestingly, Judge Katz discounted the presence of the plaintiff’s expert report as he had in *Kosierowski v. Allstate*, noting that the “mere presence of an expert opinion supporting the non-moving party’s position does not necessarily defeat a summary judgment motion; rather there must be sufficient facts in the record to validate that opinion.”⁴¹²

(13) *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583 (E.D. Pa. 1999) (Katz, J.)

In this case, the insurer filed a Motion for Summary Judgment based upon the facts of record. The plaintiff submitted a report from a “bad faith expert” which opined that Allstate had acted in bad faith under the particular facts of the case. Judge Katz of the Eastern District nonetheless granted the insurer’s motion for summary judgment, stating, “The mere presence of an expert opinion supporting the non-moving party’s position does not necessarily defeat a summary judgment motion; rather there must be sufficient facts in the record to validate that opinion.” He noted that the bad faith expert gave no consideration to the insurer’s alternative reasons for investigatory delays, nor did the expert fairly address the insurer’s IME report. The court held that the plaintiff’s bad faith expert report failed to consider much of the context of the case, and thus did not create a genuine issue of material fact.

§7:18(b) Summary Judgment in Favor of Insurer

Bodnar v. Nationwide Mut. Ins. Co., 2013 U.S. Dist. LEXIS 148343 (Oct. 15, 2013), *reconsideration denied*, 2014 U.S. Dist. LEXIS 94931 (July 11, 2014), *later proceeding at* 2015 U.S. Dist. LEXIS 124504 (Sept. 15, 2015), *reconsideration denied*, 2015 U.S. Dist. LEXIS 162169 (M.D. Pa. Dec. 3, 2015) (Mariani, J.), *aff’d*, 2016 U.S. App. LEXIS 17903 (3d Cir. Oct. 4, 2016) (Hardiman, J.) (CGL policy)

Duda v. Standard Ins. Co., 2015 U.S. Dist. LEXIS 56606 (E.D. Pa. Apr. 30, 2015) (Pratter, J.), *aff’d*, 649 F. App’x 230 (3d Cir. 2016) (Jordan, J.) (disability policy)

Goddard v. State Farm Mut. Auto. Ins. Co., 2014 U.S. Dist. LEXIS 5974 (E.D. Pa. Jan. 16, 2014) (O’Neill, J.), *aff’d sub nom.*, *Feingold v. State Farm Mut. Auto. Ins. Co.*, 629 F. App’x 374 (3d Cir. 2015) (Scirica, J.) (auto policy-UIM)

Rogers v. Harleysville Ins., Berks Co. CCP No.: 14-674 (Jan. 21, 2016), *aff’d*, 2016 Pa. Super. Unpub. LEXIS 3339 (Pa. Super. Sept. 13, 2016) (Platt, J.) (commercial auto policy, inland marine policy)

Racioppi v. Progressive Ins. Co., 2015 Phila. Ct. Com. Pl. LEXIS 415 (Philadelphia Dec. 14, 2015) (Shreeves-Johns, J.), *aff’d*, 2016 Pa. Super. Unpub. LEXIS 1624 (Pa. Super. May 11, 2016) (Ford Elliott, J.) (auto policy, UIM)

Shaffer v. State Farm Mut. Auto. Ins. Co., 2014 U.S. Dist. LEXIS 149095 (M.D. Pa. Oct. 20, 2014) (Rambo, J.), *aff’d*, 643 F. App’x 201 (3d Cir. 2016) (Vanaskie, J.) (auto policy, UIM)

AmerisourceBergen Corp. v. Ace American Ins. Co., 2013 Phila. Ct. Com. Pl. LEXIS 249 (Phila. July 16, 2013) (Snite, J.), *aff’d*, 2014 PA Super. 198 (Pa. Super. Ct. 2014) (Jenkins, J.) (on coverage issue) (“claims expenses” clause of professional liability policy)

Currie v. State Farm Fire & Cas. Co., 2012 U.S. Dist. LEXIS 190437 (E.D. Pa. Aug. 19, 2014) (Kelly, J.) (homeowner’s policy, granted in part)

⁴⁰⁸ *Monarch, Inc.*, 2004 U.S. Dist. LEXIS 14803, at *13.

⁴⁰⁹ *Williams*, 83 F. Supp. 2d at 571.

⁴¹⁰ *Id.* (citing *Jung v. Nationwide Mut. Fire Ins. Co.*, 949 F. Supp. 353, 356 (E.D. Pa. 1997)).

⁴¹¹ *Id.* at 568.

⁴¹² *Williams*, 83 F. Supp. 2d at 573 (citing *Kosierowski v. Allstate*, 51 F. Supp. 2d 583, 595 (E.D. Pa. 1999)).

Dunn v. Scottsdale Ins. Co., 2013 U.S. Dist. LEXIS 107984 (M.D. Pa. Aug. 1, 2013) (Mannion, J.) (commercial property)

Deibler v. Nationwide Mut. Ins. Co., 2013 U.S. Dist. LEXIS 119723 (W.D. Pa. Aug. 23, 2013) (Bissoon, J.) (auto policy, UM)

Goddard v. State Farm Mut. Auto. Ins. Co., 2014 U.S. Dist. LEXIS 5974 (E.D. Pa. Jan. 16, 2014) (O'Neill, J.) (auto policy, UIM)

Hayden v. Westfield Ins. Co., 2013 U.S. Dist. LEXIS 153334 (W.D. Pa. Oct. 25, 2013) (Hornak, J.), *aff'd*, 2014 U.S. App. LEXIS 17911 (3d Cir. 2014) (Krause, J.) (homeowner's policy)

Honesdale Volunteer Ambulance Corp., Inc. v. American Alternative Ins. Co., 2014 U.S. Dist. LEXIS 38184 (M.D. Pa. Mar. 24, 2014) (Mannion, J.) (commercial property policy)

Hayes v. American Int'l Group, 2014 U.S. Dist. LEXIS 103564 (E.D. Pa. July 29, 2014) (Hey, M.J.) (long term disability policy)

Hudgins v. Travelers Home & Marine Ins. Co., 2013 U.S. Dist. LEXIS 107775 (E.D. Pa. July 31, 2013) (Yohn, J.) (homeowner's policy, granted in part)

Kitsock v. Baltimore Life Ins. Co., 2014 U.S. Dist. LEXIS 2155 (M.D. Pa. Jan. 8, 2014) (Schwab, M.J.) (accidental death policy)

Kojsza v. Scottsdale Ins. Co., 2014 U.S. Dist. LEXIS 5286 (M.D. Pa. Jan. 15, 2014) (Mariani, J.) (homeowner's policy)

Lincoln General Ins. Co. v. Gracie Corp. of New Jersey, 2013 Pa. Dist. & Cnty. Dec. LEXIS 190 (Chester Mar. 8, 2013) (Tunnell, J.) (surety agreement)

Lites v. Trumbull Ins. Co., 2013 U.S. Dist. LEXIS 153346 (E.D. Pa. Oct. 25, 2013) (Restrepo, J.) (auto policy, election of tort option)

Miezejewski v. Infinity Auto Ins. Co., 2014 U.S. Dist. LEXIS 7425 (M.D. Pa. Jan. 22, 2014) (Mannion, J.) (auto policy, UIM)

Moran Industries, Inc. v. Netherlands Ins. Co., 2014 U.S. Dist. LEXIS 20081 (M.D. Pa. Feb. 19, 2014) (Brann, J.) (commercial property policy)

Rowe v. Nationwide Ins. Co., 2014 U.S. Dist. LEXIS 36302 (W.D. Pa. Mar. 20, 2014) (Gibson, J.) (auto policy, UIM)

United States Fire Ins. Co. v. Kelman Bottles, 2014 U.S. Dist. LEXIS 71220 (W.D. Pa. May 23, 2014) (Schwab, J.), reconsideration denied, 2014 U.S. Dist. LEXIS 88256 (W.D. Pa. June 27, 2014) (Fisher, J.) (equipment breakdown policy)

Rhodes v. USAA Cas. Ins. Co., No. 2004-GN-2279, PICS Case No. 13-2322 (C.P. Blair July 18, 2013) (Brown, S.J.) (auto policy, UIM benefits)

National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc., 2013 U.S. Dist. LEXIS 97226 (W.D. Pa. July 12, 2013) (Ambrose, J.) (CGL policy, granted in part)

Yera, Inc. v. Travelers Cas. Ins. Co. of Am., 2013 Phila. Ct. Com. Pl. LEXIS 191 (Phila. June 17, 2013) (Snite, J.), *aff'd without op.*, 2014 Pa. Super. LEXIS 2050 (Super. Ct. Apr. 22, 2014) (commercial property policy)

Albert v. Erie Ins. Exch., 2013 PA Super. 59 (Super. Ct. Mar. 20, 2013) (Lazarus, J.) (auto policy, reimbursement for lost wage and travel expenses)

United States Fire Ins. Co. v. Kelman Bottles, 538 F. App'x 175 (3d Cir. 2013) (Roth, J.) (all risk policy)

American Collision & Automotive Center, Inc. v. Windsor-Mt. Joy Mut. Ins. Co., 2012 U.S. Dist. LEXIS 139490 (E.D. Pa. Sept. 27, 2012) (Gardner, J.) (fire loss for boat)

Anheuser-Busch, Inc. v. Ins. Co. of North America, 2012 Phila. Ct. Com. Pl. LEXIS 335 (Phila. Nov. 1, 2012), *supplemental opinion at*, 2013 Phila. Ct. Com. Pl. LEXIS 13 (Phila. Jan. 3, 2013) (McInerney, J.) (environmental policy)

A.P. Pino & Assocs., Inc. v. Utica Mut. Ins. Co., 2012 U.S. Dist. LEXIS 91918 (E.D. Pa. July 3, 2012) (Schiller, J.) (E&O policy)

ArcelorMittal Plate, LLC v. Joule Technical Servs., Inc., 2012 U.S. Dist. LEXIS 180512 (E.D. Pa. Dec. 20, 2012) (Schiller, J.) (CGL policy)

Smith v. State Farm Mut. Auto. Ins. Co., 506 F. App'x 133 (3d Cir. 2012) (Barry, J.) (auto policy, UIM benefits)

CAMICO Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP, 2013 U.S. Dist. LEXIS 91649 (E.D. Pa. June 28, 2013) (DuBois, J.) (commercial liability policy)

Capriotti v. Allstate Prop. & Cas. Ins. Co., 2012 U.S. Dist. LEXIS 126540 (E.D. Pa. Sept. 6, 2012) (O'Neill, J.) (homeowner's policy)

Chemij v. Allstate Ins. Co., 2012 U.S. Dist. LEXIS 80688 (E.D. Pa. June 11, 2012) (Schiller, J.) (auto policy, UIM benefits)

Dameshek v. Encompass Ins. Co. of Am., 2012 U.S. Dist. LEXIS 87570 (M.D. Pa. June 25, 2012) (Kane, C.J.) (homeowner's policy)

Davis v. State Farm Ins., 2012 U.S. Dist. LEXIS 177225 (E.D. Pa. Dec. 14, 2012) (Joyner, J.) (auto policy, theft coverage)

Gold v. State Farm Fire & Cas. Co., 880 F. Supp. 2d 587 (E.D. Pa. 2012), 2012 U.S. Dist. LEXIS 102470 (McLaughlin, J.) (homeowner's policy, water damage)

Hamm v. Allstate Prop. & Cas. Ins. Co., 2012 U.S. Dist. LEXIS 159348 (W.D. Pa. Nov. 7, 2012) (Hornak, J.) (homeowner's policy)

Hasan v. Allstate Ins. Co., Inc., 2013 U.S. Dist. LEXIS 58981 (E.D. Pa. Apr. 24, 2013) (Sitarski, M.J.) (homeowner's policy)

K2 Settlement, LLC v. Certain Underwriters at Lloyd's, London, 2012 U.S. Dist. LEXIS 170832 (W.D. Pa. Nov. 30, 2012) (Lancaster, C.J.) (mortgage banker's bond)

Mabrat v. Allstate Ins. Co., 2012 U.S. Dist. LEXIS 176386 (E.D. Pa. Dec. 12, 2012) (Baylson, J.) (homeowner's policy)

Markel Ins. Co. v. Young, 2012 U.S. Dist. LEXIS 81800 (E.D. Pa. June 12, 2012) (Shapiro, J.) (CGL policy)

Sypek v. State Farm Mut. Auto Ins. Co., 2012 U.S. Dist. LEXIS 83326 (M.D. Pa. June 15, 2012) (Caputo, J.) (auto policy, UIM benefits)

Mirarchi v. Seneca Specialty Ins. Co., 2013 U.S. Dist. LEXIS 40513 (E.D. Pa. Mar. 22, 2013) (Pratter, J.) (commercial property policy)

Neshaminy Constructors, Inc. v. Federal Ins. Co., 2012 U.S. Dist. LEXIS 86079 (E.D. Pa. June 21, 2012) (Savage, J.) (inland marine insurance policy)

Olender v. Nat'l Cas. Co., 2012 U.S. Dist. LEXIS 117731 (E.D. Pa. Aug. 21, 2012) (Tucker, J.) (commercial garage insurance policy)

Palmisano v. State Farm Fire & Cas. Co., 2012 U.S. Dist. LEXIS 116938 (W.D. Pa. Aug. 20, 2012) (Fischer, J.) (homeowner's policy)

Quinn v. Liberty Mut. Grp., 2013 U.S. Dist. LEXIS 31194 (E.D. Pa. Mar. 7, 2013) (Bartle, J.) (auto policy, UM benefits)

Schlegel v. State Farm Mut. Auto. Ins. Co., 2013 U.S. Dist. LEXIS 111514 (M.D. Pa. Aug. 8, 2013) (Mannion, J.) (auto policy UIM benefits)

Swan Caterers, Inc. v. Nationwide Mut. Fire Ins. Co., 2012 U.S. Dist. LEXIS 162305 (E.D. Pa. Nov. 13, 2012) (Yohn, J.) (commercial property policy)

Timothy v. State Farm Fire & Cas. Co., 2012 U.S. Dist. LEXIS 119698 (W.D. Pa. Aug. 23, 2012) (McVerry, J.) (homeowner's policy)

U.S. Bank, N.A. v. First American Title Ins. Co., 2013 U.S. Dist. LEXIS 65751 (E.D. Pa. May 8, 2013) (Yohn, J.) (title insurance)

Viscounte v. Liberty Mut. Grp., 2012 U.S. Dist. LEXIS 177228 (E.D. Pa. Dec. 14, 2012) (Sitarski, M.J.) (homeowner's policy, water damage)

Carcarey v. GEICO General Ins. Co., 2011 U.S. Dist. LEXIS 123679 (E.D. Pa. Oct. 26, 2011) (McLaughlin, J.) (auto policy, UM benefits)

Cozzone v. AXA Equitable Life Insurance Society of the United States, 2012 U.S. Dist. LEXIS 34526 (M.D. Pa. Mar. 14, 2012) (Blewitt, M.J.) (disability policy, statute of limitations)

Dawson v. Utica First Ins. Co., 2011 Phila. Ct. Com. Pl. LEXIS 164 (Philadelphia Apr. 4, 2011) (New, J.) (commercial fire policy)

Enwereji v. State Farm Fire & Cas. Co., 2011 U.S. Dist. LEXIS 83417 (E.D. Pa. July 28, 2011) (Baylson, J.) (homeowner's policy)

Fabrikant v. State Farm Fire & Cas. Co., 2012 U.S. Dist. LEXIS 67017 (M.D. Pa. May 14, 2012) (Conaboy, J.) (homeowner's policy)

Foster v. Westchester Fire Ins. Co., 2011 U.S. Dist. LEXIS 106726 (W.D. Pa. Sept. 20, 2011), *reconsideration denied*, 2012 U.S. Dist. LEXIS 88274 (W.D. Pa. June 26, 2012) (Flowers Conti, J.) (malpractice policy)

Heebner v. Nationwide Ins. Enterprise, 2011 U.S. Dist. LEXIS 111382 (E.D. Pa. Sept. 28, 2011) (Goldberg, J.) (auto policy, UM benefits)

Lehman v. Victoria Fire & Cas. Ins. Co., 2011 U.S. Dist. LEXIS 64212 (W.D. Pa. June 16, 2011) (Standish, J.) (auto policy)

L.R. Costanzo Co. v. Ohio Cas. Ins. Co., 2012 U.S. Dist. LEXIS 1655 (M.D. Pa. Jan. 6, 2012) (Mariani, J.) (CGL policy)

Mitch's Auto Service Center, Inc. v. State Auto. Mut. Ins. Co., 2011 U.S. Dist. LEXIS 123199 (E.D. Pa. Oct. 24, 2011) (Robreno, J.) (commercial property policy)

MP III Holdings, Inc. v. Hartford Cas. Ins. Co., 2011 U.S. Dist. LEXIS 72370 (E.D. Pa. June 30, 2011) (Davis, J.) (educator's legal liability policy)

Mu'Min v. Allstate Prop. & Cas. Ins. Co., 2011 U.S. Dist. LEXIS 94365 (E.D. Pa. Aug. 17, 2011) (Buckwalter, J.) (homeowner's policy)

Pfister v. State Farm Fire & Cas. Co., 2011 U.S. Dist. LEXIS 81324 (W.D. Pa. July 26, 2011), *later proceeding at*, 2011 U.S. Dist. LEXIS 92556 (W.D. Pa. Aug. 18, 2011) (Schwab, J.) (homeowner's policy)

Platt v. Fireman's Fund Ins. Co., 2012 U.S. Dist. LEXIS 71000 (E.D. Pa. May 22, 2012) (Buckwalter, J.) (auto policy, as to wage loss claim only)

Principal Life Ins. Co. v. Weiss, 2009 U.S. Dist. LEXIS 131300 (E.D. Pa. July 30, 2009) (Davis, J.) (life insurance policy)

Schmitt v. State Farm Ins. Co., 2011 U.S. Dist. LEXIS 105834 (W.D. Pa. Aug. 12, 2011) (Lenihan, C.M.J.), adopted by, 2011 U.S. Dist. LEXIS 105836 (W.D. Pa. Sept. 19, 2011) (Cercone, J.) (homeowner's policy)

Seto v. State Farm Ins. Co., 2012 U.S. Dist. LEXIS 3306 (W.D. Pa. Jan. 11, 2012) (McVerry, J.) (homeowner's policy)

Sicherman v. Nationwide Life Ins. Co., 2012 U.S. Dist. LEXIS 47630 (E.D. Pa. Apr. 4, 2012) (McLaughlin, J.) (life insurance policy)

United States Fire Ins. Co. v. Kelman Bottles, 2012 U.S. Dist. LEXIS 48684 (W.D. Pa. Apr. 5, 2012) (Schwab, J.) (commercial property policy)

Verdetto v. State Farm Fire & Cas. Co., 837 F. Supp. 2d 480 (M.D. Pa. 2011), *reconsideration denied*, 2012 U.S. Dist. LEXIS 29593 (M.D. Pa. Mar. 6, 2012) (Caputo, J.), *aff'd*, 510 F. App'x 209 (3d Cir. 2013) (Cowen, J.) (renter's insurance)

Watson v. Nationwide Mut. Ins. Co., 2012 U.S. Dist. LEXIS 83065 (E.D. Pa. June 14, 2012) (Surrick, J.) (auto policy, UM benefits)

Aumen v. Nationwide Mut. Ins. Co., 2011 U.S. Dist. LEXIS 31360 (M.D. Pa. Mar. 8, 2011) (Prince, M.J.), *adopted by* 2011 U.S. Dist. LEXIS 31166 (M.D. Pa. Mar. 24, 2011) (Jones, J.) (UIM claim)

Bariski v. Reassure America Life Ins. Co., 834 F. Supp. 2d 233 (M.D. Pa. 2011) (Kane, C.J.) (bad faith claim under life insurance policy barred by statute of limitations)

Cozza v. State Farm Fire & Cas. Co., No. 2-CV-02380 (E.D. Pa.) (Davis, J.), *aff'd*, 440 F. App'x 73 (3d Cir. 2011) (Fisher, J.) (homeowner's policy exclusion for subsurface water)

El Bor Corp. v. Fireman's Fund Ins. Co., 787 F. Supp. 2d 341 (E.D. Pa. 2011) (Robreno, J.) (exclusion in property insurance policy)

Garvin v. Allstate Ins. Co., 2011 Phila. Ct. Com. Pl. LEXIS 9 (Phila. Jan. 19, 2011) (Di Vito, J.) (homeowner's policy)

Kling v. State Farm Fire & Cas., 2011 U.S. Dist. LEXIS 21835 (E.D. Pa. Mar. 3, 2011) (Fullam, S.J.) (homeowner's policy)

3039 B Street Assocs., Inc. v. Lexington Ins. Co., 740 F. Supp. 2d 671 (E.D. Pa. 2010) (Robreno, J.), *aff'd*, 444 F. App'x 610 (3d Cir. 2011) (Barry, J.) (commercial property policy)

Amica Mut. Ins. Co. v. Fogel, 2010 U.S. Dist. LEXIS 89522 (M.D. Pa. June 7, 2010) (Carlson, M.J.), *adopted by* 2010 U.S. Dist. LEXIS 76744 (M.D. Pa. July 29, 2010) (Jones, J.) *aff'd on bad faith issue only, rev'd on other grounds*, 656 F.3d 167 (3d Cir. 2011) (Ambro, J.) (UIM claim)

Luse v. Liberty Mut. Fire Ins. Co., 2010 U.S. Dist. LEXIS 67608 (M.D. Pa. July 7, 2010) (Rambo, J.), *aff'd*, 411 F. App'x 462 (3d Cir. 2011) (per curiam) (homeowner's policy)

Morrison v. Wells Fargo Bank, N.A., 711 F. Supp. 2d 369 (M.D. Pa. 2010) (Smyser, M.J.) (title insurance policy)

Morrisville Pharmacy, Inc. v. Hartford Cas. Ins. Co., 2010 U.S. Dist. LEXIS 116607 (E.D. Pa. Oct. 29, 2010) (Rufe, J.) (commercial all-risks policy)

Nationwide Mut. Fire Ins. Co. v. Nova Real Estate LLC, 2011 U.S. Dist. LEXIS 20601 (E.D. Pa. Mar. 1, 2011) (Surrick, J.) (business property policy)

Rossi v. Progressive Ins., 813 F. Supp. 2d 643 (M.D. Pa. 2011) (Caputo, J.) (UIM claim)

Sadel v. Berkshire Life Ins. Co. of Am., 2011 U.S. Dist. LEXIS 8993 (E.D. Pa. Jan. 31, 2011) (Goldberg, J.), *aff'd*, 2012 U.S. App. LEXIS 6455 (3d Cir. Mar. 30, 2012) (Rendell, J.) (disability policy)

Scottsdale Ins. Co. v. City of Hazleton, 2009 U.S. Dist. LEXIS 44861 (M.D. Pa. May 28, 2009) (Caputo, J.), *aff'd*, 400 F. App'x 626 (3d Cir. 2010) (Rendell, J.) (public entity policy)

Tangle v. State Farm Ins. Cos., 2010 U.S. Dist. LEXIS 89349 (W.D. Pa. Aug. 4, 2010) (Baxter, M.J.), *adopted by*, 2010 U.S. Dist. LEXIS 89345 (W.D. Pa. Aug. 30, 2010) (McLaughlin, J.), *aff'd*, 444 F. App'x 592 (3d Cir. 2011) (Rendell, J.) (homeowner's policy)

Thomer v. Allstate Ins. Co., 790 F. Supp. 2d 360 (E.D. Pa. 2011) (Kelly, S.J.) (auto policy, first party medical benefits)

Treadways LLC v. Travelers Indem. Co., 2011 U.S. Dist. LEXIS 47708 (E.D. Pa. May 4, 2011) (Rueter, M.J.), *aff'd*, 2012 U.S. App. LEXIS 5094 (3d Cir. Mar. 12, 2012) (Ambro, J.) (commercial auto policy, worker's compensation policy)

Western World Ins. Co. v. Delta Prop. Mgmt. Inc., 2010 U.S. Dist. LEXIS 125296 (W.D. Pa. Nov. 29, 2010) (Schwab, J.) (general liability policy)

Whitmoyer Ford, Inc. v. Republic Franklin Ins. Co., 2010 U.S. Dist. LEXIS 32607 (E.D. Pa. Apr. 2, 2010) (Golden, J.) (commercial property policy)

Bomgardner v. State Farm Fire & Cas., 2010 U.S. Dist. LEXIS 96379 (E.D. Pa. Sept. 15, 2010) (McLaughlin, J.) (liability policy exclusion for faulty workmanship)

Bonsu v. Jackson Nat'l Life Ins. Co., 2010 U.S. Dist. LEXIS 89 (M.D. Pa. Jan. 4, 2010) (Conner, J.) (life insurance policy)

Calestini v. Progressive Cas. Ins. Co., 2010 U.S. Dist. LEXIS 136815 (M.D. Pa. Dec. 28, 2010) (Caputo, J.) (UIM claim)

Chebatoris v. Monumental Life Ins. Co., 2010 U.S. Dist. LEXIS 86367 (W.D. Pa. Aug. 23, 2010) (Lenihan, M.J.) (accidental death policy)

Colella v. State Farm Fire & Cas. Co., 2010 U.S. Dist. LEXIS 31895 (E.D. Pa. Apr. 1, 2010) (Joyner, J.), *aff'd*, 407 F. App'x 616 (3d Cir. 2011) (Barry, J.) (summary judgment for insurer affirmed, water damage property claim)

Costello v. Gov't Employees Ins. Co., 2010 U.S. Dist. LEXIS 28511 (M.D. Pa. Mar. 25, 2010) (Vanaskie, J.) (motion for judgment on the pleadings granted; UIM claim)

Empire Fire & Marine Ins. Co. v. Jones, 739 F. Supp. 2d 746, 2010 U.S. Dist. LEXIS 101046 (M.D. Pa. Aug. 19, 2010) (Blewitt, M.J.), *adopted by*, 739 F. Supp. 2d 746 (M.D. Pa. Sept. 13, 2010) (Jones, J.) (truckers' liability policy)

Fitzmartin v. Allstate Prop. & Cas. Co., 2010 U.S. Dist. LEXIS 98299 (M.D. Pa. Sept. 20, 2010) (Blewitt, M.J.) (homeowner's policy)

Hampton v. GEICO Gen. Ins. Co., 759 F. Supp. 2d 632 (W.D. Pa. 2010) (Lenihan, M.J.), *adopted by* 759 F. Supp. 2d 632 (W.D. Pa. 2010) (Ambrose, J.) (auto policy, first party medical benefits)

Kao v. Markel Ins. Co., 708 F. Supp. 2d 472 (E.D. Pa. 2010) (Brody, J.) (commercial property policy)

Klay v. AXA Equitable Life Ins. Co., 2010 U.S. Dist. LEXIS 102881 (W.D. Pa. Sept. 28, 2010) (Flowers Conti, J.) (disability policy)

Bottke v. State Farm Fire & Cas. Co., 2009 U.S. Dist. LEXIS 4203 (E.D. Pa. Jan. 22, 2009) (Schiller, J.) (homeowner's policy)

Brown v. Great Northern Ins. Co., 2009 U.S. Dist. LEXIS 13758 (M.D. Pa. Feb. 23, 2009) (Caputo, J.) (UIM claim)

Crawford v. Allstate Ins. Co., 2009 U.S. Dist. LEXIS 79200 (E.D. Pa. Sept. 1, 2009) (Buckwalter, J.) (UIM and wage loss claim)

Harhai v. Travelers Companies, Inc., Slip Op., July Term, 2008, No. 03747 (Phila. Com. Pl. July 2009) (Bernstein, J.) (commercial auto policy)

Ingraham v. GEICO Ins. Co., 2009 U.S. Dist. LEXIS 24467 (W.D. Pa. Mar. 24, 2009) (Flowers-Conti, J.) (UIM and first party medical claim)

Kister v. W.N. Tuscano Agency, Inc., 2009 Pa. D. & C. Dec. LEXIS 96 (Somerset Aug. 26, 2009) (Klementik, J.) (commercial auto policy)

McCleester v. State Farm Mut. Auto. Ins. Co., 2009 U.S. Dist. LEXIS 90345 (M.D. Pa. Sept. 30, 2009) (Vanaskie, J.) (personal auto policy, wage loss claim)

NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos., 2009 U.S. Dist. LEXIS 92991 (E.D. Pa. Oct. 1, 2009) (Baylson, J.) (motion for judgment on the pleadings granted; commercial auto policy)

Post v. St. Paul Travelers Ins. Co., 2009 U.S. Dist. LEXIS 52167 (E.D. Pa. March 31, 2009), *reconsideration denied*, 2009 U.S. Dist. LEXIS 43730 (E.D. Pa. May 21, 2009) (Brody, J.), *aff'd in part (on bad faith issue) and vacated and remanded in part*, 2012 U.S. App. LEXIS 15767 (3d Cir. July 31, 2012) (Ambro, J.) (professional malpractice policy)

Serino v. Prudential Ins. Co. of Am., 706 F. Supp. 2d 584 (M.D. Pa. 2009) (Kosik, J.) (disability policy)

Smalanskas v. Indian Harbor Ins. Co., 2008 Pa. D. & C. Dec. LEXIS 233 (Lackawanna Feb. 15, 2008) (*Nealon, J.*), *aff'd without opinion*, 970 A.2d 490 (Pa. Super. Feb. 10, 2009) (commercial general liability policy)

Smith v. Continental Cas. Co., 2008 U.S. Dist. LEXIS 76818 (M.D. Pa. Sept. 30, 2008) (Jones, J.), *aff'd*, 347 F. App'x 812 (3d Cir. 2009) (Barry, J.) (professional services policy)

Somerset Indus., Inc. v. Lexington Ins. Co., 639 F. Supp. 2d 532 (E.D. Pa. 2009) (Goldberg, J.) (all-risks policy)

Teti v. Phoenix Ins. Co., 2009 U.S. Dist. LEXIS 8027 (E.D. Pa. Feb. 3, 2009) (Joyner, J.) (homeowner's policy)

Whitmore v. Liberty Mut. Fire Ins. Co., 2008 U.S. Dist. LEXIS 76049 (E.D. Pa. Sept. 30, 2008) (Pratter, J.)

Allison v. Allstate Indem. Co., 2008 U.S. Dist. LEXIS 50684 (E.D. Pa. June 27, 2008)

Aquila v. Nationwide Mut. Ins. Co., 2008 U.S. Dist. LEXIS 93823 (E.D. Pa. Nov. 13, 2008) and 2008 U.S. Dist. LEXIS 101518 (E.D. Pa. Dec. 15, 2008) (Strawbridge, M.J.)

Atiyeh v. National Fire Ins. Co. of Hartford, 2008 U.S. Dist. LEXIS 76770 (E.D. Pa. Sept. 30, 2008) (Gardner, J.)

Blaylock v. Allstate Ins. Co., 2008 U.S. Dist. LEXIS 1098 (M.D. Pa. Jan. 7, 2008)

Grammenos v. Allstate Ins. Co., 2009 U.S. Dist. LEXIS 36155 (E.D. Pa. Apr. 28, 2009) (Rueter, M.J.) (homeowner's policy)

Johnson v. Progressive Ins. Co., 2008 Phila. Ct. Com. Pl. LEXIS 295 (CCP Phila. Nov. 21, 2008) (DiVito, J.), *aff'd*, 987 A.2d 781 (Pa. Super. 2009) (Bowes, J.) (UIM claim)

Kidd v. Prudential Ins. Co. of Am., 2008 U.S. Dist. LEXIS 2934 (M.D. Pa. Jan. 15, 2008)

Leach v. Northwestern Mut. Ins. Co., 2006 U.S. Dist. LEXIS 83624 (W.D. Pa. Nov. 16, 2006) *aff'd*, 262 F. App'x 455 (3d Cir. 2008)

Levin v. Transamerica Occidental Life Ins. Co., 2008 U.S. Dist. LEXIS 66243 (E.D. Pa. Aug. 20, 2008) (Joyner, J.)

Littleton v. State Farm Fire & Cas. Co., 2008 U.S. Dist. LEXIS 73278 (M.D. Pa. Sept. 22, 2008) (Rambo, J.)

McCrorry v. State Farm Mut. Auto. Ins. Co., 2008 U.S. Dist. LEXIS 28397 (W.D. Pa. Apr. 7, 2008)

Rock-Epstein v. Allstate Ins. Co., 2008 U.S. Dist. LEXIS 76042 (E.D. Pa. Sept. 29, 2008) (Schiller, J.)

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Tuschak v. State Farm Mut. Auto. Ins. Co., 2008 U.S. Dist. LEXIS 55020 (W.D. Pa. July 14, 2008)

Employers Mut. Cas. Co. v. Loos, 476 F. Supp. 2d 478 (W.D. Pa. 2007)

Wedemeyer v. United States Life Ins. Co., 2007 U.S. Dist. LEXIS 15742 (E.D. Pa. Mar. 6, 2007)

McCullough v. Northwestern Mut. Life Ins. Co., 2007 U.S. Dist. LEXIS 95134 (W.D. Pa. 2007)

Barry v. Ohio Cas. Grp., 2007 U.S. Dist. LEXIS 2684 (E.D. Pa. Jan. 12, 2007).

Smith v. Westfield Ins. Co., 2007 U.S. Dist. LEXIS 43996 (E.D. Pa. June 15, 2007)

Ressler v. Enterprise Rent-A-Car Co., 2007 U.S. Dist. LEXIS 50967 (W.D. Pa. July 13, 2007)

Hanna v. State Farm Fire & Cas. Co., 2007 U.S. Dist. LEXIS 59650 (E.D. Pa. Aug. 14, 2007)

SRP Management Corp. v. Seneca Ins. Co., 2007 U.S. Dist. LEXIS 71824 (E.D. Pa. Sept. 27, 2007)

Oehlmann v. Metro. Life Ins. Co., 644 F. Supp. 2d 521 (M.D. Pa. 2007)

Easy Sportswear, Inc. v. American Economy Ins. Co., 2007 U.S. Dist. LEXIS 86114 (W.D. Pa. Nov. 21, 2007) (Fischer, J.)

Harlan v. Erie Ins. Grp., 80 Pa. D. & C. 4th 61 (Lawrence 2006)

Amato v. Rockingham Cas. Co., 2006 U.S. Dist. LEXIS 24761 (W.D. Pa. Apr. 11, 2006)

Totty v. Chubb Corp., 2006 U.S. Dist. LEXIS 61013 (W.D. Pa. Aug. 28, 2006)

Tate v. U.S. Financial Life Ins. Co., 2006 U.S. Dist. LEXIS 62603 (W.D. Pa. Sept. 1, 2006)

American Home Assurance Co. v. Church of Bible Understanding, 2006 U.S. Dist. LEXIS 63859 (E.D. Pa. Sept. 6, 2006)

Connolly v. Reliastar Life Ins. Co., 2006 U.S. Dist. LEXIS 83440 (E.D. Pa. Nov. 13, 2006)

Estakhrian v. Continental Gen. Ins. Co., 2006 U.S. Dist. LEXIS 95607 (E.D. Pa. Dec. 18, 2006)

Northwestern Mut. Life Ins. Co. v. Stein, 2005 U.S. Dist. LEXIS 590 (E.D. Pa. Jan. 13, 2005)

Hollingsworth v. State Farm Fire & Cas. Co., 2005 U.S. Dist. LEXIS 3694 (E.D. Pa. Mar. 9, 2005).

Coregis Ins. Co. v. Salmanson & Falcao LLC, 2002 U.S. Dist. LEXIS 8992 (E.D. Pa 2002)

Kosierowski v. Allstate Ins. Co., 51 F. Supp. 2d 580 (3d Cir. 2000).

Segall v. Liberty Mut. Ins. Co., 2000 U.S. Dist. LEXIS 16382 (E.D. Pa. Nov. 9, 2000)

Quaciari v. Allstate Ins. Co., 998 F. Supp. 578, (E.D. Pa. 1998), *aff'd without opinion*, 172 F.3d 860 (3d. Cir. 1998)

Santora v. Commercial Union Ins. Co., 1998 U.S. Dist. LEXIS 2366 (E. D. Pa. Feb. 25, 1998)

Jung v. Nationwide Mut. Fire Ins. Co., 949 F. Supp. 353 (E.D. Pa. 1997)

Hyde Athletic Indus., Inc. v. Continental Cas. Co., 969 F. Supp. 289 (E.D. Pa. 1997)

Federated Life Ins. Co. v. Edward Walker, 1997 U.S. Dist. LEXIS 566 (E.D. Pa. Jan. 17, 1997)

Seidman v. Minnesota Mut. Life Ins. Co., 1997 U.S. Dist. LEXIS 14342 (E.D. Pa. Sept. 11, 1997)

Montgomery v. Federal Ins. Co., 836 F. Supp. 292 (E.D. Pa. 1993)

§7:21 —Cases Not Allowing Bifurcation

(1) *Scotti v. USAA Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 13515 (M.D. Pa. Feb. 11, 2011) (Munley, J.)

After Scotti was in an auto accident, she filed a UIM claim with USAA, maintaining that recovery from the other driver's insurer did not cover all of her medical claims. When USAA did not render a decision on her claim, Scotti filed this breach of contract and bad faith action. USAA filed a motion seeking bifurcation of the two claims, and requesting a stay of the bad faith claim until the contract claim was resolved. Judge Munley of the Middle District of Pennsylvania denied the bifurcation motion:

In support of its argument, USAA Casualty cites a string of cases indicating that a bad faith action cannot lie where it has been determined that there has been no breach of a duty under the insurance contract. . . . That uncontroversial proposition, however, does not necessitate staying a bad faith action where an accompanying breach of contract claim has not yet been disposed—as here. Additionally, we find that the interests of judicial economy would be better served by taking discovery on the two claims simultaneously, rather than potentially having to take discovery first on Scotti's breach of contract claim and then again on her bad faith claim. Accordingly, USAA Casualty's request for a stay will be denied.⁴¹³

(2) *Excelsior Ins. Co. v. Incredibly Edible Delites*, 2009 U.S. Dist. LEXIS 118247 (E.D. Pa. Dec. 17, 2009) (O'Neill, J.)

Excelsior filed suit to determine its obligations under a commercial general liability policy issued to the insureds, IED and IFC. The insureds asserted a counterclaim, alleging breach of contract, breach of the covenant of good faith and fair dealing, and statutory bad faith. Excelsior filed a motion to bifurcate its declaratory judgment claims from IED and IFC's breach of contract and statutory bad faith counter-claims. Noting that it was within its discretion to make this decision, Judge O'Neill of the Eastern District decided that judicial economy weighed in favor of allowing all claims to proceed together:

Even if the declaratory judgment claims are decided for Excelsior, IFC and IED may be permitted to proceed with their bad faith claims against the insurer. . . . [A] finding here that Excelsior did not ultimately have a duty to cover IFC does not make Excelsior's alleged actions (e.g., wrongfully naming EAI as a defendant in this action and thereby disrupting the settlement proceedings between IFC and EAI in the Connecticut litigation) per se reasonable. Because both IED and IFC may maintain bad faith causes of action, I find that bifurcating the claims will not serve judicial economy.⁴¹⁴

(3) *Suscavage v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 43793 (M.D. Pa. June 3, 2008) (Munley, J.)

Before the UIM arbitration pursuant to policy terms was held, the plaintiff insureds filed a bad faith action. Judge Munley of the Middle District stayed the suit pending the arbitration. The arbitration resulted in an award for the plaintiff, after which the bad faith action proceeded. Prior to trial, the insurer filed a motion to "trifurcate" the trial, seeking separate trials on the breach of contract claim, the bad faith action and the punitive damages claim. Judge Munley denied the motion.

According to the court, "Pennsylvania courts have indicated that bad faith claims are separate and distinct from breach of contract claims," and "the language of section 8371 does not indicate that success on the contract claim is a prerequisite to success on the bad faith claim."⁴¹⁵ "Thus," according to the court,

even if we had a trial on the breach of contract claim and the jury found for the defendant we would still need to try the bad faith claim. Moreover, plaintiffs' breach of contract claim and the bad faith claim are interrelated and based on nearly identical facts. To trifurcate the trial would only lead to confusion, delay and inconvenience that would not serve the interest of judicial economy. Thus, Defendant has not met its burden to establish that trifurcation of the trial is necessary. Proper instruction to the jury and argument from counsel will allow the jury to comprehend the different causes of action and separate them. To have three separate trials would simply be a waste of judicial resources.⁴¹⁶

(4) *National Grange Mut. Ins. Co. v. Walsh*, 77 Pa. D. & C.4th 368 (Lackawanna 2005) (Minora, J.)

A broken water pipe in a rental property owned by Mr. and Mrs. Walsh caused interior damage. The insurer denied the property damage claim, and initiated a declaratory judgment action to determine if coverage was owed. The insureds asserted a counterclaim that included counts for declaratory judgment, breach of contract, and statutory bad

⁴¹³ *Scotti v. USAA Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 13515, at *7-8 (M.D. Pa. Feb. 11, 2011).

⁴¹⁴ *Excelsior Ins. Co. v. Incredibly Edible Delites*, 2009 U.S. Dist. LEXIS 118247, at *14-15 (E.D. Pa. Dec. 17, 2009) (citations omitted) (citing *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 F. App'x 424 (3d Cir. 2007) where bad faith claim stemmed largely from actions taken during investigation of claim).

⁴¹⁵ *Suscavage v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 43793, at *5 (M.D. Pa. June 3, 2008) (citing *March v. Paradise Mut. Ins. Co.*, 435 Pa. Super. 597, 646 A.2d 1254 (Pa. Super. 1994)).

⁴¹⁶ *Id.* at *5.

faith. The insurer filed preliminary objections seeking dismissal of the breach of contract and bad faith claims. The insurer also filed a motion to sever and stay the breach of contract and bad faith claims until the declaratory judgment issues were resolved.

Judge Minora of Lackawanna County denied the insurer's motion to dismiss the bad faith and breach of contract claims on grounds that both claims were pled sufficiently. The court also denied the insurer's motion to sever and stay these claims until after the declaratory judgment proceedings. The court held that under Pa.R.C.P. 213, it had discretion whether or not to grant severance, and given that the insurer's declaratory judgment action and the insured's counterclaim arose from the same set of facts, "[t]o hold two trials would be a waste of the Court's resources."⁴¹⁷

The court further held that since all claims would be resolved in a non-jury trial before a judge, the court would be in a position to control the flow of evidence and order in which it was presented without the possibility of confusion of the jury with evidentiary issues. The court also noted that should the insurer prevail in its declaratory judgment claim, there "will obviously be no finding for the Defendants on their Breach of Contract and Bad Faith claims."⁴¹⁸

(5) *Nathanson v. Aetna Cas. & Sur. Co.*, 2001 U.S. Dist. LEXIS 18248 (E.D. Pa. Nov. 7, 2001) (Ludwig, J.)

In this case, Judge Ludwig of the Eastern District denied the insurer's application to bifurcate the contractual and extracontractual claims noting that the "claims are interrelated and bifurcation would be likely to lead to additional inconvenience and delay, not less."⁴¹⁹

(6) *Sickora v. Northwestern Mut. Life Ins. Co.*, 2001 U.S. Dist. LEXIS 16394 (E.D. Pa. Oct. 10, 2001) (Waldman, J.)

In this bad faith action, the insurer moved for bifurcation of the litigation into benefits and bad faith stages. The court denied the insurer's motion to bifurcate stating that the insurer has not shown that "its proposed bifurcation would promote convenience, expedition or economy, or is necessary to avoid prejudice."⁴²⁰

(7) *Zurich Ins. Co. v. Health Systems Integration, Inc.*, 1998 U.S. Dist. LEXIS 5927 (E.D. Pa. Apr. 28, 1998) (Hutton, J.)

Judge Hutton of the Eastern District denied an insurer's motion for bifurcation in this case, holding that the company had not met "the burden of presenting evidence that a separate trial is proper in light of the general principle that a single trial tends to lessen the delay, expense and inconvenience to the parties."⁴²¹ In denying the motion to bifurcate, the court wrote, "In its essence, Zurich's argument is premised upon the assumption that it will win the coverage issue. . . . The court cannot accept this premise, however, as it assumes the very thing that Zurich must prove."⁴²²

(8) *Reading Tube Corp. v. Employers Ins. of Wausau*, 944 F. Supp. 398 (E.D. Pa. 1996) (Joyner, J.)

Wausau Insurance Company moved to bifurcate the issue of liability on the breach of contract count and bad faith count before plaintiff presented any evidence on the issue of damages. Judge Joyner of the Eastern District denied bifurcation, holding:

Wausau has failed to show that separate trials are necessary. Wausau cannot prevail in its motion for separate trials merely because it believes that Reading Tube may try to present prejudicial evidence; Wausau can always object to any prejudicial evidence Reading Tube seeks to present if and when Reading Tube makes that attempt. Neither can Wausau successfully argue that it should prevail on its motion for separate trials because it believes that Reading Tube will not be able to meet its burden of establishing liability, and it wishes to avoid issues of damages altogether. The jury can decide issues of liability and damages simultaneously. Accordingly, Wausau's request for bifurcation is denied.⁴²³

⁴¹⁷ *Nat'l Grange Mut. Ins. Co., v. Walsh*, 77 Pa. D. & C.4th 368 (Lackawanna 2005).

⁴¹⁸ *Id.* at 12.

⁴¹⁹ 2001 U.S. Dist. LEXIS 18248, at *4-5.

⁴²⁰ *Sickora*, 2001 U.S. Dist. LEXIS 16354, at *5.

⁴²¹ *Zurich Ins. Co. v. Health Sys. Integration*, 1998 U.S. Dist. LEXIS 5927, at *8 (quoting *Mangabat v. Sears, Roebuck & Co.*, 1992 U.S. Dist. LEXIS 13031, at *1 (E.D. Pa. Aug. 26, 1992)).

⁴²² *Zurich Ins. Co. v. Health Sys. Integration*, 1998 U.S. Dist. LEXIS 5927, at *9.

⁴²³ *Reading Tube*, 944 F. Supp. at 404.

CHAPTER 8 PLEADING AND PROVING BAD FAITH

§8:03 Violations of the UIPA and Regulations as Relevant on the Issue of Bad Faith

§8:04(b) — Federal Court Cases

(1) ***Campenella Constr. Co., Inc. v. Great Am. Ins. Co. of N.Y.*, 2010 U.S. Dist. LEXIS 51042 (E.D. Pa. May 21, 2010) (Baylson, J.)** (UIPA allegations struck)

In dismissing Plaintiff's UIPA and bad faith claims, Judge Baylson of the Eastern District relied on the reasoning of the *Oehlmann* opinion:

"It is well settled...that the UIPA does not provide a private citizen with a cause of action against an insurer." . . . Instead, "[t]he UIPA may only be enforced by the Commissioner, and such enforcement is wholly within the discretion of the Commissioner." *Oehlmann v. Metro. Life Ins. Co.*, 644 F. Supp. 2d 521, 531 (M.D. Pa. 2007). In addition, the UIPA only "attempts to prevent and regulate violations that are *systemic* in the insurance industry, as only violations committed 'with a frequency that indicated a general business practice' are sanctionable." *Id.* (quoting 40 P.S. § 1171.5(a)(10)).⁴²⁴

(2) ***Jack v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 30136 (E.D. Pa. Mar. 3, 2017) (Baylson, J.)** (UIPA allegations irrelevant)

Plaintiff was unable to resolve his claim with his homeowners's carrier, State Farm, within the suit limitations period. State Farm refused to extend the period without a release of a potential bad faith claim, so plaintiff filed suit. State Farm filed a motion to dismiss. Judge Baylson of the Eastern District granted the motion without prejudice, as is also discussed in §7:02.

Plaintiff contended that State Farm violated the UIPA during the claims handling process in requesting a release that went beyond the subject matter of the claim, and that such violation was evidence in support of his bad faith claim. The court found that the complaint failed to allege facts showing that State Farm's actions were a general business practice, so "we cannot consider State Farm's potential violation of the regulation as a factor swaying against dismissal."⁴²⁵

(3) ***Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 156687 (M.D. Pa. Nov. 19, 2015) (Kane, J.), subsequent proceeding at 2017 U.S. Dist. LEXIS 54267 (M.D. Pa. Apr. 10, 2017) (Carlson, M.J.)** (UIPA violations relevant but not per se bad faith)

In this UIM and bad faith case, Judge Kane of the Middle District discussed the applicability of alleged UIPA violations in the context of her decision on defendant insurer's motion to dismiss. The court did not render a decision on whether UIPA violations could be evidence of bad faith, but stated: "The Court questions the relevance of alleged violations of the UIPA to a bad faith analysis, for the reasons discussed in *Oehlmann v. Metropolitan Life Ins. Co.*, 644 F. Supp. 2d 521 (M.D. Pa. 2007)."⁴²⁶ In ruling on a subsequent summary judgment motion, Magistrate Judge Carlson addressed the issue further, stating, "A violation of these insurance rules can be considered when examining a bad faith claim under §8371. . . . However, it is also clear beyond peradventure 'that a violation of the UIPA or the UCSP is not a *per se* violation of the bad faith standard.'"⁴²⁷

(4) ***Scott v. Foremost Ins. Co.*, 2015 U.S. Dist. LEXIS 133698 (E.D. Pa. Sept. 30, 2015) (Baylson, J.)**

This case is discussed in more detail in §9:05(b). Judge Baylson of the Eastern District denied the insurer's motion to dismiss the bad faith claim. In its decision, the court noted that "Plaintiffs do not improperly rely on violations of Pennsylvania statutes to support their bad faith claim. *See Bombar v. West Am. Ins. Co.*, 2007 PA Super 222, 932 A.2d 78, 92 (Pa. Super. 2007) (citing the Unfair Insurance Practices Act when discussing the bad faith standard)."⁴²⁸

(5) ***Smith v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 152773 (W.D. Pa. Oct. 24, 2012) (Gibson, J.)** (court disregards UIPA allegations)

Plaintiff was injured in an auto accident while a passenger in her mother's car. The mother had an automobile policy with Nationwide. Plaintiff was a named insured under an auto policy with defendant Allstate. Plaintiff sought UIM coverage from Allstate. Following arbitration, Allstate paid the policy limits. Plaintiff then filed this suit against

⁴²⁴ *Campenella Constr. Co., Inc. v. Great Am. Ins. Co. of N.Y.*, 2010 U.S. Dist. LEXIS 51042, at *14-15 (E.D. Pa. May 21, 2010) (emphasis in original).

⁴²⁵ *Jack v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 30136, at *9 (E.D. Pa. Mar. 3, 2017).

⁴²⁶ *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 156687, at *10 n.3 (M.D. Pa. Nov. 19, 2015).

⁴²⁷ *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *31 (M.D. Pa. Apr. 10, 2017).

⁴²⁸ *Scott v. Foremost Ins. Co.*, 2015 U.S. Dist. LEXIS 133698, at *8 (E.D. Pa. Sept. 30, 2015).

Allstate, alleging both common law and statutory bad faith. Allstate filed a motion for summary judgment. Judge Gibson of the Western District denied the motion.

Plaintiff contended that alleged violations of UIPA and the UCSP regulations were relevant and admissible as to the bad faith claim. Noting a conflict between the Pennsylvania state courts and the federal courts on the issue, the court stated:

Although Plaintiff uses the UIPA and USCP to support her argument that Allstate acted in bad faith and is therefore liable pursuant to 42 Pa. C.S. §8371, Plaintiff does not rest her bad faith argument on alleged violations of the UIPA or USCP nor is Plaintiff's factual or evidentiary support for her bad faith claim relevant solely to violations of the UIPA or USCP.... Thus, the Court will consider Plaintiff's factual allegations and evidentiary support albeit not in the context of the UIPA or UCSP. Rather, the Court will consider Plaintiff's factual allegations and evidentiary support as they are relevant to the standard established in *Terletsky*....⁴²⁹

(6) *Hilston v. Am. Gen. Life Ins. Co.*, 2015 U.S. Dist. LEXIS 61804 (E.D. Pa. May 12, 2015) (Kearney, J.)(UIPA violations irrelevant)

Plaintiff brought this bad faith suit against life insurer AGLIC after it failed to pay benefits under her father's life insurance policy. AGLIC filed a motion to dismiss. Judge Kearney of the Eastern District denied the motion as to the bad faith claim, and in the course of its discussion, it explained that "We follow the federal courts within this Circuit and find that violations of the UIPA cannot support a statutory bad faith claim."⁴³⁰

(7) *Moore v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 13018 (E.D. Pa. Feb. 3, 2015) (Beetlestone, J.) (holding the fact conduct violates the UIPA does not prevent the conduct from also being evidence of bad faith)

Plaintiff filed this bad faith action after defendant State Farm denied coverage on her homeowner's claim. Plaintiff alleged in part that State Farm's violations of UIPA provided a basis for statutory bad faith recovery. State Farm filed a motion to dismiss this portion of the claim. Judge Beetlestone of the Eastern District denied the motion.

Looking to other case law from the district, the court concluded that "a violation of the UIPA does not *per se* constitute bad faith.... Nor does the fact conduct violates the UIPA prevent the conduct from also being evidence of bad faith."⁴³¹ The framework for analyzing a bad faith claim provided: "the question is whether the particular conduct (that may or may not violate the UIPA) is relevant to show that the insurer lacked a good faith basis for denying benefits and knowingly or recklessly disregarded that fact."⁴³²

(8) *Militello v. Allstate Prop. & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 86945 (M.D. Pa. June 26, 2014) (Rambo, J.) (holding that a claim for bad faith may be based on an alleged violation of the UIPA)

Plaintiff filed this bad faith suit after he and his homeowner's carrier could not resolve a claim. Defendant filed a motion to dismiss. Judge Rambo of the Middle District denied the motion as to bad faith.

Defendant argued that plaintiff's bad faith claim was based on alleged violations of UIPA and therefore could not state a claim. The court disagreed: "[C]ontrary to Defendant's position, '[a] claim for bad faith may be based on an alleged violation of the [UIPA].'. . . Therefore, because violations of the UIPA may constitute bad faith, the relevance thereto is material and pertinent, and Defendant's motion to strike will be denied."⁴³³

(9) *Williamson v. Chubb Indem. Ins. Co.*, 2013 U.S. Dist. LEXIS 178022 (E.D. Pa. Dec. 19, 2013) (Baylson, J.) (violations of UIPA may be the basis for a bad-faith action)

Plaintiffs sought coverage from their homeowner's carrier, defendant Chubb, after their home suffered substantial damage. When the parties could not agree on the value of the claim, plaintiffs filed this bad faith action. Chubb moved to dismiss. Judge Baylson of the Eastern District denied the motion.

In its ruling, which is discussed in more detail in §§9:05(b) and 9:07, the court noted that violations of UIPA "may be the basis for a bad-faith action."⁴³⁴

⁴²⁹ *Smith v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 152773, at *11-12 (W.D. Pa. Oct. 24, 2012).

⁴³⁰ *Hilston v. Am. Gen. Life Ins. Co.*, 2015 U.S. Dist. LEXIS 61804, at *16 n.4 (E.D. Pa. May 12, 2015).

⁴³¹ *Moore v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 13018, at *3 (E.D. Pa. Feb. 3, 2015) (citation omitted).

⁴³² *Moore v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 13018, at *3 (E.D. Pa. Feb. 3, 2015) (citation omitted).

⁴³³ *Militello v. Allstate Prop. & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 86945, at *13 (M.D. Pa. June 26, 2014) (citations omitted).

⁴³⁴ *Williamson v. Chubb Indem. Ins. Co.*, 2013 U.S. Dist. LEXIS 178022, at *12-13 (E.D. Pa. Dec. 19, 2013).

(10) ***United States Fire Ins. Co. v. Kelman Bottles*, 2014 U.S. Dist. LEXIS 71220 (W.D. Pa. May 23, 2014) (Schwab, J.), reconsideration denied, 2014 U.S. Dist. LEXIS 88256 (W.D. Pa. June 27, 2014) (Fisher, J.)** (holding that a claim for bad faith cannot be solely predicated upon an alleged violation of the UIPA)

Defendant Kelman was a company that manufactured glass, and as part of the business, had a glass melting furnace that leaked, causing damage. Kelman sought coverage under an equipment breakdown policy with third-party defendant CNA. When the claims were denied, US Fire, who issued another policy involved, brought this declaratory judgment action and Kelman filed a third party bad faith action against CNA. CNA brought a motion for summary judgment on the issue. Judge Schwab of the Western District of Pennsylvania granted the motion, and reconsideration was later denied by Judge Fisher, as is also discussed in §§10:07(d), 10:11 and 10:25.

As part of its argument on the bad faith claim, Kelman maintained that CNA's claims handling violated UIPA and its regulations. The court noted that "a claim for bad faith cannot be solely predicated upon an alleged violation of the UIPA."⁴³⁵

(11) ***Swan Caterers, Inc. v. Nationwide Mut. Fire Ins. Co.*, 2012 U.S. Dist. LEXIS 162305 (E.D. Pa. Nov. 13, 2012) (Yohn, J.)**

Plaintiff filed a claim for wind and water damage with its property insurer, Nationwide. After Nationwide denied the claim, plaintiff filed this bad faith suit. Nationwide filed a motion for summary judgment. Judge Yohn of the Eastern District granted the motion, as is also discussed in §10:07(b).

Plaintiff contended in part that Nationwide acted in bad faith by violating a section of the UCSP Regulations relating to negotiations with an unrepresented party. The court concluded that these allegations could not provide the basis for a bad faith recovery:

Courts within the Third Circuit and the Commonwealth of Pennsylvania continue to recognize that the UIPA and UCSPR do not provide plaintiffs with a private right of action. . . . Furthermore, since the Pennsylvania Superior Court's decision in *Terletsky*, which defined 'bad faith' in the context of section 8371, courts in this circuit have 'refused to consider UIPA violations as evidence of bad faith.'⁴³⁶

(12) ***Watson v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 118873 (E.D. Pa. Oct. 12, 2011) (Surrick, J.)**

Plaintiff was injured in an auto accident, following which she sought first-party medical benefits from her auto insurer, Nationwide. Based upon the findings of the PRO process, Nationwide refused payment for certain medical bills. Plaintiff filed this bad faith action, and Nationwide filed a motion to dismiss, arguing in relevant part that insofar as the bad faith claim was based upon alleged violations of UIPA, it should be dismissed. Judge Surrick of the Eastern District of Pennsylvania granted the motion in this regard, explaining that since the Superior Court enunciated the two-part analysis for bad faith claims in *Terletsky*, federal courts "have refused to consider UIPA violations as evidence of bad faith."⁴³⁷

(13) ***Klay v. AXA Equitable Life Ins. Co.*, 2010 U.S. Dist. LEXIS 102881 (W.D. Pa. Sept. 28, 2010) (Conti, J.)**

In this case arising out of a disability insurance policy, also discussed in §5:03, plaintiff Klay filed this suit alleging, *inter alia*, breach of the Unfair Claims Settlement Practices regulations. The insurer argued, and Judge Conti of the Western District agreed, that UIPA and its regulations did not provide a private right of action, so the count brought under the statute could not survive. Klay argued that the count should be deemed a statutory bad faith claim under §8371. The court ruled: "Defendant disagrees and argues that plaintiff should not be able to boot-strap his alleged unfair insurance practices act violations into a bad faith claim under 42 Pa. Cons. Stat. §8371 at this juncture. The court agrees."⁴³⁸

(14) ***Somerset Indus., Inc. v. Lexington Ins. Co.*, 639 F. Supp. 2d 532 (E.D. Pa. 2009) (Goldberg, J.)**

This case is discussed in §§10:07(b) and 10:13(b). Somerset claimed that Lexington acted in bad faith in its investigation of the water damage at its property. In support of its claim, Somerset argued that Lexington's actions violated the UIPA. Judge Goldberg of the Eastern District granted Lexington's motion for summary judgment on the bad faith claim. As to consideration of the alleged UIPA violations, the court held as follows:

Conduct which violates the UIPA may be considered when determining whether an insurer acted in bad faith. . . . The UIPA generally prohibits an insurer *inter alia* from refusing to pay a claim without a reasonable basis, failing to affirm or deny a claim in a reasonable period of time, not

⁴³⁵ *United States Fire Ins. Co. v. Kelman Bottles*, 2014 U.S. Dist. LEXIS 71220, at *33 n.6 (W.D. Pa. May 23, 2014).

⁴³⁶ *Swan Caterers, Inc. v. Nationwide Mut. Fire Ins. Co.*, 2012 U.S. Dist. LEXIS 162305, at *24-25 (E.D. Pa. Nov. 13, 2012) (quoting *Watson v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 118873 (E.D. Pa. Oct. 12, 2011)).

⁴³⁷ *Watson v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 118873, at *12 (E.D. Pa. Oct. 12, 2011).

⁴³⁸ *Klay v. AXA Equitable Life Ins. Co.*, 2010 U.S. Dist. LEXIS 102881, at *62 (W.D. Pa. Sept. 28, 2010).

attempting good faith settlements when liability is clear, and compelling litigation by offering substantially less than the amount due. . . . The UIPA violations simply repeat the allegations in the Complaint that Lexington acted in bad faith by delaying its investigation and failing to settle. As such, we will not separately address the UIPA, but we will consider any delay and Lexington's failure to settle, in determining this Motion.⁴³⁹

(15) *Atiyeh v. Nat'l Fire Ins. Co. of Hartford*, 2008 U.S. Dist. LEXIS 76770 (E.D. Pa. Sept. 30, 2008) (Gardner, J.)

This case arose from a water-related loss on the plaintiffs' property. Plaintiffs filed a complaint alleging breach of contract, bad faith, and claims under the Unfair Insurance Practices Act (UIPA). The case was removed to federal court and the insurer filed a motion to dismiss. As to the bad faith claim, the insurer argued that the plaintiffs' conclusory allegations in the complaint were legally insufficient to state a claim for bad faith. Judge Gardner of the Eastern District found that the federal rules required only that a complaint allege sufficient facts to put the defendant on notice of the essential elements of the plaintiff's cause of action.⁴⁴⁰ However, citing prior district court cases, the court held, "Even under the less stringent notice pleading requirement, however, I conclude that plaintiffs have not sufficiently alleged facts to establish a claim of bad faith."⁴⁴¹ The court found the complaint deficient because "plaintiffs have not made any allegations that defendant's investigation was unreasonable, that the denial of the claim was unreasonable, or that defendant lacked a sufficient basis for denying the claim."⁴⁴²

The insurer also contended that there was no individual cause of action under the UIPA, and that an alleged violation of the UIPA was not equivalent to a violation of § 8371. The court agreed, finding that violations of UIPA do not establish per se bad faith conduct because "most of the acts defined as 'unfair methods of competition' and 'unfair or deceptive acts or practices' are not relevant to the question of whether the elements of a bad faith claim are satisfied."⁴⁴³ The court held that the plaintiffs' bad faith claim as pled was legally insufficient.

(16) *Moss Signs, Inc. v. State Auto. Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 26770 (W.D. Pa. Apr. 2, 2008) (Standish, J.)

In this case, discussed in §5:02, plaintiff's complaint included a separate count alleging violation of the UIPA and the UCSPR. Citing *Oehlmann v. Metro. Life Ins. Co.*, addressed in this section, the court ordered that all references to the UIPA and the UCSPR be stricken:

We agree with the analysis of *Oehlmann* Most importantly for purposes of this decision, allegations that an insurer violated the UIPA and UCSP are irrelevant to a court's consideration of whether the insurer's actions also violated §8371 because the Pennsylvania Superior Court established a definitive two-prong test for answering that question in *Terletsky v. Prudential Prop. & Cas. Ins. Co.*

While we do not disagree with Plaintiff that the UIPA and USCP provide the standard by which an insurer's actions should be measured, we find that any violations thereof are irrelevant in determining whether Defendant acted in bad faith under Pennsylvania law and conclude Paragraphs 58, 62 and 63 should be stricken from the Complaint.⁴⁴⁴

(17) *Hered, LLC v. Seneca Ins. Co.*, 2008 U.S. Dist. LEXIS 111943 (M.D. Pa. Feb. 21, 2008) (Blewitt, M.J.)

In this fire loss case, discussed in §8:07, the insurer filed a motion to exclude the testimony of plaintiff's expert witness, Seeherman, a public adjuster. Seeherman opined that the insurer had violated the UIPA in failing to timely respond to plaintiff's damages estimate. The insurer moved to preclude this opinion. Magistrate Judge Blewitt of the Middle District concluded that testimony concerning alleged violations of the UIPA were relevant to the bad faith claim:

While Defendant argued that an expert was not required to testify about the number of days that it took to respond to Plaintiff, we find that the above quoted statement of Seeherman in his Report to the effect that Defendant's conduct violated the UIPA should be permitted as such testimony was permitted in *Gallatin*. As the *Gallatin* Court found, and as we find in our case, any possible prejudice with respect to the expert's [Seeherman's] stated testimony can be cured by a jury instruction.⁴⁴⁵

⁴³⁹ *Somerset Indus., Inc. v. Lexington Ins. Co.*, 639 F. Supp. 2d 532, 543 n.7 (E.D. Pa. 2009).

⁴⁴⁰ *Atiyeh v. Nat'l Fire Ins. Co. of Hartford*, 2008 U.S. Dist. LEXIS 76770, at *24-25 (E.D. Pa. Sept. 30, 2008).

⁴⁴¹ *Atiyeh v. Nat'l Fire Ins. Co. of Hartford*, 2008 U.S. Dist. LEXIS 76770, at *25 (E.D. Pa. Sept. 30, 2008).

⁴⁴² *Atiyeh v. Nat'l Fire Ins. Co. of Hartford*, 2008 U.S. Dist. LEXIS 76770, at *26 (E.D. Pa. Sept. 30, 2008) (citing *Scarpato v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 4585, 2007 WL 172341, at *5 (E.D. Pa. Jan. 23, 2007); *Mezzacappa v. State Farm Ins. Co.*, 2004 U.S. Dist. LEXIS 25441, 2004 WL 2900729, at *1-2 (E.D. Pa. Dec. 14, 2004)).

⁴⁴³ *Atiyeh v. Nat'l Fire Ins. Co. of Hartford*, 2008 U.S. Dist. LEXIS 76770, at *20 (E.D. Pa. Sept. 30, 2008) (citing *Dinner v. United Servs. Auto. Ass'n Cas. Ins. Co.*, 29 F. App'x 823, 827 (3d Cir. 2002)).

⁴⁴⁴ *Moss Signs, Inc. v. State Auto. Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 26770, at *14-16 (W.D. Pa. Apr. 2, 2008).

⁴⁴⁵ *Hered, LLC v. Seneca Ins. Co.*, 2008 U.S. Dist. LEXIS 111943, at *21-22 (M.D. Pa. Feb. 21, 2008) (citing *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417, 421 (W.D. Pa. 2006)).

(18) *Employers Mut. Cas. Co. v. Loos*, 476 F. Supp. 2d 478 (W.D. Pa. 2007) (Conti, J.)

In this case, discussed in §§8:04 and 10:05, the defendant insureds sought to bolster their bad faith claim by citing to alleged violations of the insurer under Pennsylvania's Unfair Insurance Practices Act for allegedly failing to acknowledge and act promptly upon written or oral communications with respect to claims arising under insurance policies. While agreeing that the language of the UIPA could be used as a guide for determining whether an insurer's conduct constitutes bad faith, the court nonetheless found no bad faith under the circumstances:

While the court may look to the language of the UIPA in considering defendants' bad faith claim, defendants cannot establish the existence of bad faith under section 8371 merely by demonstrating that plaintiff's conduct failed to adhere to a specific mandate of the UIPA. A failure to comply may be equally consistent with a mistake as with bad faith. In those circumstances a finding of bad faith, without other evidence, cannot reasonably, under the clear and convincing standard, be found by the trier of fact.

Defendants are correct insofar as they contend that the court may look to the language of the UIPA for guidance with respect to whether particular conduct on the part of an insurer constitutes bad faith.... Nonetheless, that does not mean that every violation of the UIPA automatically constitutes bad faith within the meaning of section 8371. Although the Pennsylvania Supreme Court has not yet addressed the issue, both the Pennsylvania Superior Court and the United States Court of Appeals for the Third Circuit have taken the position that a violation of the UIPA does not constitute per se bad faith under section 8371.... Plaintiff's mere failure to respond to a letter cannot alone suffice to establish the existence of statutory bad faith.⁴⁴⁶

(19) *DeWalt v. Ohio Cas. Ins. Co.*, 513 F. Supp. 2d 287 (E.D. Pa. 2007) (McLaughlin, J.)

In this case, discussed in §§3:04 and 10:07, the plaintiff argued that Ohio Casualty acted in bad faith in not complying with the UCSP regulations by failing to communicate with Guffey every 45 days with respect to updates as to the status of its investigation.⁴⁴⁷ Although the insurer did not dispute that it did not provide such updates, the insurer argued that the alleged UCSPR deficiencies could not support a bad faith claim because they did not cause the excess verdict. The court agreed.

(20) *Heinlein v. Progressive N. Ins. Co.*, 2007 U.S. Dist. LEXIS 51592 (W.D. Pa. July 17, 2007) (Ambrose, J.)

Judge Ambrose of the Western District has noted, "[A] failure to communicate in writing, in violation of the UIPA, is not necessarily bad faith."⁴⁴⁸

(21) *Pittas v. Hartford Life Ins. Co.*, 513 F. Supp. 2d 493 (Pa. 2007) (Ambrose, J.)

This case is discussed in §10:03(b). With respect to alleged violations of the UIPA and the claims settlement regulations, the court cited the Third Circuit opinion in *Dinner v. USAA*, noting that "a violation of the UIPA or the [Unfair Claims Settlement Practices regulations] is not a cursory violation of the bad faith standard and that it is only the *Terletsky [v. Prudential]* standard itself that allows one to determine whether a violation of the former is of any relevance. . . ." ⁴⁴⁹ Although recognizing that two of the three letters written by plaintiff's counsel were unanswered, the court found no evidence that this was a "common practice" of the insurer, and further added that "mere failure to respond to a letter cannot alone suffice to establish the existence of statutory bad faith."⁴⁵⁰

(22) *Estakhrian v. Continental General Ins. Co.*, 2006 U.S. Dist. LEXIS 95607 (E.D. Pa. Dec. 18, 2006) (Davis, J.)

In this case, the court held that "[i]t is settled law that there is no private cause of action under the [Unfair Claims Settlement Practices Regulations]."⁴⁵¹

(23) *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440 (E.D. Pa. Nov. 13, 2006) (Joyner, J.)

In this case discussed in §10:07, the plaintiff filed a claim under the Unfair Insurance Practices Act and the Unfair Claims Settlement Practices regulations. This claim was rejected by the court, which stated, "The case law is abundantly clear that there is no private cause of action under the UIPA or UCSPR."⁴⁵² In addition, in opposing summary judgment, the plaintiff provided to the court an expert opinion that argued that the insurer acted in bad faith

⁴⁴⁶ *Emp'rs Mut. Cas. Co. v. Loos*, 476 F. Supp. 2d 478, 494 (W.D. Pa. 2007).

⁴⁴⁷ See generally Section 8:04.

⁴⁴⁸ *Heinlein v. Progressive N. Ins. Co.*, 2007 U.S. Dist. LEXIS 51592, at *12 n.3 (W.D. Pa. July 17, 2007).

⁴⁴⁹ *Pittas v. Hartford Life Ins. Co.*, 513 F. Supp. 2d 493, 503 (W.D. Pa. 2007) (quoting *Dinner v. USAA Cas. Ins. Co.*, 29 F. App'x 823, 827-28 (3d Cir. 2002)).

⁴⁵⁰ *Pittas v. Hartford Life Ins. Co.*, 513 F. Supp. 2d 493, 503 (W.D. Pa. 2007) (citing *Employers Mut. Cas. Co. v. Loos*, 2007 U.S. Dist. LEXIS 14236 (W.D. Pa. Feb. 28, 2007)).

⁴⁵¹ *Estakhrian v. Cont'l Gen. Ins. Co.*, 2006 U.S. Dist. LEXIS 95607, at *36 (E.D. Pa. Dec. 18, 2006) (citing *Smith v. Nationwide Mut. Fire Ins. Co.*, 935 F. Supp. 616, 620 (W.D. Pa. 1996); *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440 (E.D. Pa. Nov. 13, 2006)).

⁴⁵² *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440, at *42 (E.D. Pa. Nov. 13, 2006).

and violated the UIPA. The court held that the proffered expert's opinion that the company acted in bad faith constituted an "improper (and inadmissible) opinion" on the ultimate legal issue of whether defendants acted in bad faith.⁴⁵³ The court rejected allegations that the insurer violated the UIPA or UCSPR as improper legal conclusions.

(24) *Williams v. Hartford Cas. Ins. Co.*, 83 F. Supp. 2d 567 (E.D. Pa. 2000) (Katz, J.), *aff'd without opinion*, 261 F.3d 495 (3d Cir. Apr. 4, 2001)

In this bad faith litigation arising out of the handling of a UIM claim, the plaintiffs alleged that Hartford had violated Pennsylvania's Unfair Practices Act and applicable regulations setting forth specific time requirements for communication with the insured. The court acknowledged that Hartford did in fact fail to comply with the requirements that it complete its investigation within thirty-five days after notice of the claim, or follow up with written explanations of why the investigation had not been completed. The court ruled, however, that "[s]tanding alone, this failure does not constitute clear and convincing evidence of bad faith."⁴⁵⁴

§8:07 — Cases

(1) *Honesdale Volunteer Ambulance Corp., Inc. v. Am. Alternative Ins. Co.*, 2014 U.S. Dist. LEXIS 38184 (M.D. Pa. Mar. 24, 2014) (Mannion, J.)

Plaintiff's commercial property was damaged in an earthquake, so it sought coverage from its commercial property insurer, defendant AAIC. After AAIC denied coverage, plaintiff filed this breach of contract and bad faith action. Defendant filed a motion for summary judgment. Judge Mannion of the Middle District granted the motion as to the bad faith claim.

As part of its motion, defendant submitted an expert report opining on bad faith. The court refused to rely on the report in rendering its decision:

Defendant has also submitted a report from an expert who opines that AAIS did not act in bad faith. The court has not considered this report, as making a bad faith determination at the summary judgment stage does not require "scientific, technical, or other specialized knowledge," but a consideration of the facts. . . . A district court need not give an expert report any weight in considering a bad faith claim.⁴⁵⁵

(2) *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440 (E.D. Pa. Nov. 13, 2006) (Joyner, J.)

In this case discussed in §10:07, in opposing summary judgment, the plaintiff provided to the court an expert opinion which argued that the insurer acted in bad faith and violated the UIPA. The court held that the proffered expert's opinion that the company acted in bad faith constituted an "improper (and inadmissible)" opinion on the ultimate legal issue of whether defendants acted in bad faith.⁴⁵⁶ The court also rejected allegations that the insurer violated the UIPA or UCSPR as improper legal conclusions. According to the court,

[Plaintiff's expert] offers only a fact-starved conclusion rather than a reasoned opinion. And since an expert's opinion "does not necessarily defeat a summary judgment motion when it is unsupported by sufficient facts," it certainly will not when it is not supported by a single fact.⁴⁵⁷

(3) *Morris v. USAA Cas. Ins. Co.*, 2016 U.S. Dist. LEXIS 58948 (M.D. Pa. May 3, 2016) (Kosik, J.)

Plaintiff brought this entitlement to UIM benefits and bad faith action after he and his defendant auto insurer were unable to resolve his UIM claim. Defendant filed a motion in limine seeking to bar the testimony of plaintiff's bad faith expert. Judge Kosik of the Middle District of Pennsylvania denied the motion. The court noted without substantive discussion that bad faith cases typically did not require expert testimony, but it would be allowed in this case. The expert, however, would be "precluded from offering any legal conclusions."⁴⁵⁸

(4) *Craker v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 48029 (W.D. Pa. Apr. 4, 2012) (Lancaster, C.J.)

The Crakers filed this breach of contract and bad faith suit against their auto insurer, State Farm, after State Farm refused to pay the UIM limits to resolve their claim. At issue before the court was State Farm's motion to strike the Crakers' bad faith expert. Chief Judge Lancaster of the Western District granted the motion to strike the expert.

State Farm argued that the expert report and testimony should be stricken because the expert had not been timely disclosed. The court agreed, noting that at the post-discovery status conference, the court had asked both parties

⁴⁵³ *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440, at *47 n.32 (E.D. Pa. Nov. 13, 2006).

⁴⁵⁴ *Williams v. Hartford Cas. Ins. Co.*, 83 F. Supp. 2d 567, 576 (E.D. Pa. 2000).

⁴⁵⁵ *Honesdale Volunteer Ambulance Corp., Inc. v. Am. Alternative Ins. Co.*, 2014 U.S. Dist. LEXIS 38184, at *29 n.4 (M.D. Pa. Mar. 24, 2014) (citing *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 410 F. App'x 484, 487 (3d Cir. 2011)).

⁴⁵⁶ *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440, at *47 n.32 (E.D. Pa. Nov. 13, 2006).

⁴⁵⁷ *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440, at *47 n.32 (E.D. Pa. Nov. 13, 2006) (citing *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 595 (E.D. Pa. 1999)).

⁴⁵⁸ *Morris v. USAA Cas. Ins. Co.*, 2016 U.S. Dist. LEXIS 58948, at *3 (M.D. Pa. May 3, 2016).

whether any expert discovery remained and the Crakers did not voice any need to conduct additional discovery. Additionally, the court rejected the Crakers' argument that they were not aware that they needed an expert because they did not believe State Farm would file a summary judgment motion on the claim. The court stated that the Crakers knew that when they filed a bad faith claim, they eventually would be required to prove that claim.⁴⁵⁹

(5) *Smith v. Allstate Ins. Co.*, 912 F. Supp. 2d 242 (W.D. Pa. 2012) (Gibson, J.)

Plaintiff filed this bad faith suit after failing to resolve her UIM claim with her auto insurer, Allstate. Plaintiff planned to use an expert as part of her bad faith case at trial. Allstate filed a motion in limine to preclude this testimony. Judge Gibson of the Western District granted the motion.

The court noted that the expert was going to offer testimony relating to the handling of the UIM claim, Allstate's policies, insurance industry practices and standards, and violations of the UIPA. The court found that "[t]hese issues are neither particularly complex nor scientific. Additionally, much of the information contained in [the expert's] report and to which [the expert] is expected to testify could be placed before the jury without the aid of expert testimony."⁴⁶⁰ The court believed that the jurors could analyze testimony of Allstate employees regarding these issues and thus the expert testimony "would risk usurping the role of the juror as factfinder."⁴⁶¹

The court also found that the expert's expected testimony relating to UIPA and Allstate's alleged violations of the act was "inappropriate expert testimony."⁴⁶² "These alleged violations have little relevance to the question of whether the insurer had a reasonable basis for denying benefits under the policy and knew or recklessly disregarded its lack of reasonable basis in denying the claim."⁴⁶³ Thus, under Rule 403, the probative value of the testimony would be substantially outweighed by the danger of unfair prejudice and juror confusion.

The court also precluded the expert testimony because the expert improperly contained legal conclusions and "[i]t is well-settled that expert opinion on the ultimate legal issue of whether a defendant acted in bad faith is inadmissible."⁴⁶⁴ Similarly, the expert's "interpretation of insurance law and the application of this law to the instant case [is an] impermissible legal conclusion."⁴⁶⁵ Further, the expert report improperly assessed the adjuster's subjective intentions and motivation.

Finally, the expert report was based in part on inadvertently disclosed attorney-client privileged material. Thus, it was impermissibly based on inadmissible evidence.

(6) *Sadel v. Berkshire Life Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 8993 (E.D. Pa. Jan. 31, 2011) (Goldberg, J.), *aff'd*, 473 F. App'x 152 (3d Cir. 2012) (Rendell, J.)

This case is discussed in more detail in §§10:13(c) and 10:15. In opposing Berkshire's motion for summary judgment, plaintiff filed his expert report, which opined that the insurer had no reason to deny the disability claim, no reason to delay payment of the claim, and no reason to threaten rescission of the policy.

The court found that the expert report could not create a genuine issue of material fact in support of plaintiff's opposition to the summary judgment motion because his conclusion that the delay in payment was in bad faith ignored pertinent facts. The report failed to note that much of the nine-month delay between plaintiff's filing of his disability claim and Berkshire's notification that it was investigating inconsistencies in the application was due to plaintiff's own failures to provide information, leading the court to find that the expert's "conclusion completely ignores the undisputed record."⁴⁶⁶ Furthermore, the court found that the expert report failed to address the undisputed fact that several of the answers on plaintiff's insurance application were inaccurate: "An expert report does not raise a genuine dispute of material fact where the report did not consider the context of the case."⁴⁶⁷ Finally, the court ruled that plaintiff's expert report contained legal opinions that were solely within the court's purview, and could not be used to create a genuine issue of material fact. "As a general rule an expert's testimony on issues of law is inadmissible."⁴⁶⁸

The Third Circuit affirmed, in an opinion by Judge Rendell. While not specifically addressing the expert's report, it concluded that "we agree with the District Court that Sadel has presented no evidence to support his claim that Berkshire acted in bad faith in investigating his claim or refusing to pay benefits."⁴⁶⁹

⁴⁵⁹ *Craker v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 48029, at *13 (W.D. Pa. Apr. 4, 2012).

⁴⁶⁰ *Smith v. Allstate Ins. Co.*, 912 F. Supp. 2d 242, 251 (W.D. Pa. 2012).

⁴⁶¹ *Smith v. Allstate Ins. Co.*, 912 F. Supp. 2d 242, 251 (W.D. Pa. 2012).

⁴⁶² *Smith v. Allstate Ins. Co.*, 912 F. Supp. 2d 242, 252 (W.D. Pa. 2012).

⁴⁶³ *Smith v. Allstate Ins. Co.*, 912 F. Supp. 2d 242, 252 (W.D. Pa. 2012).

⁴⁶⁴ *Smith v. Allstate Ins. Co.*, 912 F. Supp. 2d 242, 253 (W.D. Pa. 2012).

⁴⁶⁵ *Smith v. Allstate Ins. Co.*, 912 F. Supp. 2d 242, 254 (W.D. Pa. 2012).

⁴⁶⁶ *Sadel v. Berkshire Life Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 8993, at *34 (E.D. Pa. Jan. 31, 2011).

⁴⁶⁷ *Sadel v. Berkshire Life Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 8993, at *35-36 (E.D. Pa. Jan. 31, 2011) (footnote omitted; citing *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 596 (E.D. Pa. 1999)).

⁴⁶⁸ *Sadel v. Berkshire Life Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 8993, at *36 n.11 (E.D. Pa. Jan. 31, 2011) (quoting *Allstate Prop. & Cas. Ins. Co. v. Vargas*, 2008 U.S. Dist. LEXIS 67516, 2008 WL 4104542 at *5 (E.D. Pa. Aug. 29, 2008)).

⁴⁶⁹ *Sadel v. Berkshire Life Ins. Co. of Am.*, 473 F. App'x 152, 156 (3d Cir. 2012).

(7) ***Hered, LLC v. Seneca Ins. Co.*, 2008 U.S. Dist. LEXIS 111943 (M.D. Pa. Feb. 21, 2008) (Blewitt, M.J.)**

Plaintiff's building suffered damages in a fire, allegedly in excess of \$3.4 million. Defendant Seneca made two advance payments to plaintiff, totaling over \$95,000, but ultimately denied the claim, stating that it did not owe coverage because the plaintiff made misrepresentations regarding whether the sprinkler system in the building was functioning. Plaintiff sued, alleging breach of contract and bad faith. The insurer filed a counterclaim based in part on plaintiff's alleged misrepresentations.

In discovery, the plaintiff identified as an expert witness Jay Seeherman, who was a public adjuster hired by plaintiff to adjust the fire loss. Seeherman submitted a report that opined that (1) the plaintiff's loss was covered under the policy, (2) the insurer had acted in bad faith, and (3) the insurer had committed violations of the Unfair Insurance Practices Act (UIPA) in handling plaintiff's claim. Seneca filed a motion to preclude the use of expert testimony. Noting that the court's decision whether to allow Seeherman to testify with respect to the bad faith cause of action rested in its discretion,⁴⁷⁰ Magistrate Judge Blewitt granted in part, but denied in part, the insurer's motion.

According to the court:

"Although an insured is not required to prove an insurer's bad faith practices through expert testimony, such expert testimony is permissible if it is helpful to the trier of fact and is otherwise admissible. . . . Among other things, expert testimony may be appropriate with respect to issues such as insurance claims adjusting process lacked [sic] a reasonable basis for denying an insured's claim."⁴⁷¹

Plaintiff conceded at oral argument that Seeherman was "not qualified and competent in our case to testify that Defendant acted in bad faith,"⁴⁷² and thus the court granted the motion to exclude the opinion that the insurer acted in bad faith. Seeherman had further opined that the claimed loss was covered, but the court also struck this portion of the proposed expert testimony:

[I]nsofar as Plaintiff seeks to have Seeherman testify as to his opinion of whether the Seneca Insurance policy applied to Plaintiff's fire loss claim, we find that Seeherman cannot opine on the coverage issue, and he cannot testify as to his interpretation of whether Plaintiff's Seneca policy applied to its fire loss claim, i.e. Plaintiff's contract liability claim. . . . In making an insurance policy coverage determination, the Court must initially decide the scope of the insurance coverage and then review the allegations raised in the pleading to see if they would fall within the scope of the policy if proven. . . . Further, under Pennsylvania law, the interpretation of an insurance contract is a question of law for the court to decide.⁴⁷³

The proposed expert report further opined that the insurer had violated the UIPA by failing to timely respond to plaintiff's damages estimate. The insurer sought to strike that proposed testimony, but the court allowed it:

While Defendant argued that an expert was not required to testify about the number of days that it took to respond to Plaintiff, we find that the above quoted statement of Seeherman in his Report to the effect that Defendant's conduct violated the UIPA should be permitted as such testimony was permitted in *Gallatin*. As the *Gallatin* Court found, and as we find in our case, any possible prejudice with respect to the expert's [Seeherman's] stated testimony can be cured by a jury instruction.⁴⁷⁴

CHAPTER 9 EXAMPLES WHERE COURTS HAVE FOUND BAD FAITH MAY EXIST

§9:02 Unreasonable Delay in Handling Claims

§9:03(a) — Cases (Auto Claims)

(1) ***Hall v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 155739 (W.D. Pa. Oct. 31, 2012) (Mitchell, J.)**

Plaintiff was injured in a single vehicle accident in October 2009 when he swerved to avoid a vehicle that ran a stop sign. Plaintiff requested UM and wage loss coverage from Nationwide, his auto insurer. Nationwide initially made two income loss benefits payments. After mid-December 2009, Nationwide stopped making the payments because the employer notified Nationwide that plaintiff would be laid off due to the seasonal nature of his work, and it was anticipated plaintiff would be re-hired in the spring. In April 2010, plaintiff notified Nationwide that he had

⁴⁷⁰ *Hered, LLC v. Seneca Ins. Co.*, 2008 U.S. Dist. LEXIS 111943, at *16 (M.D. Pa. Feb. 21, 2008) (quoting *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417, 421 (W.D. Pa. 2006)).

⁴⁷¹ *Hered, LLC v. Seneca Ins. Co.*, 2008 U.S. Dist. LEXIS 111943, at *16 (M.D. Pa. Feb. 21, 2008) (quoting *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417, 421 (W.D. Pa. 2006)).

⁴⁷² *Hered, LLC v. Seneca Ins. Co.*, 2008 U.S. Dist. LEXIS 111943, at *16 (M.D. Pa. Feb. 21, 2008).

⁴⁷³ *Hered, LLC v. Seneca Ins. Co.*, 2008 U.S. Dist. LEXIS 111943, at *17 (M.D. Pa. Feb. 21, 2008) (citations omitted).

⁴⁷⁴ *Hered, LLC v. Seneca Ins. Co.*, 2008 U.S. Dist. LEXIS 111943, at *21-22 (M.D. Pa. Feb. 21, 2008) (citing *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417, 421 (W.D. Pa. 2006)).

returned to work. In June 2010, plaintiff claimed that he notified the insurer that he could no longer work due to his accident-related injuries; Nationwide disputed receiving this information. Plaintiff provided an economic loss report, through his counsel, to Nationwide in January 2012 indicating that plaintiff had not been able to work since June 2010. Nationwide had plaintiff submit to an IME in April 2012. Plaintiff, through counsel, provided medical records to support the claim in May 2012. Nationwide apparently received the IME report in August 2012. Nationwide paid the remaining wage loss benefits in September 2012. Before the court was defendant Nationwide's motion for summary judgment on the bad faith claim. Judge Mitchell of the Western District denied the motion, as also discussed in §9:05.

Plaintiff claimed that Nationwide acted in bad faith in its delay of payment of wage loss benefits. The court agreed that there was a genuine issue of material fact that the nearly 2-year delay in pursuing an investigation of the wage loss benefits claim was in bad faith:

The plaintiff asserts that notwithstanding the above notice to Nationwide, including his conversation in June 2010 with its employee who handled his case from the beginning, Nationwide did not require him to attend an independent medical exam until April 27, 2012. . . . It was not until September 11, 2012 that Nationwide paid the remaining limits of his wage loss claim. . . . The plaintiff insists that Nationwide did nothing but delay and obstruct him from receiving the wage loss benefits he was due.

Based on the record, a material question of fact exists as to whether Nationwide handled the plaintiff's wage loss claim in bad faith and with an improper motive.⁴⁷⁵

(2) *Nazario v. Nationwide Mut. Ins. Co.*, 2010 U.S. Dist. LEXIS 55467 (M.D. Pa. May 17, 2010) (Smyser, M.J.), adopted by, 2010 U.S. Dist. LEXIS 55469 (M.D. Pa. June 7, 2010) (Conner, J.)

Plaintiff and her husband were in an automobile accident in late 2005, in which plaintiff's husband was killed. The other driver, who was at fault, was uninsured. Plaintiff sought UM benefits from the auto policy she and her husband had at the time of the accident with defendant, Nationwide. Nationwide retained an attorney to handle the settlement of the claim; plaintiff was likewise represented by counsel. Prior to releasing the check, Nationwide's attorney, in March 2006, provided a proposed release to plaintiff's counsel. Plaintiff's counsel responded in summer 2006, refusing to sign the release on the grounds that it was overbroad and not required in order for plaintiff to recover benefits to which she was clearly entitled. Plaintiff's counsel demanded legal authority for requiring such a release, and communications between counsel continued through a period of long delays. In September 2007, the insurer's counsel sent a revised release, which plaintiff's counsel advised by letter remained unacceptable. By July 2008, when the insurer's counsel had not responded to plaintiff's counsel's objections, plaintiff filed suit in the York County Court of Common Pleas. A hearing was conducted in November 2008, after which the court approved and entered the order proposed by plaintiff's attorney.

Thereafter, plaintiff filed suit against Nationwide alleging breach of contract and bad faith under §8371. Nationwide removed the action to the Middle District and filed a motion for summary judgment. Magistrate Judge Smyser recommended that the insurer's motion be denied with respect to the bad faith claim; Judge Conner adopted the report and recommendation.⁴⁷⁶

In support of its bad faith claim, the plaintiff argued that (1) the insurer had required plaintiff to sign a release that, in general, it had stopped requiring of its insureds; (2) the insurer's counsel had failed to provide any justification for the broad language of the release; (3) the insurer's personnel were not properly trained; and (4) the insurer recklessly disregarded the significant delay in paying benefits. Plaintiff provided expert testimony from two experts who testified that a case similar to plaintiffs would typically take about three months to resolve, and the way the case was handled was outside the standard of practice. In support of its motion for summary judgment, Nationwide argued that the delay was attributable, at most, to negligence, which would not support a bad faith claim. The insurer further argued that any delay was attributable to the insurer's counsel, not to the insurer itself. Lastly, the insurer asserted that its release was reasonable and not overly broad and its employee training was inapposite to the bad faith issue.

The court found that it was undisputed that there was no question that plaintiff's claim was covered and that she was entitled to the UM policy limits. There was also no dispute that it took over two and a half years for plaintiff to receive those benefits. According to the court, the record showed extremely lengthy delays by Nationwide's counsel in responding to each of plaintiff's counsel's objections to the release, objections which the court noted were arguably valid given the breadth of the claims the release language covered. In denying the insurer's motion, the court found that there were genuine issues of material fact to be submitted to the trier of fact:

It would be a reasonable inference for a jury to draw that a 32 month delay in paying the insurance benefit to the plaintiff to which the plaintiff was entitled is an unreasonable delay and is the result of bad faith. No outside agency caused this delay. The delay is not attributable to a lengthy necessary investigation, awaiting a resolution of a related separate claim or matter, or to a court delay. A 32

⁴⁷⁵ *Hall v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 155739, at *23-24 (W.D. Pa. Oct. 31, 2012).

⁴⁷⁶ *Nazario v. Nationwide Mut. Ins. Co.*, 2010 U.S. Dist. LEXIS 55469 (M.D. Pa. June 7, 2010).

month delay by an insurer in paying a benefit under the insurance policy supports a finding made by a fact finder using a clear and convincing filter that the insurer failed to process the claim in good faith.

. . . [Defendant's] assertions are essentially factual assertions and, in conflict with the plaintiff's assertions as they are, show that there are issues that the fact finder must decide. For the court to find it to be free from dispute that counsel's actions and inactions were entirely independent of and are not reasonably attributable to the defendant would involve the court in fact finding that the summary judgment record does not support. For the court to determine that the documents drafted by the defendant's attorneys and the process followed by the plaintiff's attorneys had the purpose and effect only of protecting good faith interests of the defendant would also involve fact finding not supported by the summary judgment record. For the court to evaluate the defendant's employee training processes or the conduct and under-standings of its employees would similarly involve fact finding as to disputed issues. The plaintiff's evidence and reasonably proffered inferences, if accepted by the fact finder, would support a finding of bad faith.⁴⁷⁷

(3) *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 92230 (E.D. Pa. July 8, 2014) (Stengel, J.)

Plaintiff was involved in an auto accident when another driver ran a red light and later settled for the tortfeasor's policy limits. In September 2013, she sought UIM benefits from her auto carrier, defendant State Farm, and a couple of weeks later, supplemented the initial demand package with additional records. State Farm notified plaintiff that her claim was being referred to counsel. At the end of October 2013, plaintiff requested that the claim be evaluated. State Farm then requested that plaintiff give an EUO and submit to an IME. Plaintiff again requested, at the end of January 2014, an evaluation, and requested a copy of the IME report. Plaintiff made the same requests again twice in mid-February, when it did not receive a response. Shortly after receiving the latter letters, counsel contacted plaintiff and indicated the IME report had not been completed, so he could not evaluate the UIM claim. The report, dated late January, 2014, was sent on February 27. Counsel then made an offer well below the policy limits, which plaintiff rejected; plaintiff then filed this bad faith suit. Defendant moved to dismiss. Judge Stengel of the Eastern District of Pennsylvania denied the motion, as is also discussed in §§9:11 and 9:13(a).

Plaintiff alleged that the six-month delay in handling the claim was in bad faith. As part of its analysis, the court explained that because both the tortfeasor and plaintiff were insured with State Farm, it would "lead[] one to infer that the plaintiff's underinsured claim could be evaluated relatively quickly."⁴⁷⁸ Additionally, the court concluded that plaintiff adequately stated a claim: "[e]ach request for an evaluation of her claim was met with further requests for information or was ignored.... These facts point to the defendant's lack of a reasonable basis for its delay...along with an inference that the defendant's behavior was tied to self-interest."⁴⁷⁹

(4) *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 147875 (M.D. Pa. Oct. 15, 2013) (Rambo, J.)

Plaintiff was in an auto accident, following which he settled with the tortfeasor. Plaintiff then sought UIM benefits from his auto insurer, State Farm. State Farm filed a motion to dismiss the bad faith claim. Judge Rambo of the Middle District of Pennsylvania denied the motion.⁴⁸⁰

Plaintiff did not allege specific dates, but the court indicated that the UIM claim was likely submitted in April or May 2011, and suit was filed 14 months later, prior to any offer by State Farm. The court found that the allegations that plaintiff provided all relevant medical records and a vocational report, demanded less than the policy limits, gave an EUO, and provided all information State Farm sought sufficient to allow the bad faith delay claim to proceed:

While the court is mindful of the fact that State Farm may be conducting a comprehensive investigation into the claim thereby providing what may be a reasonable basis for any delay, these facts may also indicate questionable investigation and communication practices, especially considering that the underlying automobile accident involved a "clear liability, head-on collision." Thus, the court concludes that this is a case in which discovery is needed regarding State Farm's handling of Plaintiffs' UIM claim. . . .⁴⁸¹

(5) *Pavlick v. Encompass Indem. Ins. Co.*, 2011 U.S. Dist. LEXIS 76026 (W.D. Pa. July 14, 2011) (Schwab, J.)

On November 1, 2009, Pavlick was in his front yard when he was struck and killed by an automobile. Pavlick had an auto policy with Encompass that included \$500,000 in UIM coverage. Pavlick owned a construction business that

⁴⁷⁷ *Nazario v. Nationwide Mut. Ins. Co.*, 2010 U.S. Dist. LEXIS 55467, at *14-17 (M.D. Pa. May 17, 2010).

⁴⁷⁸ *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 92230, at *11 (E.D. Pa. July 8, 2014).

⁴⁷⁹ *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 92230, at *11 (E.D. Pa. July 8, 2014).

⁴⁸⁰ A subsequent opinion in this matter is discussed in §§14:05(a) and 14:13.

⁴⁸¹ *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 147875, at *13 (M.D. Pa. Oct. 15, 2013) (citation to record omitted).

had an auto policy with defendant State Auto, also with \$500,000 in UIM limits. Plaintiff Mrs. Pavlick, his widow and executrix of his estate, presented a UIM claim to both insurers. Through counsel, she contacted Encompass (on November 4, 2009) and State Auto (on December 2, 2009), seeking the UIM policy limits under each policy. On December 18, 2009, and again on January 13, 2010, State Auto sought additional time for investigation. Plaintiff's attorney objected to the January letter on the grounds that it cited to inapplicable coverage provisions.

State Auto then sought a recorded statement from Mrs. Pavlick. During the statement, State Auto asked Mrs. Pavlick about an extramarital affair and also about Mr. Pavlick's alleged contributory negligence. In early March 2010, defendants Encompass and State Auto offered \$650,000, combined, to settle. When Mrs. Pavlick requested information about the insurers' position on liability, about their justification for the offer and for their files, the insurers increased their combined offer to \$950,000. The insurers indicated that because of Mr. Pavlick's contributory negligence and Mrs. Pavlick's affair, they would not offer the full \$1,000,000 combined policy limits. On March 26, 2010, Plaintiff accepted the offer. Thereafter, Plaintiff filed this bad faith case. Encompass filed a motion to dismiss the bad faith claim. Judge Schwab of the Western District of Pennsylvania denied the motion.

Plaintiff alleged that Encompass acted in bad faith in delaying payment under the policy where it was clear that the damages exceeded the policy limits and that Encompass continued to delay payment of the full policy limits. Plaintiff also alleged that Encompass acted in bad faith, delaying payment by investigating whether she was involved in an affair, irrelevant to a finding of UIM damages. The court found that "[T]he Amended Complaint has adequately pled that four months may be an unreasonable amount of time to pay that amount when that amount was purportedly available to the carrier sooner."⁴⁸²

(6) *Brown v. Liberty Mut. Fire Ins.*, 2008 U.S. Dist. LEXIS 24215 (E.D. Pa. Mar. 26, 2008) (Stengel, J.)

This case, discussed in §9:05, arose out of a first party income loss claim made by an insured in connection with a motor vehicle accident. The insurer promptly paid the claim for medical expenses, but the claim for income loss was unresolved for over four years. In rejecting the insurer's motion for summary judgment, Judge Stengel of the Eastern District held, "The long delay and mishandling of Ms. Brown's income loss claim may rise above mere negligence to bad faith. . . . Viewing the facts in the light most favorable to the plaintiff, a reasonable jury could find that Liberty Mutual Fire acted in bad faith."⁴⁸³

(7) *Sawyer v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 97609 (M.D. Pa. Jan. 20, 2006) (Caputo, J.)

In this case, the plaintiff asserted that the insurer acted in bad faith by delaying the resolution of her UIM claim by misrepresenting the existence of a UM/UIM "write-down" form, and later untimely producing a form whose authenticity plaintiff disputed. The insurer countered that it failed to produce the write-down form only because part of its file was missing, and produced the form as soon as it was located. The insurer further argued that throughout the search for the write-down, it took a reasonable and accurate legal position that the UIM benefits under the policy were limited to \$35,000, an amount which had been offered in settlement.

Cross-motions for summary judgment were filed by both parties, which were denied because factual issues existed. In denying plaintiff's motion, Judge Caputo of the Middle District held open the possibility that plaintiff might prevail at trial, stating, "[I]f Plaintiff is able to demonstrate that the applicable write-down form produced by Defendants is invalid, Plaintiff may be able to prove bad faith on the part of Defendants."⁴⁸⁴

(8) *Levin v. Great Am. Ins. Co.*, 2001 U.S. Dist. LEXIS 20100 (E.D. Pa. Dec. 4, 2001) (Yohn, J.)

In a bad faith suit arising out of a UM claim, Judge Yohn of the Eastern District denied the insurer's motion for partial summary judgment on the issue of bad faith in part because, the court held, a reasonable jury could find that the insurer had acted in bad faith by delaying the UM arbitration in order to find a medical expert to support its denial of benefits, rather than to legitimately investigate the claim.

§9:03(b) — Cases (Property Claims)

(1) *Hudgins v. Travelers Home & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 107775 (E.D. Pa. July 31, 2013) (Yohn, J.)

After plaintiff's home burned down in February 2009, she filed a claim with her homeowner's carrier, Travelers. There was a question of whether plaintiff's mentally ill son started the fire, so Travelers sent a reservation of rights letter, but advanced some funds on the policy. On the date of plaintiff's examination under oath (EUO) in March 2009, her son was arrested for arson, but charges were later withdrawn. Travelers continued to reserve its rights under the policy as its investigation continued. In December 2009, Travelers requested that the son submit to an EUO, but the EUO did not happen because plaintiff's former attorney had stopped representing her and failed to communicate the request for the son's EUO.

⁴⁸² *Pavlick v. Encompass Indem. Ins. Co.*, 2011 U.S. Dist. LEXIS 76026, at *11 (W.D. Pa. July 14, 2011).

⁴⁸³ *Brown v. Liberty Mut. Fire Ins.*, 2008 U.S. Dist. LEXIS 24215, at *15-16 (E.D. Pa. Mar. 26, 2008).

⁴⁸⁴ *Sawyer v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 97609, at *27-28 (M.D. Pa. Jan. 20, 2006).

Plaintiff filed a breach of contract and bad faith action in February 2010, but when her current attorney learned of the EUO request, the EUO occurred. The suit resulted in a judgment for defendant due to plaintiff's failure to cooperate. Following the EUO, Travelers accepted coverage. In June 2010, it issued a check for past rental expenses because the house was not habitable. In September 2010, Travelers issued a check for costs associated with rebuilding. Later in September 2010, Travelers issued another check for rental expenses and a check for personal property losses. A third check for rental expenses was issued in January 2011, and soon thereafter the insurer notified plaintiff that Additional Living Expense (ALE) payments would end in April 2011. In January 2011, when the appeal from the earlier action was still pending, plaintiff filed this bad faith action. After this suit was filed, the Superior Court affirmed the judgment in the first suit. Travelers filed a motion for summary judgment on the bad faith claims. Judge Yohn of the Eastern District of Pennsylvania granted the motion in part and denied it in part.

Plaintiff contended that Travelers acted in bad faith in its investigation by delaying the request for her son's EUO by nine (9) months. Travelers contended that the son's mental health and detention prevented it from seeking the EUO sooner. The court found a genuine issue of material fact existed: "Whether Travelers was prevented from taking [the son's] EUO for some unstated reason, or whether it acted in bad faith by stalling for nine months, is a factual dispute for trial, although probably one that Travelers can easily refute."⁴⁸⁵

(2) *Cher-D, Inc. v. Great Am. Alliance Ins. Co.*, 2009 U.S. Dist. LEXIS 30206 (E.D. Pa. Apr. 7, 2009), reconsideration denied, 2009 U.S. Dist. LEXIS 51553 (E.D. Pa. June 15, 2009) (Surrick, J.)

This case arose from two fires that took place about seven months apart at the insured's property. The insured made a claim under its commercial policy for both fires. During the claim, a dispute developed when the insurer agreed that the damage for the first fire took place within the policy period and was covered, but the damage from a second fire took place outside of the policy period and was not covered. The insurer therefore denied coverage for any damage from the second fire. The insured contended that the second fire would never have occurred but for the first fire, and therefore any damage caused by the second fire was resulting damage that fell within coverage. The insured filed an action against the insurer alleging breach of contract and statutory bad faith. The insurer filed a motion for summary judgment before Judge Surrick of the Eastern District.

The court found that under the policy terms, there was no available coverage for the second fire, and therefore granted summary judgment to the insurer on that claim. As to the bad faith claim, however, the insured argued that it should not be dismissed because the complaint alleged bad faith not only for the refusal to provide coverage for the second fire, but also for an alleged failure to make timely payment on covered losses from the first fire. The court allowed the bad faith claim to stand, reasoning that the complaint as worded embraced both claims. Having accepted that the insured's bad faith claim was adequately pled, the court outlined the considerations relevant to the insured's allegations of bad faith delay:

Delay in making payment on a claim is "a relevant factor in determining whether bad faith has occurred." . . . "[A] long period of time between demand and settlement does not, on its own, necessarily constitute bad faith. Rather, courts have looked to the degree to which a defendant insurer knew that it had no basis to deny the claimant . . ." Evidence of an insurer's delay in settling a claim can support a jury verdict of bad faith when the plaintiff makes multiple demands for payment and the insurer's liability is clear.⁴⁸⁶

However, the court noted that "an insurer generally does not act in bad faith by delaying an investigation when 'red flags' cause the delay."⁴⁸⁷ In the court's view there was evidence that the insurer delayed in making payment on the first fire, and thus "did not attempt in good faith to effect a prompt, fair, and equitable settlement of the insured's claim."⁴⁸⁸ The court further believed that in the months between the first and second fire, there were no "red flags" to justify a delay on the insured's claim, and no indication that the insurer was gathering facts for an investigation. The court noted that it was not until after the second fire that the insurer provided its estimate of the damage from the first fire. The court therefore denied summary judgment on the bad faith claim, stating that, "[c]onsidering all of these facts, we are satisfied that a reasonable jury could find by clear and convincing evidence that Defendant acted in bad faith."⁴⁸⁹

(3) *Erie Ins. Exchange v. Sze*, 2008 Phila. Ct. Com. Pl. LEXIS 197 (Phila. CCP, Aug. 4, 2008) (Abramson, J.)

The insurer filed a declaratory judgment action to determine the rights and obligations of the parties under two commercial policies, and based upon certain representations made by the defendant-insureds in obtaining the policies. The defendants filed a counterclaim alleging that the insurer acted in bad faith by, among other things, permitting six

⁴⁸⁵ *Hudgins v. Travelers Home & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 107775, at *26-27 (E.D. Pa. July 31, 2013).

⁴⁸⁶ *Cher-D, Inc. v. Great Am. Alliance Ins. Co.*, 2009 U.S. Dist. LEXIS 30206, at *33-35 (E.D. Pa. Apr. 7, 2009).

⁴⁸⁷ *Id.* at *36-37.

⁴⁸⁸ *Id.* at *40.

⁴⁸⁹ *Id.* at *41.

months to elapse without exercising due diligence in its investigation relative to the accuracy of the policy applications.⁴⁹⁰ Erie filed preliminary objections to the counterclaim. The court overruled the preliminary objections, stating, “Accepting these facts as true, [the defendants] may be able to prove by clear and convincing evidence that Erie denied their claim knowing that it lacked a reasonable basis.”⁴⁹¹

(4) *Kilmer v. Connecticut Indemnity Co.*, 189 F. Supp. 2d 237 (M.D. Pa. Feb. 28, 2002) (Vanaskie, J.)

In this fire damage claim discussed in greater detail in §9:05, the parties settled the claim for \$223,800, based on the appraisal approximately 17 months following the fire.

Alleging undue delay, the plaintiffs sued the insurer for bad faith. The insurer moved for summary judgment. Judge Vanaskie of the Middle District stated that “[t]his is a close case on whether a jury could find by clear and convincing evidence of bad faith,” and specifically noted that “the delay in this case is not egregious.”⁴⁹² However, the court ruled that there existed questions of fact, “on which reasonable minds might disagree,”⁴⁹³ and summary judgment was denied.

In so holding, the court noted a lack of communication from the insurer to the insureds that it found “unsettling,”⁴⁹⁴ and the court questioned a six-month delay in completing plaintiffs’ statement under oath.

§9:03(c) — Cases (Other Claims)

(1) *Cozzone v. AXA Equitable Life Ins. Soc’y of the U.S.*, 2011 U.S. Dist. LEXIS 39528 (M.D. Pa. Apr. 12, 2011) (Munley, J.)

Cozzone, a physician, alleged that she was disabled and therefore entitled to recover benefits under her overhead expense policy with defendant AXA. AXA used a third party administrator, defendant DMS, to administer the claim. After alleged delays in payment, Cozzone filed suit against AXA and DMS for breach of contract and bad faith. The defendants filed a motion to dismiss which was denied by Judge Munley of the Middle District. According to the court, “Cozzone has alleged that the Defendants unreasonably delayed benefits payments. As such, it would be premature to dismiss the claim.”⁴⁹⁵

§9:04 Inadequate Investigation or Legal Research

§9:05(a) — Cases (Auto Claims)

(1) *Galko v. Harleysville Pennland Ins. Co.*, 71 Pa. D. & C.4th 236 (Lackawanna 2005) (Minora, J.)

The insured had an automobile insurance policy with Harleysville that covered a 1985 vehicle registered to the insured. In 1999, the insured traded in the 1985 vehicle and purchased a 1996 vehicle without informing the insurer. Her policy did not require her to notify Harleysville when she obtained a replacement vehicle. In 2000, the insured was involved in a motor vehicle accident while driving the 1996 vehicle. The insurer initially denied the insured coverage for first party personal injury benefits and denied the insured a defense in a third party case involving the accident. However, after the insured filed suit against the insurer, the insurer provided benefits and a defense under the policy.

The insured sued Harleysville for breach of contract and bad faith. Judge Minora of Lackawanna County granted the insured’s partial summary judgment motion as to the bad faith claim. The court defined the bad faith standard as follows:

This court has previously confirmed in *McAndrew v. Donegal Mutual Insurance Co.* . . . that an insurance company acts in bad faith against an insured when it fails to carry out a complete investigation.

The Superior Court of Pennsylvania agreed with this contention when it declared that bad faith comprises a “lack of [a] good faith investigation into [the] fact[s], and failure to communicate with the claimant. . . .”⁴⁹⁶

The court held that the insurer investigated the claim in bad faith and failed to follow its internal claims handling guidelines:

After reviewing the record, it is apparent that the insurer neglected to provide a good faith investigation. The protocol provided in the claims manual guidelines was blatantly ignored, as was the

⁴⁹⁰ *Erie Ins. Exch. v. Sze*, 2008 Phila. Ct. Com. Pl. LEXIS 197, at *9 (Phila. Aug. 4, 2008).

⁴⁹¹ *Id.* at *9-10.

⁴⁹² *Kilmer*, 189 F. Supp. 2d 237, 248.

⁴⁹³ *Id.* at 248-49.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Cozzone v. AXA Equitable Life Ins. Soc’y of the U.S.*, 2011 U.S. Dist. LEXIS 39528, at *12 (M.D. Pa. Apr. 12, 2011) (citing *Ania v. Allstate Ins. Co.*, 161 F. Supp. 2d 424, 430 n.7 (E.D. Pa. 2001)).

⁴⁹⁶ *Galko v. Harleysville Pennland Ins. Co.*, 71 Pa. D. & C.4th 236, 244 (Lackawanna 2005) (citations omitted).

language in the insurance contract. Given the lack of an investigation and ignorance of the policy language, the insurer did not have a reasonable basis for denying the benefits under the policy.⁴⁹⁷

...

Such treatment of the plaintiff's claim denotes mistreatment by the insurance company. Clearly, the insurer did know of the status of the 1996 Chevy, yet failed to properly document it, which initiated the improper denial of the plaintiff's claim and represents an apparent disregard by the insurer of its lack of a reasonable basis for denying the claim.⁴⁹⁸

The court granted the insurer's summary judgment motion as to the breach of contract and denial of liability coverage claims, because the insurer eventually extended full coverage to the insured.

(2) *Brown v. Liberty Mut. Fire Ins.*, 2008 U.S. Dist. LEXIS 24215 (E.D. Pa. Mar. 26, 2008) (Stengel, J.)

This case arose out of a first party income loss claim made by an insured in connection with a motor vehicle accident. The insurer promptly paid the claim for medical expenses under the policy, but the claim for income loss coverage was allegedly delayed for over four years, when the insurer sent out a letter indicating that the plaintiff had not established that she sustained a wage loss under the policy. Plaintiff filed a claim for breach of contract and bad faith, and the insurer moved for summary judgment on both counts. Judge Stengel of the Eastern District denied the insurer's motion.

The plaintiff was a self-employed real estate agent. The plaintiff submitted an application for lost wages in June 2000. The claims adjuster was supposed to send the form to treating physicians for verification of the dates of disability, but failed to do so. The company claims handling procedures also required that when a claimant is self-employed, all information should be forwarded to an auditor to determine wage loss. The claims adjuster acknowledged that she failed to send them to the company auditors. The insurer explained these omissions by stating its representative had requested the claimant to specify the dates of missed work, and the claimant failed to do so. In March 2004, the plaintiff obtained counsel, and the request to pay the wage loss claim was reiterated. A different claims adjuster confirmed that things were missing from the file. The record suggested that the second claims adjuster also failed to properly follow-up with investigation of the claimed wage loss. In October 2004, a team manager forwarded a letter to the claimant indicating that a preliminary wage audit did not show a loss of income. In testimony, however, the team manager disavowed the contents of the letter.

In rejecting the insurer's motion for summary judgment, the court held that "[a] reasonable jury could find that Liberty Mutual Fire acted in bad faith."⁴⁹⁹

According to the court:

This straightforward wage loss claim has been unresolved since June of 2000. The initial filings were mishandled and not maintained in the regular course of business. Even after Ms. Brown submitted her tax returns, her broker's statement of missed work and lost income, and after all the wage loss forms were completed by Ms. Brown's physicians, Liberty Mutual Fire still failed to process her wage loss claim.

There is a genuine issue of material fact as to Liberty Mutual Fire's motives. The long delay and mishandling of Ms. Brown's income loss claim may rise above mere negligence to bad faith. . . . Viewing the facts in the light most favorable to the plaintiff, a reasonable jury could find that Liberty Mutual Fire acted in bad faith.⁵⁰⁰

(3) *Hall v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 155739 (W.D. Pa. Oct. 31, 2012) (Mitchell, J.)

Plaintiff was injured in a single vehicle accident when he swerved to avoid a vehicle that ran a stop sign. Following the accident, he called the police, who indicated they would not send an officer to the scene as his vehicle was not obstructing traffic. The police provided plaintiff with an accident form to fill out and send to Penn-DOT. Plaintiff also provided this form to his automobile insurer, defendant Nationwide. Plaintiff requested UM coverage from Nationwide, which was denied for failure to provide a police report or accident report. Plaintiff also requested wage loss coverage, which was granted following an investigation. Before the court was defendant Nationwide's motion for summary judgment on the bad faith claim. Judge Mitchell of the Western District denied the motion, as is also discussed in §9:03.

Plaintiff claimed that Nationwide acted in bad faith in its investigation of the UM claim because it required him to provide a police report, which was neither required under the policy nor provided by the police under the circumstances of the accident. The court agreed that there was no requirement under the policy that an insured provide

⁴⁹⁷ *Galko v. Harleysville Pennland Ins. Co.*, 71 Pa. D. & C.4th 236, 248 (Lackawanna 2005).

⁴⁹⁸ *Galko v. Harleysville Pennland Ins. Co.*, 71 Pa. D. & C.4th 236, 249 (Lackawanna 2005).

⁴⁹⁹ *Brown v. Liberty Mut. Fire Ins.*, 2008 U.S. Dist. LEXIS 24215, at *3, *13 (E.D. Pa. Mar. 26, 2008).

⁵⁰⁰ *Brown v. Liberty Mut. Fire Ins.*, 2008 U.S. Dist. LEXIS 24215, at *15-16 (E.D. Pa. Mar. 26, 2008).

a police report in order to recover UM benefits; rather, the policy required that the accident be reported to the police. The court also noted that there was no requirement under Pennsylvania statute that an insured provide a police report, only that the accident be reported to the police. There was no question that in this case the accident was reported to the police. The court also noted that Nationwide's adjuster initially did not advise plaintiff that he needed to report the accident to the police; that guidance was not given until the second phone conversation with the adjuster, following which plaintiff did so. Plaintiff also mailed to Penn-DOT the form given to him by the police. While this form was not a police-completed accident report, it was a driver's report form the department used in situations such as presented in this case.

The court found that the adjuster failed to contact the police department or Penn-DOT to confirm their procedures, but instead insisted on a police report. The adjuster also failed to contact Penn-DOT to confirm whether the accident report had been submitted by plaintiff:

Here, a reasonable trier of fact could find that Nationwide failed to make a good faith investigation into the plaintiff's UM claim. By failing to contact PennDOT to ascertain if the plaintiff submitted a Driver's Accident Report, or the PSP [Pennsylvania State Police] . . . to learn its procedure when an individual reports an automobile accident, Nationwide may have breached its duty of good faith through some motive of self-interest.⁵⁰¹

As to his wage loss claim, plaintiff contended that Nationwide acted in bad faith in failing to continue paying wage loss benefits after the first two payments. Nationwide contended that it had learned that plaintiff's employer was laying plaintiff off due to the seasonal nature of his work, and expected to re-hire him months later. Nationwide claimed it had not been informed that plaintiff had never been able to return to work at that later time. Plaintiff maintained that he had informed Nationwide that he could no longer work due to his injuries shortly after the expected re-hire date. The court concluded that a genuine issue of material fact existed because the records showed that plaintiff had informed Nationwide of his work status shortly after the expected re-hire date.

(4) *Linko v. Nationwide Prop. & Cas. Ins.*, 2016 U.S. Dist. LEXIS 51602 (M.D. Pa. Apr. 18, 2016) (Munley, J.)

Plaintiff leased a vehicle, and sought coverage from defendant Nationwide. After he was involved in an accident, Nationwide denied coverage on the grounds that plaintiff had no policy with it. Plaintiff alleged that the lease paperwork listed Nationwide as the insurer, along with a policy number, and that Nationwide made automatic withdrawals from his bank account. After plaintiff filed this bad faith action, defendant filed a motion to dismiss. Judge Munley of the Middle District denied the motion. The court concluded that these allegations sufficiently set forth that Nationwide unreasonably denied coverage without substantial discussion.

(5) *Schifino v. GEICO Gen. Ins. Co.*, 2012 U.S. Dist. LEXIS 177072 (W.D. Pa. Dec. 14, 2012) (McVerry, J.)

Plaintiff was injured in an auto accident. He was a passenger in a vehicle that was rear-ended. The driver was insured with defendant GEICO. After receiving the policy limits from the tortfeasor's carrier, he sought UIM coverage under the GEICO policy. When the parties could not agree on the value of plaintiff's injuries, plaintiff filed this breach of contract and bad faith action. Defendant GEICO filed a motion for summary judgment on the bad faith claim. Judge McVerry of the Western District denied the motion.

Plaintiff contended that GEICO failed to conduct a meaningful investigation and failed to offer a reasonable settlement amount. The court found that there was evidence to support a conclusion that the adjuster never requested any photographs of the vehicles and never requested damage estimates. The court also noted that the adjuster failed to consider that the tortfeasor's car was going 40 m.p.h when it hit the vehicle in which plaintiff was a passenger, that the vehicle was spun 90 degrees upon impact, and there was \$3,000 worth of damage to the truck. There was also evidence that the adjuster failed to properly consider the treatment plaintiff received following the accident. Additionally, the claim was never submitted to any review by a nurse or physician and the medical testimony demonstrated that there was a dispute over the nature of the injuries. The court concluded that based on the foregoing, plaintiff "has set forth sufficient evidence to show that a reasonable factfinder could find that GEICO acted in bad faith."⁵⁰²

(6) *Monaghan v. Travellers Prop. & Cas. Co. of Am.*, 2014 U.S. Dist. LEXIS 82368 (M.D. Pa. June 16, 2014) (Munley, J.)

After plaintiff was involved in an auto accident, she submitted a claim for first party medical benefits with her auto insurer, defendant Travellers. Defendant initially paid the benefits, but stopped paying them following a third IME. Plaintiff and her husband then filed this bad faith action, and when discovery was complete, defendant filed a motion for summary judgment. Judge Munley of the Middle District of Pennsylvania denied the motion as to the bad faith claim.

⁵⁰¹ *Hall v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 155739, at *19-20 (W.D. Pa. Oct. 31, 2012).

⁵⁰² *Schifino v. GEICO Gen. Ins. Co.*, 2012 U.S. Dist. LEXIS 177072, at *10-11 (W.D. Pa. Dec. 14, 2012).

Plaintiffs contended that defendant performed the investigation in bad faith, as it sought repeated IMEs until one concluded that the injuries were not related to the accident so it could stop making payments. The court found that a genuine issue of material fact existed for the jury: “[T]he parties’ briefs amount to merely arguing the facts. As such it is apparent that summary judgment is inappropriate. It will be for the jury to decide whether the defendants engaged in bad faith and kept sending plaintiff to doctors for IMEs until they found one to conclude that her injuries were not related to the accident or whether they in good faith required the IMEs.”⁵⁰³

(7) *Pauling v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 137950 (M.D. Pa. Sept. 26, 2013) (Conner, J.)

Plaintiff’s parents had an auto policy with defendant State Farm. Plaintiff, while at school in Florida, was a victim of a hit and run accident and then he sought UM benefits from State Farm denied his claim after concluding he was at fault for the accident. Following the denial, plaintiff filed this bad faith suit. State Farm filed a motion to dismiss the bad faith claim. Judge Conner of the Middle District of Pennsylvania denied the motion.

The court concluded that plaintiff stated a bad faith claim because he alleged he resided with his parents for the purposes of insurance coverage, despite being in a different state for college and because he sufficiently set out facts supporting an unreasonable investigation. As to the investigation, plaintiff alleged that his father had spoken with a witness to the accident who indicated that the accident was not plaintiff’s fault, but when State Farm spoke with the witness, pressured him to say that the accident was plaintiff’s fault. State Farm also apparently did not contact the witness’s girlfriend, also a witness, and did not inspect the scene. The court rejected State Farm’s argument that at most the allegations could be construed to show negligence, which cannot be bad faith, holding:

[T]he course of conduct outlined in the amended complaint far surpasses mere negligence and falls squarely within the definition of bad faith conduct.... Instead, State Farm actively and intentionally worked against its insured’s interests, going so far as to “pressure[] and intimidate[]” an eyewitness into providing a false statement which place blame for the accident with [plaintiff] and, in State Farm’s view, supports its decision to deny benefits.

Assuming the veracity of this account, State Farm’s conduct embodies the “dishonest purpose” and self-interested conduct which the General Assembly sought to prevent when enacting §8371.⁵⁰⁴

(8) *Keppol v. State Farm Ins.*, 2013 U.S. Dist. LEXIS 10106 (E.D. Pa. Jan. 25, 2013) (Schiller, J.)

In this dispute over wage loss benefits in an automobile policy, plaintiff filed this action alleging bad faith against his insurer. Defendant insurer filed a motion to dismiss. Judge Schiller of the Eastern District denied the motion.

The court found plaintiff’s allegations adequate to state a claim. Specifically, plaintiff alleged that “he was entitled to coverage for lost wages and that, though he submitted documentation in support of his claim, State Farm has nevertheless refused to pay him benefits in bad faith.”⁵⁰⁵ The court concluded: “Keppol has thus stated facts supporting a bad faith claim for either an unfounded refusal to pay or a failure to investigate the facts. Taking the facts alleged in the light most favorable to Keppol, State Farm had no reasonable basis for failing to pay benefits or investigate Keppol’s claim and knew it had no reasonable basis for doing so. As a result, the Court will allow him to proceed to discovery on his bad faith claim.”⁵⁰⁶

(9) *Goshorn v. Westfield Ins. Co.*, 2012 U.S. Dist. LEXIS 63191 (M.D. Pa. May 4, 2012) (Rambo, J.)

Goshorn was in an auto accident. She recovered nearly the policy limits from the tortfeasor, and then sought UIM benefits from her auto insurer, Westfield. She submitted her claim, with documentation including the police report and medical records, in March 2011. Westfield did not review the file until late September 2011. At that time, Westfield informed Goshorn’s attorney that it was sending the MRI films for review. In late October 2011, Westfield denied the claim on the grounds that the review showed there had been no injury. Goshorn then filed this breach of contract and bad faith suit. Westfield filed a motion to dismiss the bad faith claim. Judge Rambo of the Western District denied the motion.

While noting that the insured’s “burden moving forward is quite high,” the court held that plaintiff’s complaint satisfied the minimal standards required to withstand a motion to dismiss:

Plaintiff claims that Westfield has frivolously and unfoundedly failed to pay proceeds rightfully owed to Plaintiff Furthermore, Plaintiff claims that this was done because Westfield has not conducted a proper investigation into Plaintiff’s medical claims and instead relied solely on the opinion of one medical/legal expert who only reviewed Plaintiff’s MRI films and did not review any other relevant medical documentation. Although the court makes no determination as to the ultimate viability of Plaintiff’s bad faith claim, the court does note that Plaintiff’s burden moving forward is quite high and

⁵⁰³ *Monaghan v. Travellers Prop. & Cas. Co. of Am.*, 2014 U.S. Dist. LEXIS 82368, at *11 (M.D. Pa. June 16, 2014).

⁵⁰⁴ *Pauling v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 137950, at *9-11 (M.D. Pa. Sept. 26, 2013) (footnote omitted).

⁵⁰⁵ *Keppol v. State Farm Ins.*, 2013 U.S. Dist. LEXIS 10106, at *6 (E.D. Pa. Jan. 25, 2013).

⁵⁰⁶ *Keppol v. State Farm Ins.*, 2013 U.S. Dist. LEXIS 10106, at *6-7 (E.D. Pa. Jan. 25, 2013).

a claim for bad faith cannot be based on "negligence or bad judgment" on the part of Westfield's agents. However, in light of the standard applicable to motions to dismiss, the court will allow this claim to proceed.⁵⁰⁷

(10) *Douglas v. Discover Prop. & Cas. Ins. Co.*, 810 F. Supp. 2d 724 (M.D. Pa. 2011) (Munley, J.)

Plaintiff, while driving a company-issued car, was involved in an auto accident. After resolving his claim with the tortfeasor, he sought UIM benefits from his company's commercial fleet insurer, Discover. Discover indicated that Abbott, the employer, had waived UIM benefits under the policy. Plaintiff filed suit as a putative class action against a number of defendants, including Discover, alleging that Discover breached the contract and acted in bad faith. Plaintiffs and defendant insurers filed cross motions for summary judgment. Judge Munley of the Middle District denied the motions as to the bad faith issue, finding a genuine issue of material fact.

The court concluded that the attempted waiver of UIM benefits was null and void, and turned to the bad faith claim. Defendant insurers argued that they reasonably relied on case law to support their claim that UIM benefits had been waived. Plaintiff contended that there existed contrary case law, and the MVFRL supported the contention that the insurers had acted in bad faith. The court found that this created a genuine issue of material fact, as "[a] reasonable jury could credit either party's account of what motivated Discover's decision to deny benefits."⁵⁰⁸

(11) *Zintel v. Progressive N. Ins. Co.*, 2010 U.S. Dist. LEXIS 133170 (M.D. Pa. Dec. 16, 2010) (Munley, J.)

Zintel was hit by an unidentified motorist when he knelt down to tie his shoe near a parked car, and thereafter sought UM benefits from his auto insurer, defendant Progressive. After he and Progressive were unable to resolve the UM claim, Zintel filed suit, and included a claim for bad faith. Progressive filed a motion for summary judgment. Judge Munley of the Middle District denied the motion.

Observing that bad faith claims can stem not only from denials of claims but also from an insurer's investigation,⁵⁰⁹ the court focused on Zintel's claim of bad faith based on Progressive's reduction of its settlement offer based on Zintel's alleged fault in the accident. The court noted that contributory negligence was not a defense to a claim of recklessness, but there was evidence to support a conclusion that Progressive did consider, impermissibly, Zintel's own alleged contributory negligence:

Zintel cited *Carter v. Nat'l R.R. Passenger Corp.*, 413 F. Supp. 2d 495, 501 (E.D. Pa. 2005) for the proposition that, where a defendant is found to have acted with reckless disregard of safety, a plaintiff's own contributory negligence is not a defense. (citing *Krivjanski v. Union R.R. Co.*, 515 A.2d 933, 936 (Pa. Super. Ct. 1986)) (holding that "when willful or wanton misconduct is involved, comparative negligence should not be applied.") Zintel points out that Progressive's claims specialist Karen Castelli admits comparing the relative levels of fault of Zintel and the unidentified driver, assigning the majority of liability to the unidentified driver. . . . Castelli also opined that the unidentified driver was reckless. . . . Finally, Castelli admits that this comparison of fault was factored into her claim evaluation to reduce the amount Zintel would be offered to resolve his UM claim.⁵¹⁰

Although the claims analyst's characterization of the driver's actions as "reckless" would not be considered a legal conclusion on whether the actions would, in fact, be found thus by the trier of fact, it provided evidence that Progressive knew that the driver was reckless and took into account the irrelevant fact of Zintel's own negligence in making its claims decision. This was sufficient, the court decided, to counter Progressive's summary judgment motion and preclude dismissal: "Assuming these facts, for purposes of addressing Progressive's motion for summary judgment, a reasonable jury could conclude that Progressive knew it did not have a reasonable basis to reduce its claim evaluation but reduced the evaluation anyway."⁵¹¹

(12) *Naumov v. Progressive Ins. Agency, Inc.*, 2008 U.S. Dist. LEXIS 110731 (W.D. Pa. Dec. 17, 2008) (Ambrose, J.)

In this case, also discussed in §9:19, the plaintiff asserted that Progressive acted in bad faith in suspecting him of fraud in connection with an auto damage claim, and in referring the claim to criminal investigators, who later withdrew charges. Plaintiff filed suit against Progressive, alleging, *inter alia*, bad faith on Progressive's part, claiming that Progressive knew he did not commit fraud and recklessly accused him of such. Progressive filed a motion to dismiss, which Judge Ambrose of the Western District denied. The court held that "a claim for bad faith may arise from an insurer's investigation of the claim,"⁵¹¹ and concluded that plaintiff had pled a valid claim for bad faith:

⁵⁰⁷ *Goshorn v. Westfield Ins. Co.*, 2012 U.S. Dist. LEXIS 63191, at *7-8 (M.D. Pa. May 4, 2012).

⁵⁰⁸ *Douglas v. Discover Prop. & Cas. Ins. Co.*, 810 F. Supp. 2d 724, 733 (M.D. Pa. 2011).

⁵⁰⁹ *Zintel v. Progressive N. Ins. Co.*, 2010 U.S. Dist. LEXIS 133170, at *10 (M.D. Pa. Dec. 16, 2010) (citing *Sawyer v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 97609 (M.D. Pa. Jan. 20, 2006)).

⁵¹⁰ *Zintel v. Progressive N. Ins. Co.*, 2010 U.S. Dist. LEXIS 133170, at *11-12 (M.D. Pa. Dec. 16, 2010) (footnote omitted).

⁵¹¹ *Zintel v. Progressive N. Ins. Co.*, 2010 U.S. Dist. LEXIS 133170, at *13 (M.D. Pa. Dec. 16, 2010).

⁵¹¹ *Naumov v. Progressive Ins. Agency, Inc.*, 2008 U.S. Dist. LEXIS 110731, at *18-19 (W.D. Pa. Dec. 17, 2008) (citing *Greene v. United Servs. Auto. Ass'n*, 936 A.2d 1178 (Pa. Super. 2007), *appeal denied*, 954 A.2d 577 (Pa. 2008); *Giangreco v. United States Life Ins. Co.*, 168 F. Supp. 2d 417 (E.D. Pa. 2001); and *Henderson v. Nationwide Mut. Ins. Co.*, 169 F. Supp. 2d 365 (E.D. Pa. 2001)).

Here, Plaintiff has alleged that Defendant improperly refused to pay benefits under the policy. Plaintiff has further alleged that Progressive did not properly investigate its claim, and knowingly and falsely informed the criminal authorities that Plaintiff had committed insurance fraud. Based on these allegations, Plaintiff has stated a claim for bad faith under Pennsylvania law.⁵¹²

(13) *McCrary v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 28397 (W.D. Pa. Apr. 7, 2008) (Lancaster, J.)

In this case, discussed in §9:13(a), Judge Lancaster of the Western District denied the insurer's motion for summary judgment as to bad faith. The court held that the insurer's refusal to assign a monetary value to the claimant's claim under the circumstances could be evidence of bad faith. According to the court:

Although State Farm very well could have questioned what injuries were caused by McCrary's work as a waitress, as opposed to what injuries were caused by the car accident, and/or challenged McCrary's alleged lost career prospects given her poor academic performance before the accident in that memorandum or letter, it did not. It simply made a blanket, conclusory, and convenient statement that the claim was worth less than \$200,000.

A reasonable juror could conclude that these facts prove that State Farm's goal was not to objectively and fairly determine the validity and value of McCrary's claim, but to ensure that whatever merit it had her claim was valued below its \$200,000 coverage trigger. . . . It is for this reason that this matter must be submitted to a jury for resolution.⁵¹³

(14) *Hanover Ins. Co. v. Ryan*, 619 F. Supp. 2d 127 (E.D. Pa. 2007) (Stengel, J.)

The insurer filed a declaratory judgment action against its insured, Ryan, seeking a declaration that it had no duty to defend the insured in an underlying tort case arising out of a motor vehicle accident. The insured filed a counterclaim alleging bad faith. The bad faith allegations were that the insurer, in the declaratory judgment action, entered a default judgment against its insured with no notice to the insured's counsel and that the insurer failed to properly investigate the basis for its claim denial. The insurer moved to dismiss the counterclaim. Judge Stengel of the Eastern District, accepting the insured's allegations as true, denied the insurer's motion to dismiss, stating:

[T]he actions of Hanover could constitute bad faith under §8371, especially given Hanover's failure to communicate with its insured regarding the entry of a default judgment in the present case. Ryan has therefore stated a viable claim for bad faith, and I will deny Hanover's motion to dismiss with respect to this claim.⁵¹⁴

(15) *Sawyer v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 97609 (M.D. Pa. Jan. 20, 2006) (Caputo, J.)

In this case, the plaintiff asserted that the insurer acted in bad faith by delaying the resolution of her UIM claim by misrepresenting the existence of a UM/UIM "write-down" form, and later untimely producing a form whose authenticity plaintiff disputed. The insurer countered that it failed to produce the write-down form only because part of its file was missing, and produced the form as soon as it was located. The insurer further argued that throughout the search for the write-down, it took a reasonable and accurate legal position that the UIM benefits under the policy were limited to \$35,000, an amount which had been offered in settlement.

Cross-motions for summary judgment were filed by both parties, which were denied because factual issues existed. In denying plaintiff's motion, Judge Caputo of the Middle District held open the possibility that plaintiff might prevail at trial, stating, "[I]f Plaintiff is able to demonstrate that the applicable write-down form produced by Defendants is invalid, Plaintiff may be able to prove bad faith on the part of Defendants."⁵¹⁵

(16) *Feeney v. United Services Auto. Assoc. Grp.*, C.C.P. March 1995, No. 2581 (June 21, 1996) (unreported bench trial) (Bernstein, J.)

In an unreported bench trial, the Philadelphia Court of Common Pleas in an Uninsured Motorist claim held that the insurer acted in bad faith for several reasons,⁵¹⁶ including "failing to ever obtain a legal opinion as to what the law of Pennsylvania required under the circumstances presented here as to USAA's obligation for coverage provided. . . ."⁵¹⁷

⁵¹² *Naumov v. Progressive Ins. Agency, Inc.*, 2008 U.S. Dist. LEXIS 110731, at *20 (W.D. Pa. Dec. 17, 2008) (citations omitted).

⁵¹³ *McCrary v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 28397, at *6-8 (W.D. Pa. Apr. 4, 2008).

⁵¹⁴ *Hanover Ins. Co. v. Ryan*, 619 F. Supp. 2d 127, 141 (E.D. Pa. 2007) (citations omitted).

⁵¹⁵ *Sawyer v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 97609, at *27-28 (M.D. Pa. Jan. 20, 2006).

⁵¹⁶ *Feeney* is discussed in greater detail in §9:15.

⁵¹⁷ *Feeney v. United Servs. Auto. Assoc. Grp.*, C.C.P., Phila., March Term, 1995, No. 2581, Opinion from the Bench at p.4 (June 21, 1996).

(1) *Windowizards, Inc. v. Charter Oak Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 39063 (E.D. Pa. Mar. 27, 2015) (Strawbridge, M.J.)

Plaintiffs sought coverage in August 2011 from their commercial property policy with defendant Charter Oak after the building was damaged after a heavy accumulation of snow on the roof in February 2011. Charter Oak adjusters inspected the damage with engineers and consultants; by early 2012, plaintiffs began repairs to the property and Charter Oak paid a portion of the property claim. The parties could not resolve claims relating to lost rental income or to expenses associated with code enforcement, in part because according to plaintiffs, the adjuster refused to discuss code compliance issues and code upgrade coverage. Plaintiffs filed this breach of contract and bad faith suit. Charter Oak filed a motion for partial summary judgment. Magistrate Judge Strawbridge of the Eastern District of Pennsylvania denied the motion as to the bad faith claim.

Plaintiffs contended that Charter Oak investigated the claim in bad faith. The court agreed that there were genuine issues of material fact on the issue: “A claim of bad faith may be premised on the insurer’s improper investigation of the claim. . . . Here, in light of, *inter alia*, [plaintiffs’] evidence that Mr. Giordano [adjuster] mishandled the claim by purposefully refusing to discuss the code compliance coverage, we conclude that genuine issues of material fact prevent summary judgment on this claim as well.”⁵¹⁸

(2) *Allied Dental Grp., Ltd. v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 138673 (W.D. Pa. Sept. 27, 2013) (Bissoon, J.)

Plaintiff had a business insurance policy with defendant State Farm, and filed a claim after fire damaged the office building it leased. When the parties could not agree to the valuation of the loss, plaintiff filed this bad faith suit. Defendant filed a motion to dismiss. Judge Bissoon of the Western District denied the motion.

The court noted that plaintiff alleged that the insurer performed a bad faith investigation, and concluded that the facts alleged in the complaint sufficed to state a claim:

[T]he Court finds that Plaintiff has stated at least a plausible claim for bad faith based on failure to investigate and delay in settling the claim. In support, Plaintiff makes specific factual averments including, but not limited to, that Defendant refused to meet with corporate accountants to discuss Plaintiff’s losses; Defendant unreasonably utilized an accountant who was not familiar with Plaintiff’s billing process and later relied on that accountant’s opinions in determining coverage; Defendant failed to retain legal counsel regarding Plaintiff’s claim; Defendant failed to meet with Plaintiff regarding certain factual determinations necessary to determine its loss; and Defendant delayed payment for thirteen months.⁵¹⁹

(3) *Williamson v. Chubb Indem. Ins. Co.*, 2013 U.S. Dist. LEXIS 178022 (E.D. Pa. Dec. 19, 2013) (Baylson, J.)

Plaintiffs sought coverage from their homeowner’s carrier, defendant Chubb, after their home suffered substantial damage. When the parties could not agree on the value of the claim, plaintiffs filed this bad faith action. Chubb moved to dismiss. Judge Baylson of the Eastern District of Pennsylvania denied the motion.

Chubb, as part of its investigation, hired a contractor to assess the loss. That contractor, EDS, used a computer program to value the claim that differed from the computer program that Chubb used when it performed the valuation in-house. Plaintiff claimed that EDS was used because Chubb, in bad faith, wanted to minimize the loss and that in using EDS, treated plaintiffs differently than other insureds in bad faith. The court found that plaintiffs’ allegations stated a claim:

As made clear by 40 Pa. Stat. §1171.5(a)(7), evaluating the claims of similarly-situated insureds differently can constitute an unfair insurance practice and thus may be the basis for a bad-faith action. . . . Departing from standard practice in order to generate a lower estimate may prove the dishonest purpose and self-interest that is the hallmark of bad faith. Not only do Plaintiffs allege that Chubb knew that its actions were unreasonable at the time it hired EDS, they also allege that Chubb was put on notice that there were differences in the estimating programs. . . . These allegations, taken as true, are sufficient to state a claim for bad faith under Pennsylvania law.⁵²⁰

(4) *Gold v. State Farm Fire & Cas. Co.*, 880 F. Supp. 2d 587 (E.D. Pa. 2012) (McLaughlin, J.)

Following two separate instances of water damage to their home, the Golds sought coverage under their homeowner’s policy with defendant State Farm. After State Farm denied their second claim, plaintiffs brought this

⁵¹⁸. *Windowizards, Inc. v. Charter Oak Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 39063, at *20 (E.D. Pa. Mar. 27, 2015).

⁵¹⁹. *Allied Dental Grp., Ltd. v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 138673, at *6-7 (W.D. Pa. Sept. 27, 2013) (citation to record omitted).

⁵²⁰. *Williamson v. Chubb Indem. Ins. Co.*, 2013 U.S. Dist. LEXIS 178022, at *12-13 (E.D. Pa. Dec. 19, 2013).

breach of contract and bad faith action. State Farm moved for summary judgment. Judge McLaughlin of the Eastern District granted the motion in part and denied it in part.

The Golds, plaintiffs-insureds, contended that State Farm acted in bad faith during its investigation of both the 2009 and 2010 claims. As discussed in §10:07(b), the court concluded that the bad faith claim as to the 2010 investigation would not survive summary judgment. The Court found that the claim relating to the 2009 investigation would survive summary judgment. The court pointed to several facts which created a genuine issue of material fact: the very short amount of time the adjuster performed the investigation in (12 minutes); whether the adjuster appropriately discounted the plaintiffs' description of where the water was coming from in the initial call; the adjuster's refusal to conduct an on-site investigation, despite plaintiffs' request for one; and their offer to have an independent person examine causation.⁵²¹

(5) *PMW Real Estate Mgmt., LLC v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 109989 (W.D. Pa. Aug. 5, 2013) (Cercone, J.)

Plaintiff purchased an apartment building, which it insured through a policy with State Farm. When part of a foundation wall collapsed, it filed a claim, which State Farm denied. Plaintiff then filed this breach of contract and bad faith action. State Farm filed a motion for summary judgment. Judge Cercone of the Western District denied the motion as to both counts.

As to the breach of contract count, the court found that the facts presented created a genuine issue of material fact as to whether the loss was a covered "collapse" under the policy.

As to the bad faith count, the court found that the facts presented created a genuine issue of material fact as to whether State Farm acted in bad faith during its investigation. First, the court pointed to the fact that the adjuster told plaintiff that the claim would not be covered even before an inspection of the property in support of its decision. Secondly, the court noted that the expert retained by State Farm provided deposition testimony that contradicted his report, creating an issue of fact: "His testimony may also allow the jury to determine that [the expert] did not spend enough time at the site, and his reliance on his observations from the exterior of the building were not adequate to prepare a reliable, comprehensive report upon which State Farm could reasonably rely."⁵²²

(6) *7th & Allen Equities v. Hartford Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 158081 (E.D. Pa. Nov. 2, 2012) (Gardner, J.)

Plaintiff's commercial property suffered water damage as a result of a leak in a sprinkler system. The insurer denied coverage on the grounds that the building was vacant and because plaintiff failed to take steps to prevent freezing of the sprinkler system. This declaratory judgment, breach of contract and bad faith suit followed. Before the court was the insurer's motion for summary judgment, which Judge Gardner of the Eastern District denied as to the bad faith claim. The court concluded that there were factual issues as to whether plaintiff took adequate steps to prevent freezing, denying that summary judgment on the coverage claim. Turning to the bad faith claim, the court found that because plaintiff had provided evidence creating an issue of fact on the coverage claim, "plaintiff has produced sufficient evidence that defendant did not have a basis to deny plaintiff's claim for coverage. . . ."⁵²³

(7) *Pinkhasov v. Allstate Ins.*, 2011 U.S. Dist. LEXIS 64933 (M.D. Pa. June 20, 2011) (Munley, J.) (homeowner's water damage claim)

Plaintiff's home was damaged following a water main break. His home was insured by Allstate. Following Allstate's denial of the claim, plaintiff filed suit, alleging, in part, statutory bad faith. Allstate moved to dismiss the bad faith claim. Judge Munley of the Middle District of Pennsylvania denied the motion.

Allstate contended that plaintiff failed to allege facts sufficient to state a claim. The court disagreed, finding that the allegations that Allstate failed to inspect the property and failed to conduct an investigation satisfied the minimal standards required to withstand a motion to dismiss a statutory bad faith claim:

The plaintiff asserts that by "denying the claim and/or conducting an improper investigation," the defendant's conduct and actions constitute bad faith. Specifically, plaintiff alleges that Allstate did not inspect the property, did not investigate the claim, and if it did investigate the claim it did so without adopting and implementing reasonable standards.

At a minimum, plaintiff alleges facts that show the failure by defendant to conduct a good faith investigation. The failure to conduct a good faith investigation into a claim constitutes acting in bad faith. . . .Because the allegation is sufficient to withstand a motion to dismiss, we deny Allstate's motion with respect to Count II of the complaint.⁵²⁴

⁵²¹ *Gold v. State Farm Fire & Cas. Co.*, 880 F. Supp. 2d 587, 598 (E.D. Pa. 2012).

⁵²² *PMW Real Estate Mgmt., LLC v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 109989, at *23 (W.D. Pa. Aug. 5, 2013).

⁵²³ *7th & Allen Equities v. Hartford Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 158081, at *27 (E.D. Pa. Nov. 2, 2012).

⁵²⁴ *Pinkhasov v. Allstate Ins.*, 2011 U.S. Dist. LEXIS 64933, at *8-9 (M.D. Pa. June 20, 2011) (citations to record omitted).

(8) *Lombardi v. Allstate Ins. Co.*, 2011 U.S. Dist. LEXIS 157544 (W.D. Pa. Jan. 27, 2011), reconsideration denied, 2011 U.S. Dist. LEXIS 37836 (W.D. Pa. Apr. 7, 2011) (Ambrose, J.)

Plaintiff's decedent owned a home that was insured by defendant Allstate. During the policy term, the decedent died, and the plaintiff administrator of the decedent's estate, Lombardi, requested that the utilities be shut down and disconnected, including heat and electricity. Lombardi also requested that the water be turned off. About three weeks after the request, Lombardi went to the house and discovered extensive flooding and water damage, despite a notice that the water service had been shut off the day after the request. As it was still during the policy term, Lombardi contacted Allstate. During the initial telephone call to report the loss, the Allstate adjuster informed Lombardi that the claim was being denied. A written denial followed. After Lombardi filed this bad faith suit, Allstate filed a motion for summary judgment on the bad faith claim. Judge Ambrose of the Western District of Pennsylvania denied this motion and subsequently denied reconsideration in a summary opinion.

The court agreed with Lombardi that there was a genuine issue of material fact relating to the nature of the initial investigation that concluded that the claim was not covered due to an exclusion barring coverage from frozen pipes when the home is not heated. The court explained that a genuine issue of material fact existed as to whether the "investigation"—which took place over the course of the short phone call and without an inspection of the premises or pipes—was performed in bad faith:

Put succinctly, a claim was denied during the course of a three minute phone call, when no admission was made which would have otherwise exempted the claim from coverage (i.e., the pipes froze). Specifically, Lombardi phoned to report a loss to Wendy McClure of Allstate. At no time during that approximately three minute conversation did Lombardi state that the damage was caused by a frozen pipe. At the end of that conversation, Wendy McClure, on behalf of Allstate denied the claim. That denial was confirmed in a phone call the next day and by letter issued within one week. At no point during that intervening week did Allstate send someone over to physically inspect the premises, despite having staff in the area. Neither, during that intervening week, did Allstate obtain weather reports or statements from neighbors concerning the weather during the relevant period of time. Nor, during the intervening week, did Allstate examine the "faulty" pipe. Nobody on behalf of Allstate assessed other pipes in the house to determine whether they exhibited any signs of damage from cold weather. Simply stated, Wendy McClure surmised, during a three minute phone call, that water damage in an unheated house during the winter must be due to a frozen pipe. Genuine issues of material fact exist as to whether this constitutes a "reasonable basis" for denying benefits and, if not, whether Allstate knew or recklessly disregarded its lack of a reasonable basis in denying the claim.⁵²⁵

(9) *Cher-D, Inc. v. Great Am. Alliance Ins. Co.*, 2009 U.S. Dist. LEXIS 30206 (E.D. Pa. Apr. 7, 2009), reconsideration denied, 2009 U.S. Dist. LEXIS 51553 (E.D. Pa. June 15, 2009) (Surrick, J.)

In this case discussed in §9:03, Judge Surrick denied summary judgment to an insurer regarding two fire claims involving the same property. According to the court, in the months between the first and second fire, there were no "red flags" to justify a delay on the insured's claim, and no indication that the insurer was gathering facts for an investigation. The court noted that it was not until after the second fire that the insurer provided its estimate of the damage from the first fire. The court stated that "[c]onsidering all of these facts, we are satisfied that a reasonable jury could find by clear and convincing evidence that Defendant acted in bad faith."⁵²⁶

(10) *Pak v. ALEA London Ltd.*, 2009 U.S. Dist. LEXIS 65640 (M.D. Pa. July 30, 2009) (Rambo, J.)

The Paks owned and operated several business, including a grocery store. They purchased commercial property insurance through an agent, and policies were issued 50% by defendant ALEA and 50% by defendant Sirius for each of their properties. When one wall of the grocery store collapsed, the Paks sought coverage under the applicable commercial property insurance policy. That policy provided coverage for specific named perils, but excluded coverage for "collapse," except as specifically allowed. One of the exceptions to the policy exclusion for collapse was for collapse caused by "decay that is hidden from view unless the presence of decay is known to the insured prior to collapse."

Observing that the collapse might have been caused by settlement or earth movement, excluded causes, the insurance adjuster hired an engineer who concluded that the collapse occurred because of a lack of maintenance and water damage which deteriorated the framing and brick and mortar joints. A city engineer who performed an independent exam concluded that the collapse was caused by exterior deterioration. The company sent a letter denying the claim based on policy language excluding coverage for wear and tear, hidden decay, smog, settling and continuous water seepage. The Paks asked for reconsideration of the denial through their attorney, specifically pointing to the

⁵²⁵ *Lombardi v. Allstate Ins. Co.*, 2011 U.S. Dist. LEXIS 157544, at *18-19 (W.D. Pa. Jan. 27, 2011).

⁵²⁶ *Cher-D, Inc. v. Great Am. Alliance Ins. Co.*, 2009 U.S. Dist. LEXIS 30206, at *41 (E.D. Pa. Apr. 7, 2009).

“hidden decay” exception to the collapse exclusion. The adjuster denied the request to reconsider without further investigation, on the grounds that deterioration of the wall must have been obvious to the Paks.

The Paks filed suit alleging breach of contract and statutory bad faith. The defendant insurers filed a counter-claim for declaratory relief. Defendants filed a motion for summary judgment. In support of their motion, defendants pointed to the reasonableness of their actions, including the retention of an independent adjuster, the property inspection, the retention of an engineer, and its timely claims activity. The Paks responded by arguing that the adjuster and engineer never investigated whether the Paks observed any deterioration; the adjuster never did any further factual investigation after the Paks highlighted the pertinent policy language; and the adjuster ignored the report from the city’s engineer.

Judge Rambo of the Middle District denied the defense motion for summary judgment, finding a genuine issue of material fact for a jury to resolve. According to the court, “In Pennsylvania, bad faith can exist when an insurance company fails to conduct a meaningful investigation of a claim, or where the insurer’s evaluation is less than honest, intelligent and objective.”⁵²⁷ Examining all of the evidence, the court held that summary judgment was inappropriate, holding, “From the records before it, the court concludes that a reasonable jury could decide, on the basis of clear and convincing evidence, that Defendants acted in bad faith by . . . failing to conduct a meaningful investigation regarding whether the decay of the collapsed wall was visible to the Paks prior to the collapse.”⁵²⁸

(11) *Rosborough v. Farmers Mut. Fire Ins. Co.*, 74 Pa. D. & C.4th 404 (Washington 2005) (O’Dell Seneca, P.J.)

The plaintiff husband and wife owned a house and rented it to Jon Lamotte. The home was insured with Farmers Mutual. A fire occurred at the home in April 2000. In June 2003, Lamotte pled *nollo contendere* to a charge of arson.

Farmers retained a law firm to assist in its investigation of the fire claim. The attorneys conducted an examination under oath of both plaintiffs, and also requested various financial records, phone records and other documentary evidence from the plaintiffs. The attorneys also obtained statements from various witnesses, including Colleen Stoneking. Farmers ultimately concluded that the plaintiffs were involved in the arson fire, and denied the claim. The plaintiffs filed suit alleging bad faith.

After a non-jury trial before President Judge O’Dell Seneca of the Washington County Court of Common Pleas, the court held that Farmers had acted in bad faith. Finding the plaintiff’s testimony credible, the court concluded that there was no evidence to support the contention that the plaintiffs set the fire, directed anyone to set the fire, or assisted Lamotte in setting the fire. The court found that the insurer’s representatives “did not conduct an objective investigation of plaintiffs’ fire claim” and “[t]heir handling of the instant claim was biased and reckless and appeared to the court to have goal of denying same.”⁵²⁹ The court observed that the insurer failed to send a reservation of rights letter to the plaintiff and failed to provide 30 and 45 day status letters “in violation of the Pennsylvania Insurance Department’s Standard and Regulations.”⁵³⁰

The court noted that there were numerous inconsistencies in the statement of Colleen Stoneking, and that her statement, the main reason used to deny the claim, was insufficient. The court found that alterations were made to her statement without her knowledge or consent. The court was particularly critical that the insurer “not only failed to conduct additional investigation, but made no attempt to reconcile the apparent conflicts between Ms. Stoneking’s statement and the additional documentary evidence and statements.”⁵³¹

The court was also critical of the law firm hired by Farmers to assist with the investigation. The court determined that the attorneys “were agents of the defendants” and “were not hired to offer legal advice, nor did they render a legal opinion concerning the plaintiff’s fire claim.”⁵³² The court concluded that “[t]he billing records of [the attorney] revealed that his goal was to form a ‘strategy towards building a case with time sheet records,’ against plaintiffs.”⁵³³

The court also found that the attorney and claims handler failed to reveal certain information that was helpful to the plaintiffs’ claim. According to the court, “the failure of defendant to disclose information that was potentially harmful to its case is further evidence of outrageous conduct.”⁵³⁴

The court awarded contractual benefits in the amount of \$38,760.86; interest and costs in the amount of \$6,517.18; attorneys’ fees in the amount of \$186,843; and punitive damages in the amount of \$100,000.

(12) *Kilmer v. Conn.Indem. Co.*, 189 F. Supp. 2d 237 (M.D. Pa. 2002) (Vanaskie, J.) (fire claim)

The plaintiffs owned a 228-acre parcel of land on which sat a vacant and inactive ski lodge. The plaintiffs were in the process of attempting to sell the land when the ski lodge was totally destroyed by fire. The fire occurred

⁵²⁷ *Pak v. ALEA London Ltd.*, 2009 U.S. Dist. LEXIS 65640, at *29 (M.D. Pa. July 30, 2009).

⁵²⁸ *Pak v. ALEA London Ltd.*, 2009 U.S. Dist. LEXIS 65640, at *32 (M.D. Pa. July 30, 2009).

⁵²⁹ *Rosborough v. Farmers Mut. Fire Ins. Co.*, 74 Pa. D. & C.4th 404, 411-12 (Washington 2005).

⁵³⁰ *Rosborough v. Farmers Mut. Fire Ins. Co.*, 74 Pa. D. & C.4th 404, 411 (Washington 2005).

⁵³¹ *Rosborough v. Farmers Mut. Fire Ins. Co.*, 74 Pa. D. & C.4th 404, 412 (Washington 2005).

⁵³² *Rosborough v. Farmers Mut. Fire Ins. Co.*, 74 Pa. D. & C.4th 404, 408 (Washington 2005).

⁵³³ *Rosborough v. Farmers Mut. Fire Ins. Co.*, 74 Pa. D. & C.4th 404, 411-12 (Washington 2005).

⁵³⁴ *Rosborough v. Farmers Mut. Fire Ins. Co.*, 74 Pa. D. & C.4th 404, 413 (Washington 2005).

approximately four months after the plaintiffs insured it for \$400,000. A fire investigator determined that the cause of the fire was arson.

There was a dispute as to the value of the property. The insurer believed that the coverage exceeded the value of the property and considered the possibility of fraud. The insurer conducted an investigation that included plaintiffs' statement under oath as well as an independent estimate of damages. The parties agreed to go to appraisal as provided under the policy. The parties settled the claim for \$223,800 based on the appraisal approximately 17 months following the fire.

The plaintiffs sued the insurer for bad faith. The insurer moved for summary judgment. Although noting that it was a "close case," Judge Vanaskie of the Middle District denied summary judgment.

According to the court, the insurer never developed any evidence that the plaintiffs had set the fire or committed fraud. The court also noted that the insurer did "not take steps that would ordinarily be pursued to support a fraudulent claim contention, such as securing income tax returns of the insureds."⁵³⁵ According to the court, the insurer knew that the plaintiffs were not having financial difficulties and, in fact, were improving the property. The court also noted a lack of communication from the insurer to the insureds that it found "unsettling,"⁵³⁶ and the court questioned a six-month delay in completing plaintiffs' statement under oath.

§9:05(c) — Cases (Other Claims)

(1) *Wasko v. Coventry Health & Life Ins. Co.*, 2011 U.S. Dist. LEXIS 109946 (M.D. Pa. Sept. 27, 2011) (Munley, J.)

Plaintiff applied for, and was issued, a health policy with Coventry in mid-August 2008. Several months later, her surgeon sought pre-certification for surgery on her back. Coventry approved the procedure, which was performed in late January 2009. Coventry rescinded plaintiff's coverage in late February 2009 on the grounds that plaintiff had not disclosed preexisting back problems in her application. Plaintiff filed this breach of contract and bad faith action. Coventry filed a motion to dismiss. Judge Munley of the Middle District of Pennsylvania denied the motion. The court concluded that plaintiff adequately pled a claim, in large part because she alleged she had disclosed her medical history in the application, so Coventry had no reasonable basis to deny coverage:

We determine that Wasko has adequately pled a bad faith cause of action. . . . Read in conjunction with Wasko's factual averments, these allegations satisfy the elements of a cause of action under Section 8371. She has alleged that Coventry did not have a basis for denying coverage—that is, that Wasko adequately informed Coventry of her medical history and that Coventry agreed to provide coverage with knowledge of Wasko's back pain and treatment. Having been so informed, Coventry would also know that it did not have a reasonable basis to deny coverage. Accordingly, defendant's motion will be denied.⁵³⁷

(2) *Liberty Ins. Corp. v. Keck*, 2011 U.S. Dist. LEXIS 93503 (E.D. Pa. Aug. 22, 2011) (Padova, J.)

After Hickey assaulted her, Keck filed a personal injury action against him, which included a claim for negligence. In related criminal proceedings, Hickey pled guilty to aggravated assault. Hickey lived with his in-laws, the Roops, who had a homeowner's policy with Liberty; Hickey sought a defense in the personal injury action from Liberty. Liberty brought this declaratory judgment action seeking a declaration that it did not owe a duty to defend or indemnify Hickey under the policy. Hickey and the Roops filed a counterclaim seeking recovery for Liberty's alleged bad faith. Liberty filed a motion to dismiss the counterclaim. Judge Padova of the Eastern District denied the motion, finding that the counterclaim satisfied the minimal standards required to withstand a motion to dismiss.

The court noted that recovery for bad faith was not limited to denials of coverage, but could also include bad faith in an insurer's investigation.⁵³⁸ Liberty argued that the underlying complaint did not require coverage because it did not allege that Hickey's actions were accidental, and thus it had no duty to investigate the underlying facts. The court found that the policy did not cover accidental occurrences, but the issue of Hickey's intent was not resolved, and should have been investigated. Therefore, the court found that "[W]e conclude that the Counterclaim plausibly alleges that Liberty's disclaimer of coverage based solely on a review of the Keck Complaint was unreasonable and that Liberty knew or recklessly disregarded its lack of reasonable basis when denying Hickey's claim for coverage. [T]he Counterclaim plausibly alleges that Liberty acted in bad faith in failing to investigate Hickey's claim and in refusing to defend Hickey in the Keck Litigation."⁵³⁹

⁵³⁵ *Kilmer v. Conn. Indem. Co.*, 189 F. Supp. 2d 237 (M.D. Pa. 2002).

⁵³⁶ *Kilmer v. Conn. Indem. Co.*, 189 F. Supp. 2d 237 (M.D. Pa. 2002).

⁵³⁷ *Wasko v. Coventry Health & Life Ins. Co.*, 2011 U.S. Dist. LEXIS 109946, at *9 (M.D. Pa. Sept. 27, 2011).

⁵³⁸ *Liberty Ins. Corp. v. Keck*, 2011 U.S. Dist. LEXIS 93503, at *10 (E.D. Pa. Aug. 22, 2011).

⁵³⁹ *Liberty Ins. Corp. v. Keck*, 2011 U.S. Dist. LEXIS 93503, at *14-15 (E.D. Pa. Aug. 22, 2011).

(3) ***Bybel v. Metro. Life Ins. Co.*, 2010 U.S. Dist. LEXIS 122367 (E.D. Pa. Nov. 18, 2010) (Stengel, J.)**

Bybel was an OB/GYN who suffered a shoulder injury during a delivery. She eventually was unable to perform certain OB-related procedures because of that injury, so she was terminated. Bybel applied for disability benefits, which MetLife rejected, arguing that Bybel could perform nearly all of the functions of an OB/GYN, except for a small percentage of difficult surgeries and deliveries. Bybel brought suit for MetLife's alleged breach of contract and bad faith. MetLife filed a motion for summary judgment on both counts, which Judge Stengel of the Eastern District denied.

In denying summary judgment on the breach of contract claim, the court noted that there was a material question of fact about whether Bybel was totally disabled. As to the bad faith claim, the court held that there were genuine factual issues concerning the reasonableness of MetLife's investigation and its conclusion that Bybel was not disabled:

Because there is an issue of fact whether MetLife breached its contract with Dr. Bybel in denying her total or residual disability benefits, I need not find that there is no basis for a jury to find that its refusal to award her benefits was unreasonable. I recognize that the burden on Dr. Bybel to support her bad faith claim is high, but she has meticulously set forth information showing that MetLife either completely ignored or gave no credit to much of the information she put before it. In addition, it relied on a consultant to issue a decision about her claim but did not provide that consultant with a complete record. MetLife cannot hide behind its hiring of an expert to show the absence of bad faith when it purposefully failed to use that expert to his full capabilities. As a result, I find that Dr. Bybel has demonstrated that a genuine issue of material fact remains on her bad faith claim. There is an issue of fact whether MetLife lacked a reasonable basis in denying her benefits, and an issue whether it was reckless. Intentionally limiting the information available to the consultants whose opinions would form the basis for its decision to grant or deny her benefits claim could be found by a jury to be clear and convincing evidence of bad faith.⁵⁴⁰

(4) ***Hayes v. Am. Int'l Grp.*, 2009 U.S. Dist. LEXIS 111397 (E.D. Pa. Dec. 1, 2009) (McLaughlin, J.)**

Dr. Hayes, a physician, injured his back at work, and made a claim under his disability policy with AIG. He stated that he notified defendants that he would be able to continue some aspects of his work. The insurer found him to be totally disabled and paid benefits under the policy for approximately four years. After conducting surveillance, the insurer discovered that he was working in a way incompatible with a finding of total disability. The insurer then terminated Dr. Hayes's benefits. He filed suit against the insurer and its independent claims adjuster claiming, *inter alia*, breach of contract and bad faith under §8371. Defendants filed a motion to transfer the case to New Jersey or to dismiss all claims except the breach of contract count.

Judge McLaughlin of the Eastern District denied the motion to transfer and determined that the bad faith count would survive dismissal. Pointing to various allegations, the court found that plaintiff had stated a sufficient claim under Pennsylvania law:

Here, Dr. Hayes alleges that the defendants had no reasonable basis for denying his claim because they knew, at the time that they found him to be totally disabled, that he was able to work part-time and therefore acted unreasonably when they terminated his benefits on the ground that he was observed to be practicing medicine. Dr. Hayes also alleges that the defendants acted unreasonably in finding that he was no longer disabled, when both his treating physician and the defendants' nurse evaluator found him to have a herniated disk with nerve impingement.

These factual allegations, taken as true for purposes of resolving the motion to dismiss, are sufficient to state a plausible claim at this stage in the proceedings that the defendants acted unreasonably and in bad faith in denying his claim.⁵⁴¹

(5) ***Giangreco v. U.S. Life Ins. Co.*, 2001 U.S. Dist. LEXIS 4752 (E.D. Pa. Apr. 17, 2001) (Waldman, J.)**

This case arose out of a two-vehicle automobile accident resulting in the death of an insured driver and the ensuing claim for life insurance. The life policy contained an exclusion for any loss caused directly or indirectly by being intoxicated or under the influence of any drug. The plaintiff/insured was legally intoxicated at the time of his death and the insurer, US Life, denied the claim. However, the evidence established that the other driver, also intoxicated, initiated the chain of events resulting in the insured's death.

In the bad faith action, the late Judge Waldman of the Eastern District denied the company's motion for summary judgment on the bad faith claim. According to the court:

A reasonable fact-finder could reasonably conclude on the record presented that U.S. Life denied plaintiff's claim without conducting a reasonable investigation and without a reasonable basis. It would not be unreasonable to conclude on the record presented that U.S. Life reflexively denied the

⁵⁴⁰ *Bybel v. Metro. Life Ins. Co.*, 2010 U.S. Dist. LEXIS 122367, at *32-33 (E.D. Pa. Nov. 18, 2010).

⁵⁴¹ *Hayes v. Am. Int'l Grp.*, 2009 U.S. Dist. LEXIS 111397, at *21-22 (E.D. Pa. Dec. 1, 2009).

claim upon learning that the insured was intoxicated without meaningfully pursuing the issues of causation.⁵⁴²

(6) *Mechetti v. Ill. Ins. Exchange/Classic Syndicate*, 1998 U.S. Dist. LEXIS 4035 (E.D. Pa. Mar. 30, 1998) (Bechtle, J.)

In this case, an insurer made the decision not to defend a nightclub in a negligence lawsuit based upon an assault and battery clause contained in the applicable policy. In taking this position, the insurer ignored the holding in *Britamco Underwriters, Inc. v. Weiner*,⁵⁴³ which was more than a year old at the time. Judge Bechtle of the Eastern District held as a matter of law that the insurer acted in bad faith by ignoring this clearly established precedent and refusing to defend its insured.⁵⁴⁴

(7) *Bracciale v. Nationwide Mut. Fire Ins. Co.*, 1993 U.S. Dist. LEXIS 11606 (E.D. Pa. Aug. 20, 1993) (Yohn, J.)

The policyholder and his brother were involved in an altercation with a police officer. The brother injured the police officer, who initiated a claim against both men. The policyholder sought coverage under his homeowner's policy, but the insurer denied coverage, relying on the "intended harm" exclusion. The insured assigned his rights to the injured officer, who proceeded against the insurer for coverage and bad faith. The Eastern District held that if the insurer had done adequate legal research, it would have realized that its position in denying coverage was untenable. The court held that this failure to perform adequate research of the law constituted a bad faith failure to defend the insured under principles of traditional third party bad faith as set forth in *Cowden v. Aetna*⁵⁴⁵ and its progeny.

§9:06 Unreasonable Reliance on Independent Experts

§9:07 — Cases

(1) *Williams v. Allstate Ins. Co.*, 595 F. Supp. 2d 532 (E.D. Pa. 2009) (Buckwalter, J.)

This case primarily concerned the enforceability of an automobile policy provision allowing the insurer to seek a medical examination as often as the company may reasonably require, in view of §1796 of Pennsylvania's Motor Vehicle Financial Responsibility Law (MVFL). As to the plaintiff's bad faith claim, Allstate argued that the plaintiff could not prove bad faith since a request for a medical examination as permitted by the terms of a policy could not, as a matter of law, form the basis for a bad faith action. In a footnote, Judge Buckwalter declined to grant the insurer's motion for judgment on the pleadings, stating, "[W]hile Defendant would be entitled to a dismissal of the bad faith claim if its request for the medical examination was reasonable, the bad faith claim could theoretically proceed in the face of an unreasonable request for a medical examination."⁵⁴⁶

(2) *Suscavage v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 43793 (M.D. Pa. June 3, 2008) (Munley, J.)

In this alleged bad faith matter arising out of a UIM claim, discussed in §7:21, the evidence demonstrated that the insurer's Nurse Case Manager recommended an IME with a specific physician because he purportedly held the opinion that no scientific evidence linked trauma to fibromyalgia. The plaintiff insured sought to utilize that evidence at trial, arguing that the evidence indicated that plaintiff's interest was not of paramount importance and that the insurer was attempting to minimize the value of plaintiff's claim through its investigative process. The insurer filed a motion *in limine* seeking to preclude this evidence as irrelevant because the doctor who performed the IME was not of that school of thought and, in fact, he opined that the accident amplified the fibromyalgia symptoms. Judge Munley of the Middle District denied the motion, finding that the evidence might be useful to the jury in determining whether the insurer acted in bad faith. The court also denied a defense motion to preclude evidence that another IME doctor was selected because he was a high school acquaintance of defense counsel, but found the proposed evidence to "border on the irrelevant."⁵⁴⁷

(3) *Greene v. GuideOne Mut. Ins. Co.*, 82 Pa. D. & C.4th 165 (Fayette 2007) (Leskinen, J.)

The plaintiff was involved in an automobile accident with a vehicle insured by Nationwide. The plaintiff settled with Nationwide and then filed an underinsured (UIM) claim with its insurer, GuideOne. GuideOne relied in part upon an independent medical examination (IME) report obtained by Nationwide. In defense of a subsequent bad faith claim, the insurer argued that its claims decision was supported by the IME report from Nationwide. In an opinion finding bad faith (discussed in §9:13(a)), Judge Leskinen of Fayette County questioned the "independence" of the medical

⁵⁴² *Giangreco v. U.S. Life Ins. Co.*, 2001 U.S. Dist. LEXIS 4752, at *14-15 (E.D. Pa. Apr. 17, 2001).

⁵⁴³ *Britamco Underwriters v. Weiner*, 636 A.2d 649 (Pa. Super. 1994).

⁵⁴⁴ The *Mechetti* case is discussed in greater detail in §9:17.

⁵⁴⁵ *New York, New Haven & Hartford R.R. Co. v. First Nat'l Bank of Bridgeport*, 134 A. 223 (Pa. 1957), discussed in Chapter 3.

⁵⁴⁶ *Williams v. Allstate Ins. Co.*, 595 F. Supp. 2d 532, 546 n.11 (E.D. Pa. 2009).

⁵⁴⁷ *Suscavage v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 43793, at *8 (M.D. Pa. June 3, 2008).

exam, which was five years old, and noted that Nationwide “obviously did not find it credible when they [sic] paid 90 percent of their limit.”⁵⁴⁸ The court found that the IME opinion was not credible.

The insurer also argued that it was entitled to rely upon the opinions of its retained counsel. However, the court found the attorney’s testimony to be not credible, adding that the attorney “maintained loyalty to his client, but his independence was a casualty of war.”⁵⁴⁹

(4) *Levin v. Great Am. Ins. Co.*, 2001 U.S. Dist. LEXIS 20100 (E.D. Pa. Dec. 4, 2001)

Plaintiff was involved in a car accident with an uninsured driver. She had UM coverage through the insured with limits of \$100,000. Plaintiff made a claim against the policy and demanded the limits based on the opinions of two doctors who concluded that her injuries were caused by the accident. Three doctors, including one retained by the insurer, concluded that the exact age of plaintiff’s injuries could not be determined. A later medical expert, retained by the insurer, concluded that plaintiff’s injuries were pre-existing.

Judge Yohn of the Eastern District denied the insurer’s motion for partial summary judgment on the issue of bad faith. As part of its reasoning, the court held that a jury could find that the medical opinions in the case did not provide the insurer with a reasonable basis to deny plaintiff’s claim. According to the court, the only medical expert who concluded that plaintiff’s injuries were pre-existing was retained by the insurer only after the insurer’s first medical expert concluded that he could not determine the age of the injuries.

§9:08 Unreasonable Interpretation or Application of Policy Provisions

§9:09(a) — Cases (Auto Claims)

(1) *Long v. N.J. Mfrs. Ins. Co.*, 2016 U.S. Dist. LEXIS 65575 (M.D. Pa. May 17, 2016) (Carlson, M.J.)

After plaintiff was injured in an auto accident, she submitted a UIM claim to her personal auto carrier, defendant NJM. NJM insisted that the policy’s step-down provision limited UIM benefits to \$100,000; plaintiff disagreed and filed this bad faith action. NJM filed a motion to dismiss the bad faith count. Magistrate Judge Carlson recommended that the motion be denied. The case settled prior to the filing of objections to the magistrate’s report and recommendation.

Plaintiff alleged that NJM’s position was objectively unreasonable, and NJM, which ultimately agreed that the step-down provision did not apply, contended that its initial interpretation was reasonable and not in bad faith. The court noted that an unreasonable policy interpretation can be the basis of a bad faith claim, but that an erroneous interpretation was not necessarily unreasonable:

Cases construing §8371 recognize that an unreasonable, unwarranted, and unjustified interpretation of policy language may form the basis for a bad faith claim, but set particularly exacting standards for such claims. Thus, an insurance company’s reliance on an incorrect interpretation of the law will not necessarily yield a finding of bad faith. If that interpretation of the law and policy language was erroneous, but reasonable, a bad faith may still claim fail. *See Jung v. Nationwide Mut. Fire Ins. Co.*, 949 F. Supp. 353, 360 (E.D. Pa. 1997). Likewise, if the insurance company had a number of bases for a legal position, some of which are objectively unreasonable, it may nonetheless defeat a bad faith claim by citing to any reasonable rationale for its action. *Williams v. Hartford Cas. Ins. Co.*, 83 F. Supp. 2d 567, 574 (E.D. Pa. 2000), *aff’d sub nom. Williams v. Hartford Cas. Ins. Co.*, 261 F.3d 495 (3d Cir. 2001).⁵⁵⁰

The court concluded that the parties’ arguments required it to go beyond the pleadings, and were not the proper subject for resolution by a motion to dismiss. Therefore, the court allowed the bad faith count to proceed.

(2) *Page v. Infinity Indem. Ins. Co.*, 2014 U.S. Dist. LEXIS 13790 (E.D. Pa. Jan. 31, 2014) (Shapiro, J.)

Plaintiffs’ car was destroyed by a fire when it was parked on their block overnight. The next day, they contacted their auto insurer, defendant Infinity. Defendant sent an investigator to their home that day for a recorded statement and to being investigation. Plaintiffs shared recent utility bills with the adjuster who was assigned to the claim. After the initial investigation, defendant noted some red flags, including that the fire department had noted arson as a possible cause of the fire and that plaintiffs had a number of unpaid loans that had been referred to collections, and referred the claim to the special investigation unit. At the time of the plaintiffs’ third recorded statement, they were asked for bank statements and about several things that showed up on their credit report. Plaintiffs then retained counsel, who did not provide certain materials requested by defendant, including additional bank statements, police report from a recent robbery of their home in which they allegedly lost cash and valuable items, and the named of dealerships plaintiffs had recently visited in looking for a new car. Defendant eventually denied the claim based on plaintiffs’ failure to cooperate. Plaintiffs then filed this bad faith litigation. After litigation began, plaintiffs provided

⁵⁴⁸. *Gardner v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 42471, at *4 (W.D. Pa. June 12, 2007).

⁵⁴⁹. *Gardner v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 42471, at *5 (W.D. Pa. June 12, 2007).

⁵⁵⁰. *Long v. N.J. Mfrs. Ins. Co.*, 2016 U.S. Dist. LEXIS 65575, at *10-11 (M.D. Pa. May 17, 2016).

the requested information, and defendant paid the claim. Defendant filed a motion for summary judgment on the bad faith claim. Judge Shapiro of the Eastern District of Pennsylvania found the investigation appropriate, as discussed in §10:07(a), but ultimately denied the motion.

The court explained that an insured breaches a policy if a failure to cooperate in a claims investigation was substantial and prejudiced the insurer, and the insurer has the burden of showing prejudice. The court found questions of fact existed with respect to whether plaintiffs' failures to cooperate were substantial and prejudicial. Therefore, there was a question of fact whether defendant properly used the non-cooperation clause to deny coverage: "Defendant has not shown it had reasonable basis to deny plaintiffs' claim as a matter of law, but defendant's stated willingness to reopen its investigation makes the issue of bad faith a disputed matter for the finder of fact."⁵⁵¹ Because defendant did not argue that it was entitled to summary judgment under the second prong of the *Terletsky* test, the court explained it could not rule on this issue.

(3) *Stricker v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 81850 (M.D. Pa. June 13, 2012) (Kane, J.)

Plaintiff was injured in auto accident while she was a passenger in another vehicle. After she recovered available amounts from the tortfeasor, she sought UIM coverage from her auto insurer, defendant State Farm. State Farm sent plaintiff a check for \$50,000, which it represented as being the policy limits. Plaintiff obtained counsel, who took the position that plaintiff was entitled to both the \$100,000 UIM limits from her primary policy and \$50,000 from an excess policy with State Farm. State Farm then tendered a second \$50,000 check and took the position that the \$100,000 offered was the total amount of the limits. Plaintiff then filed this bad faith suit. State Farm filed a motion to dismiss the bad faith claim. Judge Kane of the Middle District denied the motion.

The court explained that the bad faith action arose out of a dispute as to the proper amount of coverage. Plaintiff pointed to the existence of the excess policy in support of her position; State Farm pointed to language in the primary policy stating that stacking of the two policies was not permitted. The court noted that defendant need only show a reasonable basis for its coverage decision, but that plaintiff's complaint was sufficient to state a claim: "In light of the policy language quoted above, Plaintiff will have a high bar in establishing that Defendant has acted in bad faith. The Court is satisfied, however, that Plaintiff's complaint has raised her claim of bad faith at least to the level of plausibility required by *Iqbal*."⁵⁵²

(4) *Grassetti v. Prop. & Cas. Ins. Co. of Hartford*, 2011 U.S. Dist. LEXIS 42731 (M.D. Pa. Apr. 20, 2011) (Munley, J.)

Plaintiff was in an automobile accident with an unidentified driver, following which he sought UM coverage from his auto carrier, Hartford. Hartford denied coverage, contending that plaintiff had rejected UM coverage. Plaintiff then filed suit against Hartford and a related entity, alleging breach of contract and bad faith, arguing that the UM rejection form was defective, and thus void, so he was entitled to such coverage. The insurers filed a motion to dismiss the bad faith claim, which Judge Munley of the Middle District denied.

The insurers contended in their motion that because plaintiff rejected UM coverage, denial of his claim could not provide the basis for a bad faith cause of action. The court noted that the applicable statute allowed insureds to reject UM coverage, but only upon the signing of a form with the mandatory statutory language. The statutory language for the disputed sentence required that it read "uninsured coverage," but the form actually read "uninsured motorists coverage." The court concluded that the extra word worked to nullify the rejection form under the statute, as imprecise language with respect to a UIM rejection form had been found to void the rejection in *American Int'l Insurance Co. v. Vaxmonsky*.⁵⁵³ Because defendants had "constructive notice of these [statutory] provisions and of the holding in *Vaxmonsky* that non-compliant waivers are null and void[,] the complaint allegations were sufficient to "adequately allege that the Defendants withheld payment upon a claim without a reasonable basis and that Defendants did so knowing they did not have a reasonable basis."⁵⁵⁴

(5) *Galko v. Harleysville Pennland Ins. Co.*, 71 Pa. D. & C.4th 236 (Lackawanna 2005) (Minora, J.)

In this case, discussed in detail in §9:05, Judge Minora of Lackawanna County held that the insurer acted in bad faith when it denied the insured coverage for first party personal injury benefits and a defense in a third party case involving an auto accident. The court held that the insurer investigated the claim in bad faith and failed to follow its internal claims handling guidelines, stating, "The protocol provided in the claims manual guidelines was blatantly ignored, as was the language in the insurance contract."⁵⁵⁵

⁵⁵¹. *Page v. Infinity Indem. Ins. Co.*, 2014 U.S. Dist. LEXIS 13790, at *10 (E.D. Pa. Jan. 31, 2014).

⁵⁵². *Stricker v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 81850, at *9 (M.D. Pa. June 13, 2012).

⁵⁵³. *American Int'l Ins. Co. v. Vaxmonsky*, 916 A.2d 1106 (Pa. Super. 2006).

⁵⁵⁴. *Grassetti v. Prop. & Cas. Ins. Co. of Hartford*, 2011 U.S. Dist. LEXIS 42731, at *11 (M.D. Pa. Apr. 20, 2011).

⁵⁵⁵. *Galko v. Harleysville Pennland Ins. Co.*, 71 Pa. D. & C.4th 236, 248 (Lackawanna 2005) (citation omitted).

(6) *Anderson v. Nationwide Ins. Co.*, 187 F. Supp. 2d 447 (W.D. Pa. 2002) (McLaughlin, J.)

This case is discussed in greater detail in §9:11. Judge McLaughlin of the Western District held that the company acted in bad faith with respect to the plaintiff-wife's UM claim, holding that the insurer's refusal to arbitrate "constituted a material breach of the insurance contract."⁵⁵⁶ The court granted summary judgment as to her bad faith claim, holding:

The undisputed record demonstrates that despite clear and unambiguous policy language which created the exclusive arena for the resolution of uninsured motorist disputes, [the insurer] repeatedly refused to put its "team" on the arbitration field, so to speak, and continued to do so even after it had been ordered to arbitrate in common pleas court . . . [I]n light of the clear policy language and . . . case law, we have no difficulty concluding that [the insurer] lacked a reasonable basis for failing to arbitrate [the wife's] . . . uninsured motorist claim.⁵⁵⁷

§9:09(b) — Cases (Property Claims)

(7) *Pinkhasov v. Allstate Prop. & Cas. Co.*, 2012 U.S. Dist. LEXIS 151048 (M.D. Pa. Oct. 19, 2012) (Mariani, J.)

Plaintiff's home was damaged by water, and thereafter, he filed a claim with his homeowner's carrier, defendant Allstate. Defendant contended that the damage was caused by a leaky pipe; plaintiff contended he never had water in his basement prior to the date on which he made the claim. After defendant denied the claim, plaintiff filed this breach of contract and bad faith suit. Defendant filed a summary judgment motion at the close of discovery. Judge Mariani of the Middle District denied the motion.

The court considered the coverage question, and concluded that there was a question of fact about whether the damage was sudden and whether any pre-existing leak caused the claimed damages. The court found that it was possible that the damage would be covered if it was caused by plumbing problems, even if those problems were underground. Turning to the bad faith claim, the court concluded that it would "be premature to grant summary judgment in favor of either party on the bad faith claim, as there is a triable issue of fact as to whether Defendant acted in bad faith when the circumstances surrounding the denial of coverage are themselves in dispute."⁵⁵⁸

(8) *Pak v. ALEA London Ltd.*, 2009 U.S. Dist. LEXIS 65640 (M.D. Pa. July 30, 2009) (Rambo, J.)

In this case, discussed in §9:05, the Paks sought coverage under its commercial property policy after an exterior wall at their grocery store collapsed. The insurers denied coverage. Before Judge Rambo of the Middle District was defendant insurers' motion for summary judgment, which the court denied, finding a genuine issue of material fact for a jury to resolve.

The Paks argued that the companies' adjuster ignored policy language covering collapse caused by "decay hidden from view," which might have provided a reason for coverage, and based his denial on just the policy language that might support a denial. According to the court,

Plaintiffs argue that Defendants ignored the coverages applicable to the Paks. It is apparent from the records that they did. It is undisputed that Defendants' initial denial letter stated that the Paks did not have collapse coverage under Section D of the contract. Instead, Defendants based their denial on exclusions from coverage provided in Section B.2.d and f, related to wear and tear, corrosion, and water intrusion. Plaintiffs argue that this in and of itself is an indicia of bad faith that impacted the scope of Defendants' investigation. Furthermore, the Paks argue that Defendants [sic] reliance on inapplicable exclusions meant that they never conducted the most important inquiry: whether any decay was visible and known to the Paks prior to the collapse.⁵⁵⁹

Examining all of this evidence, the court denied the insurers' motion for summary judgment, stating, "From the records before it, the court concludes that a reasonable jury could decide, on the basis of clear and convincing evidence, that Defendants acted in bad faith by (1) applying the wrong sections of the insurance contract. . . ." ⁵⁶⁰

(9) *Stefanowicz v. Allstate Ins. Co.*, Unreported Decision, Phila. C.P. July Term 2005, No.1088 (Aug. 23, 2006) (Jackson, J.)

The plaintiffs' basement was flooded with water and sewage when a drain line in the basement cracked. The plaintiffs alleged that the loss occurred when the eighty year old drain line ruptured. The plaintiffs' policy with their homeowner's insurer contained a water loss endorsement which provided coverage in the event that "water . . . escapes from a plumbing . . . system . . . due to accidental discharge or overflow." The insurer's engineer issued a

⁵⁵⁶ *Anderson v. Nationwide Ins. Enter.*, 187 F. Supp. 2d 447, 455 (W.D. Pa. 2002).

⁵⁵⁷ *Anderson v. Nationwide Ins. Enter.*, 187 F. Supp. 2d 447, 458-59 (W.D. Pa. 2002).

⁵⁵⁸ *Pinkhasov v. Allstate Prop. & Cas. Co.*, 2012 U.S. Dist. LEXIS 151048, at *13 (M.D. Pa. Oct. 19, 2012).

⁵⁵⁹ *Pak v. ALEA London Ltd.*, 2009 U.S. Dist. LEXIS 65640, at *30 (M.D. Pa. July 30, 2009) (citation to record omitted).

⁵⁶⁰ *Pak v. ALEA London Ltd.*, 2009 U.S. Dist. LEXIS 65640, at *32 (M.D. Pa. July 30, 2009).

report verifying that the damage in the basement was caused by the natural breaking of the internal drain line, and not by surface water. However, the insurer denied the claim because of an exclusion for water damage caused by “backup of sewers and drains,” and its belief that the loss was not “sudden and accidental.” The breach of contract and bad faith case proceeded to a non-jury trial before Philadelphia Common Pleas Court Judge Jackson. No written opinion was issued. In a decision from the bench, the court found in favor of the plaintiffs.

According to the court, the insurer acted with “callousness . . . cavalier-like and arbitrarily” in its treatment of the plaintiffs, leaving them “adrift at sea,” and justifying a punitive damages award. The court awarded stipulated property damage in the amount of \$11,250, counsel fees in the amount of \$89,952.50, FEMA reimbursement in the amount of \$4,330.67 and punitive damages in the amount of \$100,000, for a total verdict of \$205,533.17.

(10) *TDG Partnership v. Regis Ins. Co.*, 43 Pa. D. & C.4th 169 (Chester 1999) (Gavin, J.)

In this case, discussed in greater detail below,⁵⁶¹ the Chester County Court of Common Pleas held that the insurer acted in bad faith in unreasonably interpreting its property insurance policy by (1) requiring a “holdback” on building loss payment without contractual language so permitting and (2) paying only actual cash value for contents loss despite an endorsement requiring payment for replacement costs.

(11) *Buzgon Davis v. Peerless Indem. Ins. Co.*, 2013 U.S. Dist. LEXIS 69812 (M.D. Pa. May 16, 2013) (Caldwell, J.)

Plaintiff law firm had a business owner’s policy with defendant Peerless. During a storm, plaintiff’s sump pump failed, leading to flooding and damage. Peerless paid the policy limits with respect to water damage, but refused to pay for debris removal or losses to personal effects. Plaintiff filed this breach of contract and bad faith suit. The parties filed cross motions for summary judgment. Judge Caldwell of the Middle District denied both parties’ motions as to the bad faith count.

The court ruled that there was insurance coverage under the policy, and granted plaintiff insured’s motion as to this issue. Turning to bad faith, the court concluded that there was a genuine issue of material fact precluding summary judgment. The insurer argued that because plaintiff had maintained that the policy was ambiguous, that would prevent a finding of bad faith. The court disagreed, noting that plaintiff had limited its ambiguity argument to the contract claim. The court also concluded that there was evidence that the adjuster had “reflexively” failed to look thoroughly at all pertinent policy language, even that language which plaintiff had pointed to:

Plaintiffs present a forceful argument for summary judgment as to liability on the claim, that Defendant did not engage their [sic] argument concerning coverage but simply and reflexively relied on the Extension Plus Endorsement \$100,000 blanket limit. However, for a claim where negligence or bad judgment is not enough, a fact finder should normally resolve the issue.⁵⁶²

(12) *Donahue v. Burns*, 2013 U.S. Dist. LEXIS 67498 (M.D. Pa. May 13, 2013) (Munley, J.)

Plaintiff had a homeowners’ insurance policy with defendant State Farm. The policy excluded damage from water or sewage overflow, but plaintiff had purchased an endorsement providing such coverage. After a sewage back-up caused damage to the home, plaintiff filed a claim. State Farm denied coverage on the grounds that the damage was caused by flooding. Plaintiff filed this bad faith and breach of contract case. State Farm filed a motion to dismiss the bad faith claim. Judge Munley of the Middle District denied the motion as to the bad faith claim.

The court noted that defendant State Farm denied coverage under the theory of concurrent causes, which had been found unenforceable in the situation presented in this case. Because defendant had denied coverage for an inapplicable reason, the bad faith action could proceed: “Read in conjunction with plaintiff’s factual averments, these allegations may satisfy the elements of a cause of action under Section 8371.”⁵⁶³

(13) *Petrecca v. Allstate Ins. Co.*, 53 Pa. D. & C.4th 1 (Phila. 2001) (Cohen, J.), *rev’d in part*, 797 A.2d 322 (Pa. Super. 2002) (Johnson, J.)

The plaintiffs experienced a ceiling collapse and water damage to their home and filed a homeowner’s claim with their insurer, Allstate. Allstate issued a denial letter for the claim, stating generally that the claim was not covered and the insureds had failed to comply with policy conditions. The insured filed a breach of contract and bad faith action, which was tried non-jury before Judge Cohen of the Philadelphia Court of Common Pleas.

At trial, the insurer provided more detail as to its denial, by stating that the claimed damage was pre-existing, and was the result of the wear and tear that was excluded under the policy. The company representative also testified that the insureds had violated a condition of the policy by failing to exhibit part of the damage when the claim representative was present in the insured’s home for an inspection. Sitting as fact-finder, the court held that the insurer “did not engage in fair dealing with its insured” in failing to originally specify the reasons for the claim denial:

⁵⁶¹. See §9:13 (a)-(c) below.

⁵⁶². *Buzgon Davis v. Peerless Indem. Ins. Co.*, 2013 U.S. Dist. LEXIS 69812, at *22 (M.D. Pa. May 16, 2013).

⁵⁶³. *Donahue v. Burns*, 2013 U.S. Dist. LEXIS 67498, at *13 (M.D. Pa. May 13, 2013) (Munley, J.).

Straightforward guidance in the claims process should be fundamental to insurance practice. The conduct of Allstate in this instance was not straightforward and thus in bad faith. The record demonstrated that Allstate had numerous opportunities merely to inform the Petreccas that all they needed to do was show [claim representative] Mr. Trump or another authorized representatives [sic] the physical remnants of their loss. Allstate never gave the Petreccas such guidance. When Allstate issued a denial letter it did not clearly state the reasons for the denial. The Petreccas were left at sea.⁵⁶⁴

The court rendered a verdict in favor of the plaintiff-insureds, awarding more than \$12,000 on the contract claim; \$4,231 in attorney's fees; and over \$36,000 in punitive damages on the bad faith claim.

On procedural grounds, the Superior Court reversed the trial court, remanded for a new trial by jury on the breach of contract issue and a new trial⁵⁶⁵ on the issue of bad faith damages.

(14) *Risha v. Farmer's Fire Ins. Agency*, 56 Pa. D. & C.4th 194 (Fayette 2001) (Warman, J.)

The insured husband and wife obtained a policy of property insurance for their house. The application for insurance asked whether the proposed insured had suffered any losses during the preceding five years exceeding \$1,000 in damages. The plaintiff-husband answered "no" to this question; the plaintiff-wife did not sign the application. In fact, one year earlier, both insureds had suffered a \$400,000 property loss as a result of fire.

The insurer denied a later fire claim as to both insureds on the basis of the fraudulent statement made in the application. The husband and wife filed suit against Farmer's Fire, as did the mortgagee, alleging breach of contract and bad faith. The insurer moved for summary judgment with respect to the breach of contract and bad faith claim for all plaintiffs.

The Court of Common Pleas of Fayette County, by Judge Warman, agreed with the insurer with respect to the husband, in that he had made the false representation in the insurance application. With respect to the wife, however, the court held that there was a factual question as to whether she was an "innocent co-insured" under the policy. With respect to the mortgagee, the court held that the mortgagee was a separate insured under the policy and that "the terms and conditions committed by the mortgagor is no defense to an action by the mortgagee."⁵⁶⁶ Therefore, the court found that there was a genuine issue of fact with respect to the breach of contract and bad faith claim by the wife and the mortgagee, and the insurer's motion for summary judgment was denied as to them.

(15) *American Int'l S. Ins. Co. v. Lampus*, No. GD-98-5322 (C.P. Allegh. July 31, 2000) (Manning, J.)

The plaintiff, a manufacturing concern, requested coverage from the defendant insurer that was identical to a previous policy with a different insurer. The previous insurance policy provided for "100% co-insurance" and an Agreed Value Endorsement. The defendant insurer issued a policy in accordance with the request, but the policy as issued did not contain the specific co-insurance language, nor was an Agreed Value Endorsement provided, although the declarations page did state "COINS-100%."

Two months after the new policy was issued, a fire destroyed one of plaintiff's businesses. Despite the absence of the co-insurance language in the policy, the defendant company adjusted the loss consistent with the notation on the declarations page. This resulted in the imposition of a "co-insurance penalty" reducing the amount of coverage available.

The insurer filed a declaratory judgment action seeking a declaration that the co-insurance penalty was applicable of the loss, arguing that the co-insurance endorsement was in effect and had simply been omitted due to a clerical error. In response, the insured claimed the full amount of the loss, including additional losses as a result of delay, and further sought attorney's fees incurred during litigation under §8371 in the amount of \$79,382.53.

Judge Manning of Allegheny County held that the company's insistence on applying the co-insurance penalty despite the lack of policy language established the company's bad faith in that "it acted in reckless disregard of the fact that it had no reasonable basis to support such a contention."⁵⁶⁷ The court rejected the company's arguments that the insured should bear responsibility for the issuance of a policy that did not meet its requirements. According to the court, regardless of what happened during the discussions that led to the issuance of the policy, the policy that was issued failed to contain the language that was "necessary to allow [the company] to enforce such a limiting provision."⁵⁶⁸

In assessing damages, the court stated that it believed that the "appropriate measure of additional damages are those that will place [the insured] in the position it would have been in had [the insurer] honored its contract and paid [the insured] in a timely manner, consistent with the policy provisions."⁵⁶⁹ The court awarded the full amount of attorney's fees of \$79,382.53, as well as interest from the date of submission of the proof of loss.

^{564.} *Petrecca v. Allstate Ins. Co.*, 53 Pa. D. & C.4th 1, 13-14 (Phila. 2001).

^{565.} See §7:03.

^{566.} *Risha v. Farmer's Fire Ins. Agency*, 56 Pa. D. & C.4th 194, 212 (Fayette 2001) (citing 5A Appleman, *Insurance Law and Practice*, Section 3401).

^{567.} *American Int'l S. Ins. Co. v. R.I. Lampis Co.*, Slip Op. at 19.

^{568.} *American Int'l S. Ins. Co. v. R.I. Lampis Co.*, Slip Op. at 20.

^{569.} *American Int'l S. Ins. Co. v. R.I. Lampis Co.*, Slip Op. at 20.

§9:09(c) — Cases (Other Claims)

(1) *Little Souls, Inc. v. State Auto Mut. Ins. Co.*, 2004 U.S. Dist. LEXIS 4569 (E.D. Pa. Mar. 15, 2004) (Green, S.J.)

Where the insurer and its insured disagreed as to the “period of restoration” under a business owners policy of insurance issued to the plaintiff, the insurer filed a declaratory judgment action. The court entered an order directing the parties to appraisal. Thereafter, the parties reached an agreement as to the appropriate period of restoration, but were unable to agree as to the amount of business income loss. The insured instituted suit against the insurer, alleging, *inter alia*, breach of contract and bad faith. The insurer moved to dismiss portions of the bad faith count, asserting that it should not be held liable for bad faith where it had filed a declaratory judgment action. The court refused to strike the plaintiff’s bad faith claim, holding, “While it is true the filing of a declaratory judgment alone cannot sustain an action for bad faith, the plaintiff may use that as part of its case to prove bad faith. Just because the filing alone does not prove bad faith, the filing in conjunction with other evidence may.”⁵⁷⁰

(2) *Waldman v. Pediatric Servs. of Am., Inc.*, 1999 U.S. Dist. LEXIS 6106 (E.D. Pa. Apr. 30, 1999) (Bechtle, J.)

In this case, the insurer denied the policyholder’s claim because the policyholder (1) failed to comply with the one-year suit limitation provision and (2) gave late notice of the claim. Judge Bechtle of the Eastern District upheld the claim denial finding that the plaintiff failed to comply with the suit limitation provision.⁵⁷¹ However, the court denied the insurer’s motion for summary judgment seeking to dismiss the bad faith claim. The court held that the one-year suit limitation clause did not apply to the bad faith claim under §8371. He also would not deny the insurer’s motion concerning late reporting. Noting that Pennsylvania law holds that an insurer can prevail on a late notice defense only if the delay caused prejudice to the insurer, the court held that an insurer’s decision to deny the claim due to late reporting could not be construed as reasonable under §8371 unless the insurer could demonstrate that the late reporting caused it prejudice. Since the insurer produced no evidence of prejudice, the court held there existed a genuine issue of material fact as to bad faith.

§9:11 CASES

(1) *Clemens v. N.Y. Cent. Mut. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 4903 (M.D. Pa. Jan. 15, 2015) (Conaboy, J.)

Plaintiffs were injured in an auto accident. After settling with the tortfeasor for her bodily injury limits, they sought UIM coverage from their auto insurer, defendant New York Central. When the parties were unable to resolve their claim, plaintiffs filed this breach of contract and bad faith suit. Before the court were the parties’ cross motions for summary judgment on the bad faith issue. Judge Conaboy of the Middle District denied both motions.

Plaintiffs sought UIM coverage in July 2010, and defendant attempted to obtain signatures on authorizations for medical records in order to evaluate the injuries; there was dispute over whether plaintiffs’ counsel failed to provide signed authorizations or whether defendant failed to mail the forms between that time and January 2013, when the signed authorizations were finally obtained. Plaintiffs also demanded arbitration in November 2012, but such was never agreed to. Finally, defendant and plaintiffs’ counsel were unable to schedule EUOs between December 2012 and the time the complaint was filed in September 2013 because of various disputes over whether defendant had all necessary records. The delay in resolving the UIM claim was 38 months. The court concluded that it “simply cannot conclude that either party has demonstrated as a matter of law that the other side was unilaterally responsible for the long delay between Plaintiffs’ transmission of its Notice of Intent to file an underinsured motorist claim and the filing of the complaint that initiated this matter. Nor can this Court find as a fact that, to the extent that the long delay was attributable to the Defendant, it was or was not motivated by ‘self-interest or ill will’ as required by *Terletsky, supra.*”⁵⁷²

(2) *Mineo v. GEICO*, 2014 U.S. Dist. LEXIS 95686 (W.D. Pa. July 15, 2014) (Fischer, J.)

Plaintiff was injured in an auto accident, and after settlement with the tortfeasor, turned to his auto carrier, defendant State Farm, for UIM coverage. The adjuster reviewed at least some of the medical records; there was a dispute over whether she reviewed the records of the orthopedic surgeon who repaired the rotator cuff tear. The adjuster noted that after a fall weeks after he started PT, plaintiff reported some increase in pain, and on this basis, valued the claim at below what plaintiff believed he was entitled. The adjuster never sought an IME or peer review.

⁵⁷⁰ *Little Souls, Inc. v. State Auto Mut. Ins. Co.*, 2004 U.S. Dist. LEXIS 4569, at *10 (E.D. Pa. Mar. 15, 2004) (citing *Krisa v. Equitable Life Assur. Soc’y*, 109 F. Supp. 2d 316, 321 (M.D. Pa. 2000)).

⁵⁷¹ *Waldman v. Pediatric Servs. of Am., Inc.*, 1998 U.S. Dist. LEXIS 17322 (E.D. Pa. Nov. 5, 1998).

⁵⁷² *Clemens v. N.Y. Cent. Mut. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 4903, at *10 (M.D. Pa. Jan. 15, 2015).

When the parties were unable to agree on the value of the claim, plaintiff filed this bad faith action. State Farm filed a motion for summary judgment on the bad faith claim. Judge Fischer of the Western District denied the motion.

The court explained that there were several reasons that created a genuine issue of material fact as to whether the investigation was performed in bad faith. First, the adjuster apparently relied primarily on the single PT record to value the claim. Second, the adjuster did not send plaintiff for an IME or the records for a peer review, despite the dispute over that record with plaintiff. An IME was finally performed during litigation, and the examiner opined that plaintiff had suffered the rotator cuff tear in the accident. The court noted that “at least two Pennsylvania cases have suggested that the failure to obtain an independent medical examination could be probative towards a showing of bad faith.”⁵⁷³ Third, the court concluded that it could be found that the adjuster, without an expert review, calculated the value of the claim based on speculation, contrary to the claims manual directions: “GEICO’s claims manual, moreover, admonishes its adjusters to avoid drawing conclusions based on assumption or speculation, and underscores the importance of completeness. . . .”⁵⁷⁴ Additionally, it was not clear that the adjuster had considered the orthopedic surgeon’s treatment or diagnosis. Finally, the court concluded that there were several other investigative methods GEICO could have used to determine if its valuation was appropriate: “GEICO still had several other options, including conducting an in-person interview of Mineo, examination of Mineo under oath, medical authorizations, and/or independent medical examinations.”⁵⁷⁵

(3) *Scheirer v. Nationwide Ins. Co. of Am.*, 2015 U.S. Dist. LEXIS 28286 (M.D. Pa. Mar. 9, 2015) (Mannion, J.)

In 2008, plaintiff was injured when a bus she was riding in was involved in an accident. Following the accident, in July 2011, plaintiff sought UM benefits in the amount of the \$100,000 policy limits from her auto insurer, defendant Nationwide, providing records to support her claim. There was a Medicare lien of over \$34,000. In September 2011, plaintiff demanded arbitration, which was refused in October 2012. Plaintiff provided supplemental records in January 2013. In April 2013, defendant requested an IME and SUO. Plaintiff filed this breach of contract and bad faith suit shortly thereafter. The deposition was eventually scheduled for September 2013 and the IME took place in January 2014. Defendant proposed arbitration after the deposition and provided an offer of \$25,000, which took place in February 2014, and defendant paid the arbitration award. After discovery, the parties filed cross motions for summary judgment. Judge Mannion of the Middle District of Pennsylvania denied both motions on the bad faith claim.

The court concluded that there were genuine issues of fact surrounding the delay of 31 months and whether such delay constituted bad faith. The court stated:

In the instant case, a reasonable trier of fact could find that the defendant failed to make a good faith and timely payment on plaintiff’s UM claim. For instance, whether the defendant acted unreasonably when it asserted it did not have all information necessary to complete its investigation into her UM claim and respond to her demand for the policy limits. There is contrary evidence to show that defendant indeed may have had all required records, yet failed to reasonably and timely compensate plaintiff for her injuries. Additionally, even though supplemental records and the bus video were received by defendant in January 2013, the IME of plaintiff was not performed until January 2014. The evidence is also disputed as to whether plaintiff’s deposition was unduly delayed and, if defendant failed to timely respond to the letters of plaintiff’s counsel as well as his demands for the \$100,000 policy limits.

In short, the record is not clear if defendant breached its duty of good faith regarding its handling of plaintiff’s UM claim and, if so, whether this breach was through a motive of self-interest or ill will as opposed to mere negligence.⁵⁷⁶

(4) *Wisinski v. Am. Commerce Grp., Inc.*, 2011 U.S. Dist. LEXIS 320 (W.D. Pa. Jan. 4, 2011), reconsideration denied, 2011 U.S. Dist. LEXIS 26846 (W.D. Pa. Mar. 16, 2011) (Cohill, S.J.)

The facts of this post-*Koken* case are set forth in greater detail in §9:15. Wisinski was involved in an auto accident in December 2001, following which she sought benefits for lost wages and UIM benefits from her auto insurer, ACIC. When the parties failed to resolve the various claims for benefits arising out of the accident, Wisinski filed this action for breach of contract and statutory bad faith. The parties filed cross-motions for summary judgment. Senior Judge Cohill of the Western District granted Wisinski’s motion and denied ACIC’s as to the UIM claim.

The court held that ACIC had rejected Wisinski’s arbitration demand despite policy language permitting arbitration upon either party’s request, instead taking the position that arbitration would be available only if both parties requested it. Wisinski’s original policy did allow arbitration only if both parties consented; however, a subsequent

⁵⁷³ *Mineo v. GEICO*, 2014 U.S. Dist. LEXIS 95686, at *23 (W.D. Pa. July 15, 2014) (citing *Hollock and Bonenberger*).

⁵⁷⁴ *Mineo v. GEICO*, 2014 U.S. Dist. LEXIS 95686, at *19 (W.D. Pa. July 15, 2014).

⁵⁷⁵ *Mineo v. GEICO*, 2014 U.S. Dist. LEXIS 95686, at *22 (W.D. Pa. July 15, 2014).

⁵⁷⁶ *Scheirer v. Nationwide Ins. Co. of Am.*, 2015 U.S. Dist. LEXIS 28286, at *21-22 (M.D. Pa. Mar. 9, 2015).

endorsement amended the language to allow either party to request it. Thus, the court found that ACIC's refusal to follow the policy language was in bad faith: "[I]t was clear and unambiguous on the face of ACIC's policy that either party could request arbitration. By refusing to arbitrate upon Ms. Wisinski's request, ACIC acted in bad faith."⁵⁷⁷

The court further rejected ACIC's argument that it sought the advice of outside counsel to determine whether its interpretation of the policy was correct because it found that ACIC told counsel that it did not want to arbitrate, asked advice of an attorney who had little Pennsylvania insurance experience, and did not provide counsel a current and complete copy of the policy. The court found that "under these circumstances, it was unreasonable for ACIC to rely on the advice of counsel when it did not provide him with the correct policy."⁵⁷⁸ The court also rejected ACIC's argument that under the *Koken* decision, it was not required to include mandatory arbitration in its policies, because ACIC was required to arbitrate by its own policy language.

(5) *Grassetti v. Prop. & Cas. Ins. Co. of Hartford*, 2011 U.S. Dist. LEXIS 42731 (M.D. Pa. Apr. 20, 2011) (Munley, J.)

Plaintiff was in an automobile accident with an unidentified driver, following which he sought UM coverage from his auto carrier, Hartford. Hartford denied coverage, contending that plaintiff had rejected UM coverage. Plaintiff then filed suit against Hartford and a related entity, alleging breach of contract and bad faith, arguing that the UM rejection form was defective, and thus void, so he was entitled to such coverage. The insurers filed a motion to dismiss the bad faith claim, which Judge Munley of the Middle District denied.

The insurers contended in their motion that because plaintiff rejected UM coverage, denial of his claim could not provide the basis for a bad faith cause of action. The court noted that the applicable statute allowed insureds to reject UM coverage, but only upon the signing of a form with the mandatory statutory language. The statutory language for the disputed sentence required that it read "uninsured coverage," but the form actually read "uninsured motorists coverage." The court concluded that the extra word worked to nullify the rejection form under the statute, as imprecise language with respect to a UIM rejection form had been found to void the rejection in *American Int'l Insurance Co. v. Vaxmonsky*.⁵⁷⁹ Because defendants had "constructive notice of these [statutory] provisions and of the holding in *Vaxmonsky* that non-compliant waivers are null and void[.]" the complaint allegations were sufficient to "adequately allege[] that the Defendants withheld payment upon a claim without a reasonable basis and that Defendants did so knowing they did not have a reasonable basis."⁵⁸⁰

(6) *Heinlein v. Progressive N. Ins. Co.*, 2007 U.S. Dist. LEXIS 51592 (W.D. Pa. July 17, 2007) (Ambrose, J.)

In this case, the plaintiffs alleged that the insurer acted in bad faith in the handling of its UIM claim and in not offering its \$1.2 million policy limits until after an arbitration panel had awarded over \$1.5 million. The plaintiff argued that the insurer's settlement evaluation was unreasonable. The insurer moved for summary judgment, arguing that it had conducted a reasonable investigation and made reasonable settlement offers before and during the ongoing UIM arbitration. Although not finding bad faith, the court denied the insurer's motion stating that there were genuine issues of fact that would have to be determined at trial, but noted further the following:

A reasonable fact-finder could conclude, despite those proffers, that Defendant acted in bad faith when it did not make any settlement offer until the UIM arbitration commenced. . . .

Under the natural progression from defendant's argument, a genuine dispute over the value of a UIM damages claim would essentially mean that no attempt at settlement need be made, and arbitration is always the appropriate result. I am unwilling to endorse such a rule. That plaintiffs demanded full policy limits, or that the ultimate value of the claim was unclear or disputed, does not relieve defendant of its obligation to engage in good faith negotiations with its insured.⁵⁸¹

(7) *Ritter v. Nationwide Mut. Ins. Co.*, 1998 U.S. Dist. LEXIS 10047 (E.D. Pa. June 30, 1998) (Pollak, J.)

In this case, the policyholders brought a bad faith lawsuit against the insurer while at the same time proceeding to arbitration under the UIM coverages. The insurer moved to dismiss the bad faith count, arguing that the policyholders were obligated to first arbitrate the UIM motorist claim before they could litigate their claim of bad faith. Judge Pollak of the Eastern District rejected this argument, holding that the §8371 remedy was not dependent on the resolution of the contract dispute. Because §8371 created an independent cause of action, the court wrote, "as the law of Pennsylvania now stands, defendant's argument that arbitral resolution of plaintiff's claim under the contract must precede any bad faith is without merit."⁵⁸²

⁵⁷⁷ *Wisinski v. Am. Commerce Grp., Inc.*, 2011 U.S. Dist. LEXIS 320, at *41 (W.D. Pa. Jan. 4, 2011).

⁵⁷⁸ *Wisinski v. Am. Commerce Grp., Inc.*, 2011 U.S. Dist. LEXIS 320, at *42-43 (W.D. Pa. Jan. 4, 2011).

⁵⁷⁹ *American Int'l Ins. Co. v. Vaxmonsky*, 916 A.2d 1106 (Pa. Super. 2006).

⁵⁸⁰ *Grassetti v. Prop. & Cas. Ins. Co. of Hartford*, 2011 U.S. Dist. LEXIS 42731, at *11 (M.D. Pa. Apr. 20, 2011).

⁵⁸¹ *Heinlein v. Progressive N. Ins. Co.*, 2007 U.S. Dist. LEXIS 51592, at *14-15 (W.D. Pa. July 17, 2007) (citing *Frazier v. State Farm Auto Ins. Co.*, 33 Pa. D. & C.4th 170, 176-77 (Phila. 1996)).

⁵⁸² *Ritter v. Nationwide Mutual Mut. Ins. Co.*, 1998 U.S. Dist. LEXIS 10047, at *5 (E.D. Pa. June 30, 1998).

§9:12 Failure to Make Reasonable Offer of Settlement

§9:13(a) — Cases (Auto Claims)

(1) *Wisinski v. Am. Commerce Grp., Inc.*, 2011 U.S. Dist. LEXIS 320 (W.D. Pa. Jan. 4, 2011), reconsideration denied, 2011 U.S. Dist. LEXIS 26846 (W.D. Pa. Mar. 16, 2011) (Cohill, S.J.)

This case is also discussed in §§9:11 and 9:15. Wisinski was involved in an auto accident in December 2001, following which she sought benefits for first party wage loss and UIM benefits from her auto insurer, ACIC. When the parties failed to resolve the various claims for benefits arising out of the accident, Wisinski filed this action for breach of contract and statutory bad faith. The parties filed cross-motions for summary judgment. Senior Judge Cohill of the Western District granted Wisinski’s motion and denied ACIC’s as to the UIM claim.

The court concluded that there was no genuine issue of material fact as to Wisinski’s claims regarding ACIC’s bad faith in settlement. ACIC’s first settlement offer, approximately a month after the accident, was for approximately \$7,700, although the medical records indicated that her injuries were caused by the accident. During the next year and a half, when Wisinski was represented by her first attorney, ACIC never made any other offers; however, during a period of time when Wisinski was not represented by counsel, ACIC increased its offer to \$9,000, despite having recently received a medical report documenting causation and indicating that medical bills totalled over \$50,000. After being ordered to arbitrate the claim, “ACIC unreasonably and falsely threatened that it would appeal an arbitration award in order to induce Ms. Wisinski to accept a lower settlement offer,”⁵⁸³ despite such actions being prohibited by UIPA.

Just before arbitration, ACIC increased its settlement offer to \$20,000, without any new information to support its decision. The claims examiner did not expect Wisinski to accept the offer because the medical bills were then over \$60,000, because she was permanently disabled from her employment, and because she had a favorable panel at arbitration. A month later, again without any new information to support an increased offer, ACIC offered the full \$100,000 policy limits.

Even after the parties agreed to settle, ACIC took the position that the settlement check had to include Medicare as a payee (without available insurance funds, Medicare had paid many of her bills) and that the release had to release the bad faith and wage loss claims. Despite advice from their outside counsel that Wisinski and her attorney had agreed to personally indemnify ACIC for Medicare charges and that such was routine, ACIC “persisted in its demand causing months of delay in paying the settlement funds. . . .”⁵⁸⁴ This, the court found, was in bad faith. Furthermore, according to the court, case law had held that insistence on a release for claims unrelated to the UIM claim was in bad faith: “An insurance carrier that attempts to coerce an insurer [sic] to release her bad faith claim when the policy limit was offered as settlement constitutes bad faith. . . . This is the exact conduct that ACIC engaged in, and it clearly indicates ill will towards Ms. Wisinski.”⁵⁸⁵

(2) *McCrorry v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 28397 (W.D. Pa. Apr. 7, 2008) (Lancaster, J.)

McCrorry was a passenger in a car that was involved in an accident. Suffering injuries, she sought and received \$150,000 in payments under insurance policies held by both drivers involved in the accident. She also submitted a UIM claim to her own insurance company, State Farm, seeking \$100,000 of UIM coverage. State Farm did not make an offer of settlement because it had determined that McCrorry’s claim was worth less than the \$200,000 paid by the primary carriers. More than three years after State Farm had been notified of the UIM claim, an arbitration panel awarded McCrorry \$650,000 to compensate her for her injuries and future medical costs. Following that arbitration award, State Farm paid McCrorry \$100,000 in UIM benefits. McCrorry then filed this suit alleging that the insurer acted in bad faith in the handling of her UIM claim.

The insurer sought summary judgment on the bad faith claim. Although calling it “a close case,”⁵⁸⁶ Judge Lancaster of the Western District denied summary judgment, finding that the insurer’s refusal to assign a monetary value to McCrorry’s claim because it did not know the amount of the first level of coverage could be evidence of bad faith. According to the court:

[O]nly one day after writing an extensive memorandum to file listing claimed medical costs of more than \$250,000 and lost earnings of nearly \$600,000, and recognizing that McCrorry “did sustain a concussion with some post-concussion syndrome,” the claim representative wrote a letter to McCrorry’s counsel stating that “it does not appear the claim has a value in excess of [\$200,000].” At the time she wrote that letter, the claim representative had not yet assigned any monetary value to

⁵⁸³ *Wisinski v. Am. Commerce Grp., Inc.*, 2011 U.S. Dist. LEXIS 320, at *44 (W.D. Pa. Jan. 4, 2011).

⁵⁸⁴ *Wisinski v. Am. Commerce Grp., Inc.*, 2011 U.S. Dist. LEXIS 320, at *49 (W.D. Pa. Jan. 4, 2011).

⁵⁸⁵ *Wisinski v. Am. Commerce Grp., Inc.*, 2011 U.S. Dist. LEXIS 320, at *49 (W.D. Pa. Jan. 4, 2011) (citing *Haves v. Harleysville*, 841 A.2d 121 (Pa. Super. 2003), *alloc. denied*, 870 A.2d 322 (Pa. 2005)).

⁵⁸⁶ *McCrorry v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 28397, at *5 (W.D. Pa. Apr. 7, 2008).

McCrory's claim. Nor did she have the Independent Medical Examination report from Dr. Nickell -- one of two key pieces of evidence State Farm relied on to ultimately deny McCrory's claim. . . . It simply made a blanket, conclusory, and convenient statement that the claim was worth less than \$200,000.

A reasonable juror could conclude that these facts prove that State Farm's goal was not to objectively and fairly determine the validity and value of McCrory's claim, but to ensure that whatever merit it had, her claim was valued below its \$200,000 coverage trigger. This evidence, as well as other evidence, could lead a reasonable juror to find that State Farm acted in bad faith. A reasonable juror could also find, based on this record, that State Farm did not act in bad faith. It is for this reason that this matter must be submitted to a jury for resolution.⁵⁸⁷

(3) *Scott v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 162642 (M.D. Pa. Nov. 15, 2013) (Mannion, J.)

Plaintiffs were injured in an auto accident, and eventually settled with the tortfeasor for just under the policy limits. They then sought UIM benefits from their auto insurer, defendant GEICO. The parties were unable to agree on the value of the claim, so plaintiffs filed this bad faith action. As the case neared trial, defendant filed a motion in limine to prevent introduction of evidence relating to the arbitration award and a post-arbitration memo drafted by defendant. Judge Mannion of the Middle District granted the motion in part, as discussed in §10:25, and denied it in part.

The court largely excluded introduction of a post-arbitration memo drafted by defendant, but decided to allow introduction of one sentence in which defendant set forth the pre-arbitration valuation it had placed on the claim, which was higher than any of its offers to that time. The court found the evidence was relevant and not unduly prejudicial as “[i]t is an admission by the defendant’s claims adjuster. . . . It qualifies as an admission by a party opponent. . . .”⁵⁸⁸

(4) *Strausser v. Merchants Ins. Grp.*, 2014 U.S. Dist. LEXIS 47718 (M.D. Pa. Apr. 7, 2014) (Conaboy, J.)

Plaintiff was involved in an auto accident in December 2007. After he settled with the tortfeasor, plaintiff sought UIM benefits from his auto insurer, defendant Merchants, in January 2010. After a lengthy investigation, the parties arbitrated the matter, and the arbitrator awarded an amount, \$135,000 almost 4 times greater than defendant’s last offer, which was not specifically delineated. After plaintiff filed this bad faith action, defendant filed a motion for summary judgment. Judge Conaboy of the Middle District denied the motion, as is discussed at greater length in §9:11.

Plaintiff contended that defendant’s settlement offer was unreasonably low, and in bad faith. The court agreed. Noting that mere negotiation of a claim and discrepancy between an offer and fact-finder’s award do not establish bad faith, the court found a genuine issue of material fact: “[T]he Court must observe that in a situation where, as here, the award approached four (4) times the insurer’s best offer and there is evidence that the insurer may have unreasonably . . . disregarded evidence that should have promoted a higher offer in settlement, only the finder of fact should pass on the relative credibility of the parties’ arguments.”⁵⁸⁹

(5) *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 92230 (E.D. Pa. July 8, 2014) (Stengel, J.)

Plaintiff was involved in an auto accident when another driver ran a red light and later settled for the tortfeasor’s policy limits. After she sought the \$200,000 UIM limits from her auto carrier, defendant State Farm, the insurer referred her claim to counsel and sought an EUO and IME. After receipt of the IME report, counsel made an offer of \$30,000, which plaintiff rejected; plaintiff then filed this bad faith suit. Defendant moved to dismiss. Judge Stengel of the Eastern District of Pennsylvania denied the motion, as is discussed in more detail in §9:03(a).

The court concluded that plaintiff stated a bad faith claim based on an argument that the offer was unreasonably low: “The plaintiff alleges that the settlement offer of \$30,000 was then unreasonably low based on the information contained in her medical records and in the independent evaluation by the insurer’s physician. These facts point to the defendant’s lack of a reasonable basis for its...partial denial of benefits, along with an inference that the defendant’s behavior was tied to self-interest.”⁵⁹⁰

(6) *Flaherty v. Allstate Prop. & Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 12098 (W.D. Pa. Oct. 19, 2011) (Mitchell, J.)

After plaintiff was seriously injured in a one-car auto accident, he attempted to obtain UM/UIM benefits from Allstate, which was the insurer for both his father and the car’s owner. When Allstate refused to pay benefits, he filed this breach of contract and bad faith action. Plaintiff claimed that Allstate acted in bad faith in refusing to offer any UIM benefits under his father’s policy. Allstate filed a motion to dismiss. Judge Mitchell of the Western District

⁵⁸⁷. *McCrory v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 28397, at *6-8 (W.D. Pa. Apr. 7, 2008).

⁵⁸⁸. *Scott v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 162642, at *19 (M.D. Pa. Nov. 15, 2013).

⁵⁸⁹. *Strausser v. Merchants Ins. Grp.*, 2014 U.S. Dist. LEXIS 47718, at *8-9 (M.D. Pa. Apr. 7, 2014).

⁵⁹⁰. *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 92230, at *11 (E.D. Pa. July 8, 2014).

denied the motion as to the bad faith claim brought under §8371 as to the father's policy.⁵⁹¹ The court held that plaintiff's breach of contract claim with respect to UIM benefits would go forward, as would the bad faith claim. The court noted that the allegations, including the insurer's "refusal to offer him any money for his loss, despite his extensive injuries and medical bills, constitutes bad faith,"⁵⁹² were sufficient to support a bad faith claim.

(7) *Zimmerman v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 117562 (M.D. Pa. Oct. 12, 2011) (Caputo, J.)

In May 2010, Plaintiff was injured in an auto accident caused by another driver making an illegal left hand turn. The insurer for the other driver tendered the policy limits of \$100,000. Plaintiff then sought UIM benefits from her own auto carrier, State Farm. In June 2011, State Farm made an unspecified offer to settle the claim that plaintiff contended was insufficient, so she filed this breach of contract and bad faith suit. State Farm moved to dismiss the bad faith claim. Judge Caputo of the Middle District denied the motion, finding that plaintiff's allegations were sufficient to state a claim, although the allegations were largely conclusory:

Here, Zimmerman has demonstrated she is entitled to discovery on the bad faith claim. She alleges that, a year after the accident, State Farm made an inadequate offer that did not adequately consider the severity of her injuries. Zimmerman further alleges that State Farm failed to properly investigate her claim, failed to reasonably underwrite the underinsured policy limit, and failed to negotiate in good faith with her. Although her allegations are largely conclusory, bad faith is a fact-intensive inquiry, requiring development of the record. The Court therefore finds dismissal at this stage would be inappropriate. State Farm is welcome to revisit this issue on summary judgment.⁵⁹³

(8) *Rankin v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 55305 (W.D. Pa. Apr. 27, 2011) (Mitchell, M.J.), adopted by, 2011 U.S. Dist. LEXIS 55300 (W.D. Pa. May 24, 2011) (Fischer, J.)

After plaintiff was in an auto accident, she sought UIM benefits from her auto insurer, defendant State Farm. The tortfeasor's insurance policy limit was \$200,000. In early January 2011, State Farm offered \$40,000 in settlement of the UIM claim. The offer was rejected. Less than three weeks later, State Farm raised the offer to \$100,000. After the parties were unable to resolve the claim, plaintiff filed suit, alleging breach of contract and bad faith in violation of §8371. State Farm filed a motion to dismiss and to strike certain portions of the complaint. Magistrate Judge Mitchell of the Western District of Pennsylvania recommended denial of the motion to dismiss the bad faith claim.

The court cited *Brown v. Progressive Ins. Co.*⁵⁹⁴ and *Condio v. Erie Ins. Exch.*⁵⁹⁵ as controlling Pennsylvania law in UM and UIM claims. Plaintiff alleged that State Farm had acted in bad faith in substantially increasing its settlement, from \$40,000 to \$100,000, in a short period of time, without any new information. The court held that, at the motion to dismiss stage, this presented a colorable claim for bad faith:

With no further record developed in this case, the Court cannot determine whether State Farm's widely disparate settlement offers in close proximity to one another with no additional information permit Plaintiff to state a claim for bad faith in violation of §8371. In addition, as Plaintiff notes, with no record of any evaluation done by State Farm, no determination can yet be made as to whether its offer of settlement was made in good faith.⁵⁹⁶

(9) *Rhodes v. USAA Cas. Ins. Co.*, Superior Court of Pennsylvania, Mem. Slip Op., No. 156 WDA 2007 (Pa. Super. Jan. 31, 2008)

This non-precedential Superior Court decision⁵⁹⁷ arose out of a UIM claim made in connection with a motorcycle accident. The accident occurred in July 2000. In May 2002, the plaintiffs submitted a UIM claim to the insurer. The insureds had offered to settle their claim for \$175,000. In July 2002, the insurer offered to settle for \$5,000. Plaintiffs rejected the offer and requested UIM arbitration. A litigation manager for the insurer reviewed the claim, and felt that the initial offer was fair. However, outside counsel reviewed the claim on behalf of the insurer, and felt that settlement would probably require \$50,000 to \$65,000 or more. The policy limits were \$200,000.

In July 2003, the insurer offered to settle the case for \$50,000. The insurer made several other offers of \$65,000; of \$80,000; and, in November 2003, of \$100,000, all of which were rejected. Plaintiffs reiterated their \$175,000.00 demand, which the insurer agreed to pay in December 2003.

⁵⁹¹ The court granted a motion to dismiss filed with respect to the claim under the car owner's policy, because that policy was governed by Ohio law. *Flaherty v. Allstate Prop. & Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 120698, at *22 (W.D. Pa. Oct. 19, 2011).

⁵⁹² *Flaherty v. Allstate Prop. & Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 12098, at *13 (W.D. Pa. Oct. 19, 2011).

⁵⁹³ *Zimmerman v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 117562, at *6 (M.D. Pa. Oct. 12, 2011).

⁵⁹⁴ 860 A.2d 493 (Pa. Super. 2004).

⁵⁹⁵ 899 A.2d 1136, 1144-45 (Pa. Super.), *appeal denied*, 912 A.2d 838 (Pa. 2006).

⁵⁹⁶ *Rankin v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 55305, at *12-13 (W.D. Pa. Apr. 27, 2011).

⁵⁹⁷ Under Pennsylvania Superior Court rules, memorandum opinions are generally not citable as precedent. See Superior Court Operating Procedures, §§ 65.37; *Chaaf v. Kaufman*, PICS No. 04- 0628 (Pa. Super. April 2004). This practice has been the subject of some criticism. See e.g. H. Grezlak, "The Shadow Law," *Pennsylvania Law Weekly*, November 1, 1999, p. 1; Melissa Nann, "Still No Citing Allowed," *The Legal Intelligencer*, April 28, 2004, p. 1. Pa. Rule Appellate Pro. 3519 allows a party to request publication within 14 days after an unpublished memorandum has been filed.

Plaintiffs filed a bad faith action in Blair County. The trial court granted summary judgment in favor of the insurer. In a non-precedential Memorandum Opinion, the Superior Court reversed. According to the court, “Our review of the record leads us to conclude that there is a question of material fact as to whether [the insurer] had a reasonable basis for its failure to increase its settlement offer from its very low starting point more promptly, and whether [the insurer] knowingly or recklessly disregarded a lack of reasonable basis for its actions.”⁵⁹⁸

According to the Superior Court, there existed a question of material fact as to bad faith in part because the claims adjuster “was unable to articulate a specific rationale for her estimate of \$5,000 and there was evidence to suggest that she ignored several relevant factors.”⁵⁹⁹ The court also suggested there was a question of fairness in the settlement evaluation because “[i]t was not until almost a year later, on July 1, 2003, that [the litigation manager] increased the settlement offer to \$50,000, even though there was evidence to suggest that she was aware long before this time that the claim would require considerably more to settle than \$5,000.”⁶⁰⁰

In a subsequent appellate opinion (discussed in §14:05(a)), the Superior Court addressed application of the work product doctrine, but, in summarizing the law of bad faith, observed, “This court has also found bad faith where an insurer made an arbitrary, ‘low-ball’ settlement offer bearing no reasonable relationship to the insured’s reasonable medical expenses and which ultimately turned out to be far lower than the final arbitration award.”⁶⁰¹ Interestingly, the case on subsequent remand was tried to verdict – and the insurer prevailed.

(10) *Greene v. GuideOne Mut. Ins. Co.*, 82 Pa. D. & C.4th 165 (Fayette 2007) (Leskinen, J.)

The plaintiff was involved in an automobile accident with a vehicle insured by Nationwide. The plaintiff settled with Nationwide and then filed an underinsured (UIM) claim with its insurer, GuideOne. GuideOne retained counsel to represent it in connection with the UIM claim. An examination under oath was not taken of the insured. GuideOne relied in part upon an independent medical examination (IME) report obtained by Nationwide. GuideOne’s counsel initially recommended a settlement of at least \$10,000, but later revised his opinion and concluded that the value of the claim was a zero. The case went to arbitration, and the arbitrators awarded \$75,000.

In a subsequent bad faith action tried before Judge Leskinen of Fayette County, the court awarded as part of compensatory damages \$75,000, the balance of GuideOne’s remaining limits; \$25,000, representing plaintiff’s counsel’s fees; and \$55,000 in punitive damages. In an opinion prepared in connection with a Superior Court appeal, the court reiterated its opinion that the company acted in bad faith.

The insurer argued that it was entitled to rely upon the legal opinions of its retained counsel. However, the court questioned the credibility of the defense attorney noting, “It is no secret that insurance defense work is a very competitive field, and that a single failure to perform to the company’s expectations and demands can result in the loss of all future legal work for that company.”⁶⁰² The court found the attorney’s testimony – that his revised opinion as to the value of the case was zero – to be not credible, adding that the attorney “maintained loyalty to his client, but his independence was a casualty of war.”⁶⁰³

The insurer also argued that its claims decision was supported by the IME report from Nationwide. The court questioned the “independence” of the medical exam, which was five years old, and noted that Nationwide “obviously did not find it credible when they [sic] paid 90 percent of their limit.”⁶⁰⁴ The court found that the IME opinion was not credible.

In its decision, the court was extremely critical of the insurer, noting that in passing the UIPA,

[T]he legislature emphatically stated that the resolution of insurance claims should not be a high-stakes “poker game” where the insurance carrier makes the rules, chooses most of the players, sets the odds and then “bluffs” their own insured into “folding” a “winning hand.” . . .

This court believes that the combination of compensatory and punitive damages imposed by its verdict is the minimal amount necessary to help deter the future abuse of Pennsylvania’s insurance policyholders.⁶⁰⁵

The insurer challenged the inclusion of attorney’s fees in the compensatory award. The court held that “if it is found to be inappropriate to include attorney’s fees as part of the compensatory damages, this Court would have added the \$25,000 in attorney’s fees to the punitive damages.”⁶⁰⁶

⁵⁹⁸. *Rhodes v. USAA Cas. Ins. Co.*, Superior Court of Pennsylvania, mem. slip op., No. 156 WDA 2007 (Pa. Super. Jan. 31, 2008), slip op. at 19.

⁵⁹⁹. *Id.*, slip op. at 17.

⁶⁰⁰. *Id.* at 18.

⁶⁰¹. *Rhodes v. USAA Cas. Ins. Co.*, 21 A.3d 1253, 2011 Pa. Super. LEXIS 612, at *16 (Pa. Super. Ct. May 17, 2011) (citing its earlier decision finding the trial court erred in granting USAA’s motion for summary judgment, 951 A.2d 1225 (Pa. Super. Ct. 2008)).

⁶⁰². *Greene v. GuideOne Mut. Ins. Co.*, 82 Pa. D. & C.4th 165, 167 (Fayette 2007).

⁶⁰³. *Id.* at 169.

⁶⁰⁴. *Id.* at 169.

⁶⁰⁵. *Id.* at 171-72.

⁶⁰⁶. *Id.* at 172.

(11) *Barry v. Ohio Cas. Grp.*, 2007 U.S. Dist. LEXIS 2684 (E.D. Pa. Jan. 12, 2007) (Gibson, J.)

The facts of this case appear in §10:17. Although determining that there were factual disputes, Judge Gibson of the Western District held that a reasonable jury could conclude that the insurer acted in bad faith with respect to offering “unreasonably low offers during the negotiations to settle her UIM claim.”⁶⁰⁷ In support of this suggestion, the court noted that the insurer increased its offer from \$6,000 to \$25,000 “in a two week period, . . . in the absence of any additional evidence.”⁶⁰⁸

(12) *Cohen v. State Auto Prop. & Cas. Co.*, 2001 U.S. Dist. LEXIS 1178 (E.D. Pa. Feb. 8, 2001) (Waldman, J.)

In this case, the insurer in a motion to dismiss argued that, where the insurer paid a portion of the claim before the institution of suit (but not the full amount of the claim), a bad faith claim would not lie. The late Judge Waldman of the Eastern District denied the insurer’s motion, stating “to exempt an insurer which pays any portion of proceeds due under a policy while capriciously or unreasonably withholding the balance would substantially undermine the statute.”⁶⁰⁹

(13) *Levin v. Great Am. Ins. Co.*, 2001 U.S. Dist. LEXIS 20100 (E.D. Pa. Dec. 4, 2001) (Yohn, J.)

Plaintiff was involved in a car accident with an uninsured driver and made a UM claim with her insurer. The insurer’s claim committee evaluated plaintiff’s injuries to be worth \$60,000 and authorized settlement in the amount of \$45,000. The claim representative handling the matter for the insurer made no offer of settlement. The matter was submitted for arbitration, and plaintiff was awarded \$100,000. Plaintiff sued the insurer alleging breach of contract and bad faith under §8371.

Judge Yohn of the Eastern District denied the insurer’s motion for partial summary judgment on the issue of bad faith. The court held that a jury could reasonably find that the insurer’s refusal to make a settlement offer, despite its valuation of the claim at \$60,000, could support a bad faith claim.

In the face of clear liability, the failure to make an offer is illustrative of an insurer’s knowledge or reckless disregard of a lack of reasonable basis for denying payment of benefits.⁶¹⁰

The court held that medical opinions obtained by the insurer did not provide the insurer with a reasonable basis to deny plaintiff’s claim.

(14) *Klinger v. State Farm Mut. Auto. Ins. Co.*, 895 F. Supp. 709 (M.D. Pa. 1995) (Caldwell, J), *aff’d*, 115 F.3d. 230 (3d Cir. 1997) (Nygaard, J.)

Klinger was driving a van, with Neyer as a passenger, and was involved in an accident with an underinsured vehicle. Both Klinger and Neyer suffered serious injuries. Klinger had an automobile policy with State Farm, which included under-insured motorist coverage, and Klinger and Neyer submitted a claim to State Farm for benefits.

The insureds and State Farm agreed to arbitrate the issues of coverage and damages separately. The UIM arbitrators determined that the coverage available under Klinger’s two policies was \$115,000. Thereafter, the plaintiff’s attorney demanded that State Farm tender the policy limits. This communication was sent to State Farm’s attorney who, for reasons not entirely explained, failed to relay the messages to the company in a timely fashion. State Farm ultimately learned of the miscommunications by its attorney, but nonetheless, offered nothing to Klinger and Neyer. There was also an issue as to whether State Farm’s counsel timely advised the company of the arbitration date. The UIM case went to arbitration on damages two years after the accident, and the panel awarded \$115,000 to Klinger and \$70,000 to Neyer.

Klinger and Neyer later filed suit alleging that State Farm’s delay in paying their claims constituted bad faith. State Farm moved to dismiss the bad faith claim as a matter of law, but the trial court dismissed its motion.⁶¹¹ The trial court ruled that, although State Farm could not be faulted for its counsel’s omissions, the insurer could be found to have acted in bad faith by (1) failing to inquire of its counsel about the status of the hearing and (2) relying on its counsel in view of counsel’s previous dilatory conduct.

The bad faith case then went to trial before a jury in the Middle District of Pennsylvania, and the jury awarded punitive damages totaling \$300,000—\$150,000 for each plaintiff. The Third Circuit Court of Appeals upheld the jury’s award, stating that State Farm was chargeable with the actions and the inaction of its attorney. The Third Circuit concluded, “there is ample evidence from which a reasonable jury could have concluded that State Farm knew or recklessly disregarded the fact that it had no reasonable basis for refusing to pay its insureds’ claims.”⁶¹²

⁶⁰⁷ *Barry v. Ohio Cas. Grp.*, 2007 U.S. Dist. LEXIS 2684, at *28 (E.D. Pa. Jan. 12, 2007).

⁶⁰⁸ *Id.* at *27-28.

⁶⁰⁹ *Cohen v. State Auto Prop. & Cas. Co.*, 2001 U.S. Dist. LEXIS 1178, at 7-8.

⁶¹⁰ *Levin*, 2001 U.S. Dist. LEXIS 20100, at *18.

⁶¹¹ *See Klinger v. State Farm Mut. Auto. Ins. Co.*, 895 F. Supp. 709 (M.D. Pa. 1995).

⁶¹² *Klinger*, 115 F.3d at 234.

(15) *Collins v. Allstate Ins. Co.*, 1997 U.S. Dist. LEXIS 17047 (E.D. Pa. Oct. 31, 1997) (Waldman, J.)

The plaintiff, a Philadelphia police officer, was injured on patrol duty in an automobile accident. The liability carrier tendered its policy limits of \$50,000. The plaintiff then filed a UIM claim with Allstate.

Allstate's UIM policy limits were \$25,000. Allstate's adjuster valued the UIM claim at \$15,000, erroneously believing that the plaintiff had not sought emergency room treatment for three and a half weeks. (In fact, the plaintiff had sought medical treatment immediately, and had never received emergency room treatment). Allstate's adjuster also believed that the plaintiff's involvement in two subsequent accidents—three weeks and four months later—suggested the plaintiff's injuries were exacerbated by the later accidents, although the evidence at trial established that there were no physical injuries in either of the two latter accidents. The plaintiff's counsel demanded the policy limits of \$25,000. Allstate's counsel valued the UIM claim at zero. Although there was some dispute as to how much the insurer offered prior to the arbitration, the court found that the only offer made was \$10,000, which was rejected. The arbitrators awarded \$165,000, which, because of the policy limits, was molded to \$25,000.

The bad faith case was tried before the late Judge Waldman of the Eastern District in a bench trial. The court concluded that the insurer had acted in bad faith because (1) the insurer adjuster relied on purported "strengths" which he knew, or upon reading of the file should have known, were untrue; (2) the adjuster persisted in making an offer one-third less than the company's own valuation; and (3) the company made an objectively unreasonable valuation of plaintiff's UIM claim. The court awarded approximately \$1,400 in interest, \$4,300 in costs, \$36,000 in attorneys' fees, and \$35,000 in punitive damages.

(16) *Wood v. Allstate Ins. Co.*, 1997 U.S. Dist. LEXIS 14663 (E.D. Pa. Sept. 19, 1997) (Padova, J.)

The circumstances of the handling of a UIM claim led to a bad faith action before a jury in the Eastern District; the jury awarded \$150,000 in punitive damages.

The evidence at trial established that the UIM claim was handled by two different claim representatives. The first representative was assigned to the file from December 1994 until February 1996, a period of 14 months. Throughout that period of time, the adjuster testified, he was unable to value the plaintiff's claim because the file did not contain adequate medical records relating to the injuries suffered, and therefore he was never able to place a value on the claim. The case was assigned to another claim representative in February 1996, who first reviewed the claim in June 1996. Five days after the file was brought to the new adjuster's attention, she made an offer on the file, based upon the contents that were already in the file. It was also established at trial that at the same time the company was refusing to pay the UIM benefits, the insured was receiving wage loss payments from the company stemming from the injuries sustained in the car accident.

The insurer filed a motion for a new trial, which was denied by Judge Padova, who found that the two-year delay and payment of the wage loss claim supported the finding of bad faith against the insurer.

(17) *Kraeger v. Nationwide Mut. Ins. Co.*, 1996 U.S. Dist. LEXIS 18373 (E.D. Pa. Dec. 4, 1996) (Huyett, J.)

In March 1995, counsel for the plaintiff demanded the \$100,000 UIM policy limits. Five months later, upon receiving no response, counsel for the plaintiff telephoned the assigned representative and advised her that a bad faith lawsuit would be instituted.

After suit was initiated, a claims attorney with the insurer offered \$70,000 to settle the UIM claim. Before sending the offer she discussed the claim with outside counsel, who advised that the claim was worth \$75,000 to \$95,000. At deposition, the claims attorney was unable to articulate a reason for assigning a value of \$70,000 to the plaintiff's claim. According to the record, the claims attorney did not analyze the components of the claim, did not itemize the pain and suffering or loss of consortium claim, did not ask for an independent medical examination, or a statement under oath, and did not ask for any other documents believed necessary for a proper evaluation of the claim. No explanation was given as to why action was not taken sooner on the file. In addition, although the reserve was raised to \$100,000 in September 1995, no reason was articulated for doing that. In February 1996, the \$100,000 policy limits were offered and the UIM claim was settled.

In the bad faith lawsuit, the late Judge Huyett of the Eastern District denied the insurer's motion for summary judgment:

In the instant case, Defendant failed to take any action on Plaintiff's claim for over ten months. Although Defendant had never stated that any portion of the claim was disputed, it ignored plaintiff's inquiries and failed to offer any amount to plaintiffs until a bad faith suit was imminent, and then only offered \$70,000. Defendant is unable to articulate a reason for offering only \$70,000. Defendant raised the reserve to \$100,000 in September of 1995, yet did not offer anything above \$70,000 until February 7, 1996. Summary judgment is inappropriate as a genuine issue of material fact exists as to whether defendant acted with a reckless disregard to plaintiffs' rights.⁶¹³

⁶¹³ *Kraeger*, 1996 U.S. Dist. LEXIS 18373, at *8.

(18) *Smokowicz v. Motorist Mut. Ins. Co.*, No. 93-CV-01452 (W.D. Pa.), *aff'd without opinion*, 60 F.3d 817 (3d Cir. 1995) (Cowen, C.J.)

The plaintiff purchased an auto policy through an authorized agent of Motorist Mutual for plaintiff's five vehicles. Allegedly, the plaintiff requested a policy that would provide "stacking" of underinsured motorist claims. The policy issued contained a "pro-stacking" provision and additionally contained an arbitration of disputes clause.

The plaintiff sustained serious injuries in an auto accident and filed a claim for \$500,000, the stacked amount of the plaintiff's five liability policies. The insurer only paid \$200,000 for the claim. Also, the insurer filed a declaratory judgment action despite the fact that the policy contained an arbitration clause. The court of common pleas dismissed the insurer's declaratory judgment action and required it to comply with the policy's arbitration clause. The arbitration panel found that stacking was permitted and awarded plaintiff the remaining \$300,000. Subsequently, the plaintiff brought an action for bad faith.

At trial, the plaintiff presented testimony from two experts. One was an attorney who was a past President of the Pennsylvania Trial Lawyers Association; the other was an attorney who wrote a book on bad faith claims. The experts testified that the insurer's actions constituted bad faith, were arbitrary (in paying only \$200,000 of the \$500,000 claim), were "indefensible," and "outrageous."⁶¹⁴ The jury awarded the plaintiff \$170,000 in interest, \$150,000 in court costs and attorneys' fees, and \$1.5 million in punitive damages. In affirming the lower court's opinion, the Third Circuit noted that the expert testimony provided a sufficient basis for the jury to conclude that the defendant's actions were outrageous. Furthermore, the Third Circuit concluded that although the punitive damages award was high, it was not "so grossly excessive as to shock the conscience of the court."⁶¹⁵

§9:14 Misrepresentation of Facts or Policy Provisions

§9:15 — Cases

(1) *Paul v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 133699 (W.D. Pa. Sept. 28, 2016) (Conti, J.)

Paul was hit by a vehicle when he was crossing the street as a pedestrian in September 2010 and suffered injuries, including a head injury. After resolving his claim with the driver of the vehicle, he submitted a UIM claim to his parents' auto insurer, State Farm, in December 2010. In November 2011, he provided records and demanded the UIM policy limits. State Farm, through its adjuster and outside counsel, began an investigation. Paul died in March 2013 of a heroin overdose; after his death, plaintiff administrator of his estate asserted that the accident-related injuries caused his drug use and death. Plaintiff filed this bad faith action in September 2014; State Farm asserted a concealment and fraud defense. The parties filed cross motions for summary judgment on the bad faith issue. Judge Conti of the Western District denied both motions, as is discussed in more detail in §9:11.

The court found that there were several allegations of bad faith with respect to which there was a genuine issue of material fact. The first was whether State Farm acted in bad faith with respect to its communications regarding the policy limits. The adjuster initially told plaintiff's attorney that the UIM limits were \$100,000—instead of the actual stacked limits of \$400,000—and indicated the same in its preliminary objections in the state court case (that had been dismissed without prejudice while the parties attempted to resolve the claim). State Farm argued that it had not acted in bad faith because the adjuster did not have the certified policy at the time he made that representation and that the mistake was corrected by sending the certified policy to the attorney. The court found an issue of fact for the jury to determine whether the actions were negligent or in bad faith. The court rejected State Farm's argument: "The court disagrees with State Farm's argument insofar as it would absolve State Farm from its obligations accurately to inform an insured of coverage under his Policy. State Farm concedes that Mr. Grove [adjuster] did nothing to correct his error. Merely mailing a certified Policy for Plaintiff's attorney to interpret does not qualify as meeting an insurer's obligation to inform an insured about available coverage under a policy, and definitely does not qualify as correcting a prior written error."⁶¹⁶

(2) *McMahon v. Med. Protective Co.*, 2015 U.S. Dist. LEXIS 35131 (Mar. 20, 2015), *reconsideration denied*, 2015 U.S. Dist. LEXIS 101179 (W.D. Pa. Aug. 3, 2015) (Conti, J.)

Plaintiff had a dental malpractice policy with defendant Medical Protective. After she was sued by a patient, Medical Protective settled the claim at a mediation for \$1.55 million, which included a \$50,000 contribution from plaintiff and was within the policy limits. According to the plaintiff, she had asked what authority counsel for Medical Protective had and was told that \$1.3 million was the limit, when it was higher. Plaintiff then filed this bad faith suit against Medical Protective. The parties filed cross motions for summary judgment. Judge Conti of the Western District of Pennsylvania denied the motion as to the bad faith claim, in an opinion also discussed in §§5:03 and 10:25.

⁶¹⁴ *Smokowicz*, unpublished opinion, No. 94-3400 at p. 7, 9.

⁶¹⁵ *Smokowicz*, unpublished opinion, No. 94-3400 at p. 12.

⁶¹⁶ *Paul v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 133699, at *99 (W.D. Pa. Sept. 28, 2016).

The court found the question of whether the communications regarding settlement authority to be a close call as to whether they would be sufficient to state a statutory bad faith claim. The court looked to the following as bearing on a possible finding of statutory bad faith: the fact that Medical Protective's counsel had indicated that the amount of the current offer (at that point during the negotiations) was \$1.3 million, although it was higher, even though counsel discouraged plaintiff from offering to contribute; the fact that counsel did not call his adjuster contact to discuss how to handle the offer to contribute; and the fact that the adjuster later refused to authorize reimbursement of the insured's contribution. The court found: "A reasonable jury might consider those actions and inactions to be at least reckless on the part of Medical Protective."⁶¹⁷ The Court reiterated its position in the opinion denying reconsideration.⁶¹⁸

(3) *Simmons v. Trumbull Ins. Co.*, 2012 U.S. Dist. LEXIS 58425 (E.D. Pa. Apr. 25, 2012) (Padova, J.)

After plaintiff's car was damaged by fire, she sought coverage from her auto insurer, Trumbull. Trumbull denied coverage on the grounds that the damage had been caused by an excluded peril, electrical and/or mechanical failure. Plaintiff filed this bad faith suit against Trumbull and The Hartford. The insurers filed a motion to dismiss the bad faith claim. Judge Padova of the Eastern District of Pennsylvania denied the motion.

The court found that the complaint alleged the defendant insurers had misrepresented the cause of damage to the car, and thus denied coverage inappropriately:

The damage to the Camry described in [the adjuster's] letter, a melted negative cable, is substantially different from substantial fire damage alleged in the complaint, permitting the inference that Defendants failed to reasonably investigate and evaluate Simmons's claim, misrepresented the cause and extent of damage to her Camry, and or asserted Policy defenses without a reasonable basis.⁶¹⁹

(4) *Harhai v. Travelers Cos., Inc.*, Slip Op., July Term, 2008, No. 03747 (Phila. Com. Pl. July 2008) (Bernstein, J.)

Plaintiff was an insured under a commercial automobile insurance policy issued by Travelers. The policy provided personal injury protection ("PIP") benefits as well as UM benefits. The plaintiff suffered a serious injury as a result of an automobile accident. Unrepresented by legal counsel, he submitted a claim to Travelers for hospital and medical bills, wage loss and other economic costs arising from the accident. Travelers paid him the \$100,000 PIP limit. This payment did not cover other losses, including a wage loss and eye glass expense, which would have been compensable under the available UM coverage. Travelers claims representative, although aware of the UM coverage, failed to advise the plaintiff, who was unrepresented by legal counsel, of the availability of such coverage.

Plaintiff subsequently filed suit, alleging, *inter alia*, a bad faith claim under §8371. Travelers moved for a summary judgment, arguing that Pennsylvania law did not support a cause of action based upon an insurer's failure to disclose benefits. Judge Bernstein of the Philadelphia Court of Common Pleas disagreed, and denied Travelers' motion. The court held that there were questions of fact which might support a finding of bad faith, including:

Travelers did actually deceive Mr. Harhai, advising that certain claims were not fully covered under the policy. While correct as to the PIP coverage, this representation was knowingly deceptive as to all coverages in the policy. Travelers may have acted in bad faith through denying Mr. Harhai additional benefits available under the UM provisions of the policy and refusing to tell him of this coverage applicable to claims actually presented and unpaid.⁶²⁰

(5) *Shawnee Holdings, Inc. v. Travelers Indem. Co. of Am. & Travelers Indem. Co. of Ill.*, U.S.D.C. M.D. Pa., No. 3:01-CV-2071, Dec. 17, 2004 (Munley, J.)

This bad faith case resulted in a jury verdict that an insurer acted fraudulently and in bad faith in its adjustment of a flood loss. According to the insurer's court filings,⁶²¹ the insured experienced a flood and made claim upon the insurer for damages under its policy of insurance. After the loss was adjusted and the insurer paid the insured approximately \$1.4 million, the insured released the insurer from any further claims, both known and unknown. Subsequent to execution of the release, the insured filed a lawsuit against the insurer seeking to nullify the releases and hold the insurer in bad faith based on allegations that it was fraudulently induced by the insurer to enter the releases. A federal jury in the Middle District found that the insurer acted fraudulently and was in bad faith in adjusting the insured's claim and in the execution of the releases. The jury awarded the insured \$2,724,498 in compensatory damages and \$2,275,502 in punitive damages.

⁶¹⁷ *McMahon v. Med. Protective Co.*, 2015 U.S. Dist. LEXIS 35131, at *53 (W.D. Pa. Mar. 20, 2015).

⁶¹⁸ *McMahon v. Med. Protective Co.*, 2015 U.S. Dist. LEXIS 101179, at *5-6 (W.D. Pa. Aug. 3, 2015).

⁶¹⁹ *Simmons v. Trumbull Ins. Co.*, 2012 U.S. Dist. LEXIS 58425, at *12 (E.D. Pa. Apr. 25, 2012).

⁶²⁰ *Harhai v. Travelers Cos., Inc.*, Slip Op., July Term, 2008, No. 03747 (Phila. Com. Pl. July 2009), Slip Op. at 6-7.

⁶²¹ Judge Munley did not author an opinion, and the case has not been published.

§9:16 Unreasonable Refusal to Defend Third Party Suit

§9:17 — Cases

(1) *Sabia Landscaping v. Merchants Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 162247 (E.D. Pa. Nov. 14, 2013) (DuBois, J.)

Sabia was under contract to provide snow removal services for a condo association. When a visitor to the condo slipped and fell on ice, he brought suit against the association, which brought Sabia in as a third party defendant. Sabia sought a defense and indemnification from his general liability carrier, defendant Merchants, which denied coverage. Sabia brought this declaratory judgment and bad faith action, following which defendant filed a motion to dismiss. Judge DuBois of the Eastern District of Pennsylvania denied the motion.

The court explained that the contract could be construed as providing a defense and indemnification because there were questions about whether Sabia's work was complete at the time of the fall. Turning to the bad faith claim, the court explained that Sabia stated a claim for alleged failure to settle his claim, delay, bad faith investigation, failure to explain the denial of benefits and forcing plaintiff to file suit to get benefits. The court held: "Accepting plaintiff's allegations as true, and construing them in a light most favorable to plaintiff, the Court concludes that plaintiff's allegations sufficiently state that Merchants 'did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim.' Accordingly, Merchants's motion to dismiss Sabia's bad faith claim is denied."⁶²²

(2) *Haines v. State Auto Prop. & Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 52325 (E.D. Pa. June 22, 2009) (Golden, J.)

Plaintiffs had a homeowner's policy with defendant State Auto for two consecutive years. In the 2002-2003 policy, there was coverage for losses arising out of motor vehicle liability if a recreational use vehicle designed primarily for use not on public roads and owned by plaintiffs was on an "insured location," which was defined as "any premises used by you in connection with [residential] premises." In the 2003-2004 policy, the portion of the definition of "insured location" quoted above was deleted. Plaintiffs owned a golf cart. On April 25, 2004, Plaintiffs' son was in the golf cart when it struck a boy in an alley near their house. The boy's parents sued plaintiffs in the underlying action; State Auto denied defense and coverage under the applicable '03-'04 policy. Plaintiffs sued the insurer, seeking a declaration that their homeowners' policy provided coverage, and seeking recovery for the insurer's alleged bad faith.

Plaintiffs' bad faith claim asserted that the insurer acted in bad faith by failing to provide proper notice of the change in policy terms. Plaintiffs subsequently sought to amend their §8371 claim to allege bad faith in failing to defend and indemnify in the underlying action. State Auto objected to the proposed amendment, arguing that the amendment would be futile because §8371 pertained to issues of claims handling, not policy issuance. Judge Golden of the Eastern District rejected the insurer's argument and permitted plaintiffs to amend the bad faith count. According to the court,

"Bad faith" concerns "the duty of good faith and fair dealing in the parties' contract and *the manner by which an insurer discharged its obligations of defense and indemnification* in the third-party claims context or its obligation to pay for a loss in the first party claim context." . . . "In other words, the term [bad faith] capture[s] those actions an insurer took when called upon to perform its contractual obligations of defense and indemnification or payment of a loss that failed to satisfy the duty of good faith and fair dealing implied in the parties' insurance contract."⁶²³

The court ruled that plaintiffs' allegations of bad faith, if proven, would support a finding of bad faith:

Plaintiffs' bad faith claim does not rely exclusively on Defendant's alleged failure to provide notice of policy changes. Rather, Plaintiffs' theory of bad faith appears to be that (a) based on Defendant's alleged improper notification, the 2002-2003 Policy now applies because it represents Plaintiffs' reasonable expectations of coverage and (b) based on the provisions of the 2002-2003 Policy, Defendant has engaged in a frivolous or unfounded refusal to provide coverage for the April 25, 2004 accident. . . . This is sufficient to allege a bad faith claim and, accordingly, it cannot be said that this proposed count is futile.⁶²⁴

(3) *Trunzo v. Allstate Ins. Co.*, 2006 U.S. Dist. LEXIS 68566 (W.D. Pa. Sept. 25, 2006) (Flowers-Conti, J.)

Allstate denied defense and indemnity in connection with a claim brought against the daughter of Allstate's insured. It was Allstate's position that the daughter was not an "insured person" as defined by the policy, for two reasons. The insurer determined that the daughter was not an "insured person" under the policy because she was not living with her father, who was the named insured and residing in Florida, at the time of her Pennsylvania accident.

⁶²² *Sabia Landscaping v. Merchants Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 162247, at *19 (E.D. Pa. Nov. 14, 2013) (quoting *Terletsky*, 649 A.2d at 688).

⁶²³ *Haines v. State Auto Prop. & Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 52325, at *19 (E.D. Pa. June 22, 2009) (emphasis in original; citing *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 199-200 (Pa. 2007)).

⁶²⁴ *Id.* at *20.

Allstate also took the position that the vehicle involved in the accident, which belonged to the mother's boyfriend in Pennsylvania, was not an "insured auto" under the policy. The injured claimant secured a verdict against the daughter, and, as assignee, brought a breach of contract and bad faith action. The parties filed cross-motions for summary judgment.

Judge Flowers-Conti of the Western District, interpreting the contract according to Florida law, held that the subject vehicle was an "insured auto" but that there was a question of fact on the issue of the residence of the daughter. With respect to the bad faith claim, the court denied the insurer's motion for summary judgment. The insurer had argued that it was entitled to summary judgment because it had a reasonable basis for its coverage determination. The court held that it was obligated to "draw all inferences in the light most favorable to the non-moving party," and held that a question of fact existed as to whether the insurer's claim representative had consciously disregarded evidence that the insured's daughter was living with her father at the time of the accident. Citing *Condio v. Erie Insurance Exchange*,⁶²⁵ the court noted 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, all the while remaining committed to engage in good faith with its insured."⁶²⁶ The court held that there was a question of fact as to whether the insurer made a decision to ignore circumstances that would undermine the basis for a denial of coverage, and therefore the matter should be permitted to proceed to a jury.⁶²⁷

(4) *Galko v. Harleysville Pennland Ins. Co.*, 71 Pa. D.& C.4th 236 (Lackawanna 2005) (Minora, J.)

In this case, discussed in detail in §9:05, Judge Minora of Lackawanna County held that the insurer acted in bad faith when it denied the insured coverage for first party personal injury benefits and a defense in a third party case involving an auto accident. According to the court, "Given the lack of an investigation and ignorance of the policy language, the insurer did not have a reasonable basis for denying the benefits under the policy."⁶²⁸

(5) *American Builders & Contractors Supply Co., Inc. v. Home Ins. Co.*, 1997 U.S. Dist. LEXIS 3980 (N.D. Ill. Mar. 26, 1997) (applying Pennsylvania law) (Aspen, C.J.)

In this case, the insurer argued that §8371 applied only to refusals to *pay* benefits, not to refusals to *defend*. The Northern District of Illinois, applying Pennsylvania Law, rejected this argument, stating that it could see no reason why the Pennsylvania legislature would wish to provide punitive damages for bad faith refusals to pay policy proceeds, while denying a similar remedy for parties victimized by bad faith refusals to defend.

§9:18 Other Improper Conduct by Insurer

§9:19 — Cases

(1) *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2013 U.S. Dist. LEXIS 97226 (W.D. Pa. July 12, 2013) (Ambrose, J.)

Defendant was sued in an Iowa state court action, and plaintiff insurers provided a defense and indemnification under its E&O policy, but denied coverage under its CGL and umbrella policies. The judge returned a verdict for defendant in that action. Plaintiff insurers then filed a declaratory judgment action. Defendant counterclaimed, seeking recovery for breach of contract and common law and statutory bad faith. Plaintiffs filed a motion for summary judgment. Judge Ambrose of the Western District of Pennsylvania granted the motion in part and denied it in part, as is also discussed in §§10:04(c), 10:21, 10:25, and 12:02.

In an earlier decision in the case, the court had concluded that there may have been an "occurrence" under the E&O and CGL policies. Following this decision, plaintiffs split defense costs between the E&O and CGL policies, but such allocation was not made for over a year after the decision; defendant claimed this was in bad faith. The court agreed, noting that there was a genuine issue of material fact: "They chose this course, despite their awareness that it might ultimately leave 'insufficient limits in that policy to pay an award or settlement.' Despite Plaintiffs' stated view that 'by agreement' an insufficiency problem could be 'avoided,' their course of action could reasonably be viewed as self-interested and detrimental to Defendant's interests, and as bad faith..."⁶²⁹ The court also rejected plaintiffs' argument that its initial decision—prior to denying coverage under the CGL policy—to allocate some defense costs to that policy and the fact that the underlying action eventually had no covered claims in it—after the court's summary judgment opinion on "occurrence"—insulated its decision to postpone cost allocation.

Finally, the court found a genuine issue of material fact existed as to defendant's argument that plaintiffs acted in bad faith by allocating all defense costs to the E&O policy for the time period it did so. The court explained that even though plaintiffs had the ability to decide how to allocate costs, "does not mean that it is entitled to do so in an

⁶²⁵ 899 A.2d 1136, 1145 (Pa. Super. 2006).

⁶²⁶ *Trunzo v. Allstate Ins. Co.*, 2006 U.S. Dist. LEXIS 68566, at *49 (W.D. Pa. Sept. 25, 2006).

⁶²⁷ *Trunzo v. Allstate Ins. Co.*, 2006 U.S. Dist. LEXIS 87051 (W.D. Pa. Dec. 1, 2006) (denying reconsideration).

⁶²⁸ *Galko v. Harleysville Pennland Ins. Co.*, 71 Pa. D. & C.4th at 248.

⁶²⁹ *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2013 U.S. Dist. LEXIS 97226, at *14-15 (W.D. Pa. July 12, 2013).

unreasonable or unlawful manner.... Thus, any discretion that Plaintiffs might enjoy is not fatal to Defendant's claims."⁶³⁰

(2) *Clark v. Allstate Ins. Co.*, 2013 U.S. Dist. LEXIS 65241 (E.D. Pa. May 7, 2013) (Buckwalter, J.)

After plaintiff's home suffered damage, she filed a claim with Allstate, her homeowner's insurer, on August 31, 2011. The adjuster inspected the property on September 26, 2011, and another Allstate adjuster performed an additional inspection on October 20, 2011. In November 2011, Allstate determined that plaintiff had suffered a covered loss, but the parties could not agree on the value of the loss. Plaintiff filed suit, including a count for bad faith. The insurer filed a motion to dismiss, which was denied by Judge Buckwalter of the Eastern District.

Plaintiff argued that bad faith was shown by the number of different adjusters assigned to the claim in a short time, and the disappearance of the original adjuster, apparently with all of his notes and photos. The court noted that while there could be a "reasonable explanation[]" for these things, "the Complaint does create questions about what happened and why—the answers to which could suggest that Allstate acted in bad faith—regardless of whether or not two and a half months was an appropriate amount of time to address the claim."⁶³¹

(3) *Schlegel v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 17088 (M.D. Pa. Feb. 10, 2012), later proceeding at 2012 U.S. Dist. LEXIS 97529 (M.D. Pa. July 13, 2012) (Caputo, J.)

Plaintiffs Schlegels were involved in an auto accident, following which they sought UIM benefits from their motor vehicle insurer, State Farm. As of the time of suit, State Farm had not paid any benefits. Plaintiffs filed this bad faith action. State Farm filed a motion to dismiss. Judge Caputo of the Middle District of Pennsylvania granted the motion in part and denied the motion in part. The court allowed plaintiffs' allegations that State Farm acted in bad faith by making "unreasonable document requests"⁶³² to go forward. According to the court, plaintiffs averred that they had provided all of the necessary documentation for State Farm to value the UIM claim, but the insurer allegedly continued to request documents that "it already had in its possession[]" and requested an "Uninsured/Underinsured Affidavit of Coverage, even though Defendant's internal insurance documents showed the Plaintiffs fully covered." In essence, the Schlegels have made a specific assertion that State Farm made improper document requests in order to delay and ultimately deny their UIM benefits."⁶³³

(4) *Zenith Ins. Co. v. Wells Fargo Ins. Servs. of Pennsylvania*, 2011 U.S. Dist. LEXIS 143501 (E.D. Pa. Dec. 13, 2011) (Bartle, J.)

Additional defendant Granger owned a company, Glasbern, also an additional defendant. Glasbern operated a bed and breakfast, as well as a farm, which raised crops and livestock. In November 2008, Granger and Glasbern sought a worker's compensation policy through Wells Fargo Insurance, which presented their application to Zenith. Zenith issued the policy and renewed it the following year. The application described Glasbern as a bed and breakfast operator. One of Glasbern's employees suffered an injury during the policy term and sought worker's compensation. It appears that Zenith paid benefits under the policy. Zenith filed suit against Wells Fargo Insurance, alleging that the application had not referred to the farming operations and that Wells Fargo Insurance had failed to properly investigate the application. Wells Fargo Insurance filed a third party complaint against Glasbern seeking indemnification and contribution on the grounds that Glasbern misrepresented its business. Zenith then named Glasbern and Granger as additional defendants, seeking recovery against them for, *inter alia*, negligent misrepresentation and fraud. Glasbern and Granger filed a counterclaim against Zenith and a cross-claim against Wells Fargo Insurance. In each, Glasbern and Granger included a statutory bad faith count. Zenith filed a motion to dismiss the counterclaim. Judge Bartle of the Eastern District of Pennsylvania denied the motion.

Granger and Glasbern alleged in their counterclaim that Zenith knew prior to the policy renewal that part of Glasbern's business including farming and livestock operations. They further alleged that Zenith filed its claim in order to force them into such expensive litigation that they would be forced to settle at unfavorable terms. The court concluded that these allegations were sufficient to state a claim:

When taken in the light most favorable to Glasbern and Granger as the nonmoving parties, the counterclaim sets forth detailed facts which support their position that Zenith knew of their farming operations and nonetheless instituted a suit for fraud and misrepresentation against them. Payment by an insurer of a claim for benefits does not warrant automatic dismissal of the insured's claim for bad faith. An insurance company will generally have far greater resources than the parties it insures. Thus, an insurance company may purposefully file a false or meritless lawsuit against its insured as leverage to force the insured to choose between expending money for attorneys' fees to defend a lawsuit or forfeiting insurance benefits which the party has received or is entitled to receive.⁶³⁴

⁶³⁰ *Id.* at *17-18.

⁶³¹ *Clark v. Allstate Ins. Co.*, 2013 U.S. Dist. LEXIS 65241, at *15 (E.D. Pa. May 7, 2013).

⁶³² *Schlegel v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 97529, at *12 (M.D. Pa. July 13, 2012).

⁶³³ *Id.* at *7-8.

⁶³⁴ *Zenith Ins. Co. v. Wells Fargo Ins. Servs. of Pennsylvania*, 2011 U.S. Dist. LEXIS 143501, at *9-10 (E.D. Pa. Dec. 13, 2011).

(5) *Taylor v. Government Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 39708 (E.D. Pa. Apr. 21, 2010) (Padova, J.)

Taylor was in an automobile accident with an underinsured motorist after which she claimed that she had serious injuries, some of which were permanent. Taylor settled with the other driver's insurer for near the bodily injury liability limits and then turned to her insurer, GEICO, to demand the full \$100,000 in UIM coverage. GEICO offered to settle the UIM claim for \$15,000. Taylor filed suit, alleging breach of contract and statutory bad faith. GEICO filed a motion to dismiss, arguing that the complaint did not establish a sufficient basis for bad faith or punitive damages. Judge Padova of the Eastern District denied the insurer's motion as to the bad faith claim on the grounds that the allegations in the complaint were specific enough to state a claim:

The Complaint alleges that Taylor's injuries from the accident were numerous and severe and that Geico failed to act or acted unreasonably in a number of specific ways. Accepting these allegations as true, one could reasonably infer that Geico did not have a reasonable basis for offering only \$15,000 of the \$100,000 underinsured motorist coverage and therefore acted in bad faith.⁶³⁵

The court held that a more specific pleading was unnecessary because the complaint gave "fair notice" of its claims and has "served its function as a guide to discovery."⁶³⁶

(6) *Zaloga v. Provident Life & Accident Ins. Co. of Am.*, 671 F. Supp. 2d 623 (M.D. Pa. 2009) (Kosik, J.)

This case, discussed more fully in §5:03, involves an initial award of disability benefits and subsequent termination of those benefits. The plaintiff sued the insurers alleging breach of contract and bad faith with respect to the denial of benefits. The complaint contained 23 paragraphs that made allegations regarding the insurers' "claims handling, risk management practices, background information about Defendants and the disability insurance industry, and past cases in which one or both of Defendants was a party," which allegations were purportedly alleged to demonstrate "a common design and scheme on the part of defendants."⁶³⁷ The insurers filed a motion to strike those paragraphs of the complaint that they claimed were irrelevant or scandalous. Judge Kosik of the Middle District denied the insurers' motion, stating, "It seems to the court that all of the allegations at issue either go to the reasonableness of Defendants' conduct or to Defendants' state of mind in knowing or recklessly disregarding a reasonable basis."⁶³⁸

(7) *Kohn v. UNUMProvident Corp.*, 2008 U.S. Dist. LEXIS 101658 (E.D. Pa. Oct. 31, 2008) (Baylson, J.)

Plaintiff, a practicing psychiatrist, was insured under a disability policy. After plaintiff was attacked by one of his patients, he filed a disability claim. The claims investigation was made complicated in part by the plaintiff's failure to agree to a field interview and a release of his psychiatric records. The insurer engaged a private investigation firm to conduct surveillance on the plaintiff, and ultimately a dispute arose over the insurer's unauthorized receipt of the plaintiff's cell phone records. Although there were some suspensions in the monthly disability payments, the insurer ultimately paid all benefits due. The plaintiff filed an action alleging bad faith under §8371 and an invasion of privacy, based upon the alleged improper investigative techniques.

The insurer filed a motion for summary judgment on the bad faith claim, arguing that it should be dismissed because the insurer paid all benefits to which the plaintiff was entitled, and there could be no bad faith unless the benefits had been denied. Judge Baylson of the Eastern District denied the insurer's motion for summary judgment. According to the court, "[T]he investigative tactics by UNUM may lead a jury to conclude that UNUM's suspension of the benefits and general handling of *Kohn's* claim was conducted in bad faith, including the acquisition of the phone records."⁶³⁹ Although expressing no opinion on the merits of plaintiff's claim, the court held that "plaintiff has produced sufficient evidence to allow a jury to decide whether UNUM's investigative techniques were improper and violated the Bad Faith Insurance Statute."⁶⁴⁰

(8) *Henderson v. Nationwide Mutual Ins. Co.*, 169 F. Supp. 2d 365 (E.D. Pa. Apr. 25, 2001) (Green, J.)

In a claim arising under an automobile insurance policy, the plaintiff alleged that the insurer improperly handled his stolen automobile claim on account of plaintiff's race. The plaintiff alleged that the company failed to objectively and fairly evaluate the claim, asserted defenses without a reasonable basis and fact, and unnecessarily and unreasonably compelled litigation. The defendant insurer moved to dismiss the claim, alleging that there was no basis to support it. Viewing the facts in a light most favorable to the plaintiff, Judge Green of the Eastern District denied the insurer's motion to dismiss.

⁶³⁵ *Taylor v. Gov't Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 39708, at *9 (E.D. Pa. Apr. 21, 2010) (citation omitted).

⁶³⁶ *Taylor v. Gov't Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 39708, at *11 (E.D. Pa. Apr. 21, 2010) (citing *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004)).

⁶³⁷ *Zaloga v. Provident Life & Accident Ins. Co. of Am.*, 671 F. Supp. 2d 623, 634 (M.D. Pa. 2009).

⁶³⁸ *Id.*

⁶³⁹ *Kohn v. UNUMProvident Corp.*, 2008 U.S. Dist. LEXIS 101658, at *25-26 (E.D. Pa. Oct. 31, 2008).

⁶⁴⁰ *Id.* at *26.

(9) *DiMaggio v. UNUM Corp.*, 1997 U.S. Dist. LEXIS 1912 (E.D. Pa. Feb. 24, 1997) (Weiner, J.)

In her complaint, the plaintiff insured alleged that her disability insurer cut her disability benefits by 50 percent on the basis of medical information that was improperly obtained. Specifically, the plaintiff alleged that the insurer obtained the information from statements made in a mediation session for her automobile accident lawsuit, which was conducted under a confidentiality agreement, and which did not involve the disability insurer. The plaintiff alleged that the company used this information in an attempt to force her to compromise her rights under the policy.

The plaintiff further asserted that a company field representative arranged a meeting at the plaintiff's home, which he knew would be attended by the plaintiff's attorney. The complaint alleged that the company representative arrived 30 minutes early for the meeting, when counsel was not present, and told the plaintiff to accept a lump sum settlement of her rights under the policy, threatening to conduct a forensic audit of her claim if she did not.

The company filed a motion to dismiss the complaint, holding that, if the allegations in the complaint were true, plaintiff would be able to recover damages on at least one of her claims for extra contractual damages. The motion to dismiss was denied by the court.

§9:20 Conduct by Insurer or Counsel After Institution of Litigation

§9:21 — Cases

(1) *Paul v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 133699 (W.D. Pa. Sept. 28, 2016) (Conti, J.)

Paul was hit by a vehicle when he was crossing the street as a pedestrian in September 2010 and suffered injuries, including a head injury. Plaintiff administrator filed this bad faith action after the parties were unable to resolve Paul's UIM claim; State Farm asserted a concealment and fraud defense related to plaintiff's failure to turn over evidence relating to drug use during the claims process. The parties filed cross motions for summary judgment on the bad faith issue. Judge Conti of the Western District denied both motions, as is discussed in more detail in §9:11.

The court found that plaintiff's theory that State Farm improperly asserted the concealment and fraud defense could be submitted to the jury. After Paul had died of an overdose, his counsel had included as part of the UIM claim the fact that Paul's injuries had led to drug use, rehab attempts, and his ultimate death. State Farm contended that the drug use that existed during Paul's injury recovery had been improperly concealed from it because it bore on the issue of whether Paul's complaints of head injury were actually related to drug use. Earlier in its opinion, the court concluded that the failure to disclose his drug use prior to his death was not a material misrepresentation. With respect to the bad faith claim, the court explained that although the drug use might bear on the extent of Paul's claimed injuries, there was no question that State Farm had long accepted that the undisputed medical evidence showed a head injury caused by the accident.

(2) *Gillis v. State Auto Mut. Ins. Co.*, 2017 U.S. Dist. LEXIS 5214 (W.D. Pa. Jan. 13, 2017) (Hornak, J.)

Plaintiffs' home was damaged after a nearby gas pipeline exploded. Following the explosion, plaintiffs sought coverage from their defendant homeowners' insurer, which paid for a portion of the damages, denied part of the claim as not covered, and disputed the value of another part of the claim. Defendant told plaintiffs that it intended to proceed with a subrogation action against the pipeline company. Plaintiffs filed this declaratory judgment and bad faith action. Defendant filed a motion to dismiss. Judge Hornak of the Western District of Pennsylvania denied the motion.

Plaintiffs alleged that it was bad faith for defendant to pursue a subrogation action prior to resolving their entire claim because they had not yet been "made whole." Defendant contended that it was not required to wait until plaintiffs had been "made whole" because the pipeline company had sufficient assets to pay the amounts sought. The court found that plaintiff had stated a claim with respect to this issue. Turning to the bad faith claim, the court concluded that "at this juncture [it] is not in a position to conclude that as a matter of law, the 'bad faith' claim is wholly lacking in merit" ⁶⁴¹

(3) *Michael v. Stock*, 162 A.3d 465 (Pa. Super. 2017) (Solano, J.)

In this case discussed in §§5:04(c) and 9:03(c), the Superior Court remanded a bad faith case against a title insurance company back to the trial court where the plaintiff Stock alleged "that Land Title violated the bad faith statute by advancing 'the defenses that Stock failed to cooperate with [Land Title] as required by the Policy and/or that it was the actions/inactions of Stock and/or her counsel which were the proximate cause of Stock's losses.'" ⁶⁴² The appellate court ruled that the trial court did not address these aspects of Stock's bad faith claim, and these issues remained for resolution on remand.

⁶⁴¹ *Gillis v. State Auto Mut. Ins. Co.*, 2017 U.S. Dist. LEXIS 5214, at *5 (W.D. Pa. Jan. 13, 2017).

⁶⁴² *Michael v. Stock*, 162 A.3d 465, 480 (Pa. Super. 2017).

(4) *Kump v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 58266 (M.D. Pa. Apr. 28, 2014) (Mannion, J.)

Plaintiff had a homeowner's policy with defendant State Farm, and the policy included coverage for rare coins and valuable artwork. In April 2010, plaintiff's home was burglarized and suffered serious damage due to a fire. Plaintiff submitted a claim to State Farm, which began to look into the authenticity of the collection. State Farm covered the claim with respect to the house itself and with respect to some of the coins. An investigation called into question the authenticity of the artwork, so the insurer denied that portion of the claim. The parties disputed whether State Farm agreed to cover other coins. Plaintiff filed this breach of contract and bad faith action, and subsequently filed a motion for leave to amend to include additional bad faith allegations. Judge Mannion of the Middle District of Pennsylvania granted the motion.

Plaintiff sought to add allegations relating to witness intimidation, biased investigation, inadequate legal research and unreasonable policy interpretation in an amended complaint. The court found these were properly added: "The plaintiff's allegations contained in his proposed supplemental complaint are mostly events or occurrences that came to light after the original complaint was filed. Given the broad application of bad faith in Pennsylvania, it is appropriate to allow the plaintiff to file a supplemental pleading asserting this cause of action."⁶⁴³

(5) *Hudgins v. Travelers Home & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 107775 (E.D. Pa. July 31, 2013) (Yohn, J.)

The facts of this case are discussed in detail in §9:03(b). In a bad faith action filed by plaintiff against her homeowner's carrier, Travelers, the insurer filed a motion for summary judgment on the bad faith claims. Judge Yohn of the Eastern District of Pennsylvania granted the motion in part and denied it in part, as discussed also in §§10:04(b) and 10:21.

Plaintiff contended that Travelers acted in bad faith when in its motion to dismiss the original complaint it asserted that the plaintiff had not submitted to the appraisal process. Although Travelers did not raise the issue following the filing of an amended complaint, the court found that "the act of asserting a baseless defense alone—even if it is later withdrawn—can cause delay in litigation and cause the insured to incur litigation costs. Thus, Travelers's reliance, even if temporary, on a possibly frivolous interpretation of the insurance contract can constitute bad faith."⁶⁴⁴

Plaintiff also contended that Travelers ceased paying Additional Living Expense (ALE) benefits in bad faith, because the decision to do so was motivated by the fact that plaintiff had sought sanctions against Travelers in the course of litigation. The court noted that Travelers disputed this, but found that there was a genuine issue of material fact preventing summary judgment.

(6) *Rhodes v. USAA Cas. Ins. Co.*, Superior Court of Pennsylvania, Mem. Slip Op., No. 156 WDA 2007 (Pa. Super. Jan. 31, 2008)

In this non-precedential memorandum opinion, discussed in §9:13(a), the Superior Court suggested that §8371 should be interpreted broadly:

Although Section 8371 does not define "bad faith," our decisional law has established that the term as used in the context of insurance coverage can encompass a wide range of objectionable conduct. *Condio [v. Erie Insurance Exchange]*, 899 A.2d 1136 (Pa. Super. 2006), *supra* at 1142. . . .

. . . Thus our decisional law makes clear that an action in bad faith may extend to an insurer's investigative practices or misconduct during the pendency of litigation. *See Hollock [v. Erie Insurance Exchange]*, 842 A.2d 409 (Pa. Super. 2004), *supra* at 415; *O'Donnell [ex rel. Mitro v. Allstate Insurance Company]*, 734 A.2d 901 (Pa. Super. 1999), *supra* at 906-07.⁶⁴⁵

(7) *Precision Door Co., Inc. v. Meridian Mut. Ins. Co.*, 2005 U.S. Dist. LEXIS 17999 (E.D. Pa. Aug. 23, 2005) (Brody, J.)

The facts of this case are discussed in §7:11. As part of its allegations, the insured, Precision Door, asserted that the insurer, Meridian, continued to engage in bad faith conduct during the course of the litigation. In response to a motion for judgment on the pleadings filed by the insurer, Judge Brody of the Eastern District held that the plaintiff would be entitled to introduce bad faith conduct which allegedly occurred during the course of litigation, stating, "The Pennsylvania Superior Court held that 'the conduct of an insurer during the pendency of litigation may be considered as evidence of bad faith under §8371.' *O'Donnell v. Allstate Insurance Company*, 1999 Pa. Super. 161, 734 A.2d 901, 907 (Pa. Super. 1999)."⁶⁴⁶

⁶⁴³ *Kump v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 58266, at *10-11 (M.D. Pa. Apr. 28, 2014).

⁶⁴⁴ *Hudgins v. Travelers Home & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 107775, at *30 (E.D. Pa. July 31, 2013).

⁶⁴⁵ *Rhodes v. USAA Cas. Ins. Co.*, Superior Court of Pennsylvania, mem. slip op., No. 156 WDA 2007 (Pa. Super. Jan. 31, 2008), slip op. at 10, 12.

⁶⁴⁶ *Precision Door Co., Inc. v. Meridian Mut. Ins. Co.*, 2005 U.S. Dist. LEXIS 17999, at *24-25 (E.D. Pa. Aug. 23, 2005).

§10:02 Insurer Correctly Applies Policy Provisions in Denying Third Party Coverage**§10:02(a) – Cases Involving the Duty to Defend****(1) *Hammond v. U.S. Liab. Ins. Co. & Grp.*, 2015 U.S. Dist. LEXIS 9973 (W.D. Pa., Jan. 28, 2015)(Schwab, J.), *aff'd*, 643 F. App'x 92 (3d Cir. 2016) (Ambro, J.), *cert. denied*, 137 S. Ct. 182 (2016)**

Plaintiff Hammond contracted with a company to provide consulting services relating to development of compliance software and began working with a subcontractor. The company began working directly with the subcontractor, and plaintiff terminated his relationship with the company. The company and subcontractor filed a declaratory judgment action relating to ownership of intellectual property issues. Plaintiff had business owners' coverage and technology professional liability policies with defendant USLI, and sought defense and indemnification with the company, but USLI denied coverage. At later stages of the litigation, plaintiff again requested defense and indemnification, but it was denied each time. After settling with the company and subcontractor, plaintiff then filed this bad faith action and USLI filed a motion for judgment on the pleadings. The district court granted judgment on the pleadings. On plaintiff's appeal, the Third Circuit affirmed, in a decision by Judge Ambro discussed also in §§10:07(d) and 7:11(a).

The appellate court agreed with the district court that there was no coverage under the policy because there was no "personal and advertising injury" and because the intellectual property exception barred coverage. Turning to the bad faith claim, the court explained: "Having concluded that USLI owed no duty of indemnity to Hammond, it is hard to conceive how USLI could have acted in bad faith by failing to defend him. In any event, it is a 'rare' case in which an insurer is liable for bad faith when there is no duty to provide coverage."⁶⁴⁷

(2) *Bensalem Racing Ass'n v. Ace Prop. & Cas. Ins. Co.*, 2017 Phila. Ct. Com. Pl. LEXIS 11 (Phila. Jan. 20, 2017) (Djerassi, J.)

Plaintiff was sued in the underlying action after a rider in a horse race died from injuries suffered when a chicken on the racetrack spooked his horse. In the underlying action, the rider's estate sought punitive damages. Plaintiff's commercial umbrella liability carrier, Ace, exercised its rights under the policy and participated in the defense subject to a reservation of rights relating to the punitive damages claim. The underlying action resulted in a jury award in favor of the rider, which included punitive damages in addition to damages under the Wrongful Death and Survival Acts. After post-trial motions, the parties settled with a specified portion of the settlement attributed to compensatory and delay damages and another specified portion attributed to punitive damages. Ace paid its portion of the settlement relating to compensatory and delay damages only. After plaintiff paid the portion of the settlement relating to punitive damages, it filed this breach of contract and bad faith suit. The parties filed cross motions for summary judgment. Judge Djerassi of the Philadelphia Court of Common Pleas granted Ace's motion.

The court explained that the plaintiff could not show that the punitive damages portion of the jury award or settlement was related only to vicarious liability, and therefore, Ace was entitled to summary judgment on the breach of contract count. The court concluded, in short order, that Ace was likewise entitled to summary judgment on the bad faith claim, which was based on the denial of coverage: "Since this court finds that there is no coverage for punitive damages, there can be no bad faith."⁶⁴⁸ The court subsequently filed a Rule 1925 opinion for the appeal.⁶⁴⁹

(3) *Darwin Nat'l Assur. Co. v. Luzerne County Transp. Auth.*, 2016 U.S. Dist. LEXIS 41733 (M.D. Pa. Mar. 30, 2016) (Mannion, J.)

Plaintiff Darwin filed this declaratory judgment action to determine its obligations under a Public Officials Liability and Employment Practices Liability policy issued to Luzerne County Transportation Authority (LCTA). An LCTA employee was criminally charged for actions relating to alleged attempts to defraud PennDOT, following which he tendered the criminal information to plaintiff. Plaintiff made some payments to the employee relating to costs of his defense attorney under a portion of the policy that related to claims seeking only non-monetary relief, which had lower limits than the portion of the policy that applied to claims seeking monetary relief. The employee sought coverage under the portion of the policy that had higher limits. In answering the declaratory judgment complaint, the employee also filed a bad faith counterclaim against plaintiff. After discovery, the parties filed cross motions for summary judgment. Judge Mannion of the Middle District granted plaintiff-insurer's motion on the bad faith claim.

The court explained that even if the court presiding over the criminal proceedings ordered restitution, that would be analogous to punitive damages awarded against a tortfeasor, and would not be insurable. Therefore, the court

⁶⁴⁷ *Hammond v. U.S. Liab. Ins. Co. & Grp.*, 643 F. App'x 92, 97 (3d Cir. 2016) (quoting *Post v. St. Paul Travelers Ins. Co.*, 691 F.3d 500, 524 (3d Cir. Pa. 2012)).

⁶⁴⁸ *Bensalem Racing Ass'n v. Ace Prop. & Cas. Ins. Co.*, 2017 Phila. Ct. Com. Pl. LEXIS 132, at *12 n.17 (Phila. Jan. 20, 2017).

⁶⁴⁹ *Bensalem Racing Ass'n v. Ace Prop. & Cas. Ins. Co.*, 2017 Phila. Ct. Com. Pl. LEXIS 132 (Phila. Mar. 21, 2017) (Djerassi, J.).

concluded that it was not bad faith for plaintiff to provide coverage under the non-monetary-related portion of the policy:

[E]ven if [employee's] criminal proceeding were later determined to seek restitution, allowing greater coverage to the [employee] on this basis would contravene Pennsylvania public policy, which precludes coverage for restitution arising out of criminal acts. [Employee] cannot make out the first element of a bad faith claim, that "the insurer lacked a reasonable basis for denying benefits."⁶⁵⁰

(4) *Mark I Restoration v. Assur. Co. of Am.*, 248 F. Supp. 2d 397 (E.D. Pa. 2003) (Rufe, J.), *aff'd*, 112 F. App'x 153 (3d Cir. 2004) (Sloviter, J.)

Citing *Frog, Switch & Manufacturing Company*, the Third Circuit affirmed holding that an insurer did not act in bad faith by correctly relying upon the pollution exclusion in the liability policy, stating "As this court has previously noted, where there is no duty to defend an insured against a suit, the insurer obviously has good cause to decline to defend."⁶⁵¹

() *Lenick Constr., Inc. v. Selective Way Ins. Co.*, 2016 U.S. Dist. LEXIS 38119 (E.D. Pa. Mar. 23, 2016) (Rufe, J.), *aff'd*, 2018 U.S. Dist. LEXIS 15197 (3d Cir. June 6, 2018) (Hardimann, J.) (business liability policy).

In this case, the court held that the plaintiff insured's "argument that Selective acted in bad faith fails because it has presented no evidence that Selective 'did not have a reasonable basis for denying benefits under the policy and that [it] knew of or recklessly disregarded its lack of reasonable basis.'"

(5) *CAMICO Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP*, 2013 U.S. Dist. LEXIS 91649 (E.D. Pa. June 28, 2013) (DuBois, J.)

Defendant Heffler was an administrator of class action settlement funds. One of its employees diverted funds to people other than the class action plaintiffs, and eventually pled guilty to criminal charges relating to this plan. Members of the settlement class sued Heffler. Plaintiff CAMICO paid for Heffler's defense, while simultaneously filing a declaratory judgment action seeking a declaration that it was not required to pay for the defense. Heffler responded with a bad faith counterclaim. The parties filed cross motions for summary judgment. Judge DuBois of the Eastern District granted CAMICO's motion.

Heffler argued that CAMICO acted in bad faith because it did not have a reasonable basis for its coverage decision. The court disagreed, concluding that because it held the coverage decision was correct, CAMICO could not have acted in bad faith in making such a decision.

Heffler also argued that one of the grounds on which CAMICO argued in litigation supported its decision was raised "belatedly" and thus in bad faith. The court again disagreed. The court concluded that a denial of coverage under that particular exclusion was appropriate, and not in bad faith.

(6) *Lexington Ins. Co. v. Charter Oak Fire Ins. Co.*, 2012 Phila. Ct. Com. Pl. LEXIS 255 (Phila. Sept. 6, 2012), *for appeal*, 2013 Phila. Ct. Com. Pl. LEXIS 12 (Phila. Jan. 3, 2013) (McInerney, J.)

CMX, an engineering firm, had a general liability policy with Hartford and a professional services liability policy with Lexington, procured after CMX was awarded a contract for a storm relief tunneling project. JPC entered into a joint venture contract relating to its bid on a portion of the same project. JPC obtained a commercial general liability policy through Charter Oak; the policy was to provide that CMX was an additional insured. JPC also obtained a commercial umbrella policy with North River. After work began, an employee was injured while riding his bicycle at a work site, and later died of his injuries. His estate filed a personal injury action against JPC and CMX, among others. Charter Oak defended JPC in that action, but the carriers, including Hartford, refused defense of CMX. Lexington ultimately settled the estate's claim against CMX. CMX then filed this breach of contract and bad faith suit against the various insurers and insureds, and Lexington was eventually substituted as plaintiff. North River filed a summary judgment motion, which Judge McInerney of the Philadelphia Court of Common Pleas granted in the earlier of the two above-referenced opinions. Lexington appealed, and Judge McInerney reiterated the reasoning for his grant of summary judgment in the latter opinion.

After reviewing his reasoning that North River had neither a duty to defend nor a duty to indemnify CMX, the court turned to the bad faith claim. The court explained that because the insurer had properly denied coverage under the specified exclusion, the bad faith claim could not stand: "In the case *sub judice*, North River's claims representative denied coverage to CMX based on the professional services exclusion. Lexington claimed North River's application of the exclusion was unreasonable. Since this court already determined that the professional services exclusion applied, it was impossible based on said finding for Lexington to demonstrate that North River lacked a reasonable basis to deny coverage."⁶⁵²

⁶⁵⁰ *Darwin Nat'l Assur. Co. v. Luzerne Cnty. Transp. Auth.*, 2016 U.S. Dist. LEXIS 41733, at *34-35 (M.D. Pa. Mar. 30, 2016).

⁶⁵¹ *Mark I Restoration SVC v. Assur. Co. of Am.*, 112 F. App'x 153, 158 (3d Cir. 2004) (citing *Frog, Switch, & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 751 n.9 (3d Cir. 1999)).

⁶⁵² *Lexington Ins. Co. v. Charter Oak Fire Ins. Co.*, 2013 Phila. Ct. Com. Pl. LEXIS 12, at *21-22 (Phila. Jan. 3, 2013).

(7) *L.R. Costanzo Co. v. Ohio Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 1655 (M.D. Pa. Jan. 6, 2012) (Mariani, J.)

Plaintiff constructed a building for a police commission. The police commission sued plaintiff for property damage after construction was complete. Plaintiff sought coverage under its CGL policy with American Fire, which American Fire denied. Plaintiff then filed this breach of contract and bad faith suit. American Fire filed a motion for summary judgment at the conclusion of discovery. Judge Mariani of the Middle District granted the motion in an opinion also discussed in §10:07(b).

After deciding that the claim against plaintiff sought recovery for faulty workmanship, which was not a covered event, the court turned to the bad faith claim. It found that because there was no coverage, there could be no bad faith: “Because there was no ‘occurrence’ under the policy, Defendants [insurers] did not act in bad faith in denying a defense to Plaintiff in the underlying case.”⁶⁵³

(8) *A.P. Pino & Assocs., Inc. v. Utica Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 91918 (E.D. Pa. July 3, 2012) (Schiller, J.)

Plaintiff insured filed this bad faith suit against E&O insurer, Utica, when Utica refused to defend or indemnify it in the underlying suit. The parties filed cross motions for summary judgment. Judge Schiller of the Eastern District granted Utica’s motion and denied the insured’s. The court explained that it was unclear whether the bad faith claim was brought under common law or statute, so he addressed both. Having concluded that the insurer properly denied coverage, the court found that neither the common law nor statutory bad faith claim could stand: “As the Court has already concluded that Utica did not breach its insurance policy with [insured] APA by failing to defend and indemnify Plaintiffs in the [underlying action], Utica had a reasonable basis in refusing to provide coverage. Thus, Plaintiffs cannot make out a claim of bad faith by Utica.”⁶⁵⁴

(9) *ArcelorMittal Plate, LLC v. Joule Tech. Servs., Inc.*, 2012 U.S. Dist. LEXIS 180512 (E.D. Pa. Dec. 20, 2012) (Schiller, J.)

Plaintiff owns and operates a steel production plant. Defendant Joule provided temporary staffing for plaintiff’s plant. Defendant Joule had a CGL policy with defendant Liberty, under which plaintiff was an additional insured. A worker provided by defendant Joule was injured while at plaintiff’s plant; he subsequently filed suit against plaintiff and a jury awarded him a verdict for \$1,000,000. Plaintiff sought indemnity from defendants for the litigation. Liberty denied the request for indemnity. This breach of contract and bad faith suit followed. The parties filed cross motions for summary judgment. Judge Schiller of the Eastern District granted summary judgment to defendants on the breach of contract claim, finding no coverage for plaintiff for this incident under the policy. Consequently, the court found the bad faith claim legally insufficient. Because plaintiff was not entitled to coverage, the court determined that it could not conclude that Liberty acted in bad faith in denying coverage.⁶⁵⁵

(10) *Markel Ins. Co. v. Young*, 2012 U.S. Dist. LEXIS 81800 (E.D. Pa. June 12, 2012) (Shapiro, J.)

Defendants owned a child care center, and obtained a commercial general liability policy with plaintiff Markel. One of the center’s employees was injured while working and filed suit against defendants. Defendants sought a defense and indemnification from Markel. Plaintiff insurer filed this declaratory judgment action. Defendants filed a counterclaim for statutory bad faith. The parties filed cross motions for summary judgment on the coverage claim. Judge Shapiro of the Eastern District granted the motion, including granting the insurer judgment on the bad faith claim, despite the fact that the parties had not briefed the issue.

The court concluded that the policy did not provide coverage under the circumstances presented in the personal injury action. Noting that the court had severed and stayed the bad faith counterclaim, it explained that defendants “cannot succeed on the merits of her counterclaims because the court has found Markel’s policy denied coverage of the underlying action. No motion practice or trial on the counterclaims is necessary in light of the court’s interpretation of the policy.”⁶⁵⁶

(11) *Foster v. Westchester Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 106726 (W.D. Pa. Sept. 20, 2011), *reconsideration denied*, 2012 U.S. Dist. LEXIS 88274 (W.D. Pa. June 26, 2012) (Flowers Conti, J.)

Foster, an attorney, was sued for malpractice, and sought a defense from his malpractice carrier, Westchester. Westchester denied a defense on the grounds that Foster knew of that potential claim during the application process, but failed to disclose it. Following the denial, Foster filed this suit seeking a declaratory judgment that he was entitled to coverage, and seeking recovery for breach of contract and bad faith. The parties filed cross motions for summary

⁶⁵³ *L.R. Costanzo Co. v. Ohio Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 1655, at *19 (M.D. Pa. Jan. 6, 2012).

⁶⁵⁴ *A.P. Pino & Assocs., Inc. v. Utica Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 91918, at *22 (E.D. Pa. July 3, 2012).

⁶⁵⁵ *ArcelorMittal Plate, LLC v. Joule Tech. Servs., Inc.*, 2012 U.S. Dist. LEXIS 180512, at *19 (E.D. Pa. Dec. 20, 2012).

⁶⁵⁶ *Markel Ins. Co. v. Young*, 2012 U.S. Dist. LEXIS 81800, at *24-25 (E.D. Pa. June 12, 2012).

judgment. Judge Flowers Conti of the Western District granted Westchester's summary judgment motion on the bad faith claim.⁶⁵⁷

Foster claimed that Westchester denied him a defense in the underlying action in bad faith. Westchester pointed to a letter, predating the application, that informed the malpractice plaintiff that because that plaintiff might have a claim, Foster was withdrawing as attorney and placing his carrier on notice. The court found this letter provided reasonable grounds for Westchester to believe that Foster's application was not truthful: "A letter containing what appears to be concerns about potential liability for malpractice and a need to inform an insurance carrier of that situation is certainly reasonable grounds for defendants [Westchester] to believe plaintiff [Foster] may not have been entirely truthful on his policy application."⁶⁵⁸ In addition, the court noted that Westchester had investigated the litigation giving rise to this claim—even before it had discovered the letter—and concluded that Foster should have realized that the potential malpractice claim existed. Based on this evidence, the court found that Foster could not meet his burden of proving that the insurer did not have a reasonable basis to deny coverage.

In addition, the court noted that Foster failed to provide any evidence that Westchester acted with "ill-will, self-interest, or dishonest purpose"⁶⁵⁹ The court concluded that "[t]he lack of proof establishing an essential element of a claim for which plaintiff ultimately bears the burden at trial entitles defendants to summary judgment."⁶⁶⁰

(12) *Treadways LLC v. Travelers Indem. Co.*, 2011 U.S. Dist. LEXIS 47708 (E.D. Pa. May 4, 2011) (Rueter, M.J.), *aff'd*, 2012 U.S. App. LEXIS 5094 (3d Cir. Mar. 12, 2012) (Ambro, J.)

The facts of this third party case are set forth in §10:07(a). After a jury trial resulted in a verdict in favor of Travelers on the remaining issues, Treadways appealed a number of issues, including the grant of summary judgment on the bad faith claim. The Third Circuit, in an opinion by Judge Ambro, affirmed, stating: "Treadways does not argue that Travelers wrongly denied coverage under the policies. Indeed, it admits that the policies precluded coverage. This alone was sufficient for the District Court to dismiss the bad faith claim. Because the claims asserted in the Gonsar Suit were not covered by the policies, Travelers had good cause to deny coverage and cease defending the litigation."⁶⁶¹

(13) *Haines v. State Auto Prop. & Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 28437 (E.D. Pa. Mar. 25, 2010) (Golden, J.), *aff'd*, 2011 U.S. App. LEXIS 4684 (3d Cir. Mar. 9, 2011) (Aldisert, J.)

Plaintiffs had a homeowners' policy with defendant State Auto for two consecutive years. In the 2002-2003 policy, there was coverage for losses arising out of motor vehicle liability if a recreational use vehicle designed primarily for use not on public roads and owned by plaintiffs was on an "insured location," which was defined as "any premises used by you in connection with [residential] premises." In the 2003-2004 policy, the portion of the definition of "insured location" quoted above was deleted. Plaintiffs owned a golf cart. On April 25, 2004, plaintiffs' son was in the golf cart when it struck a boy in an alley near their house. The boy's parents sued plaintiffs in the underlying action; State Auto denied defense and coverage under the applicable '03-'04 policy. Plaintiffs sued the insurer, seeking a declaration that their homeowners' policy provided coverage, and seeking recovery for the insurer's alleged bad faith. The parties filed cross motions for summary judgment. Judge Golden of the Eastern District granted State Auto's motion for summary judgment and denied the plaintiffs' cross motion.

The court engaged in a lengthy discussion of the coverage issue, concluding that State Auto did not owe coverage to plaintiffs under the policy and did not breach its contract in refusing to provide defense and indemnification in the underlying action. The court found the breach of contract and bad faith claims intertwined, and ruled that because State Auto had no duty to defend, plaintiffs could not succeed on their bad faith claim: "Because the accident was not covered under the policy, State Auto has no duty to defend Plaintiffs. In the absence of a duty to defend, Plaintiffs' claims for bad faith must be dismissed."⁶⁶²

The Third Circuit affirmed this decision; it appeared from the opinion that the bad faith decision was not challenged on appeal.

(14) *Nationwide Mut. Fire Ins. Co. v. Nova Real Estate LLC*, 2011 U.S. Dist. LEXIS 20601 (E.D. Pa. Mar. 1, 2011) (Surrick, J.)

Kay alleged that she leased a home from defendant Nova; Nova insured the home through a business owner's policy with Nationwide. A fire at the property injured Kay and killed her son. Kay claimed that the electrical system, which she alleged Nova knew was faulty but negligently never repaired, caused the fire. After receiving the claim

⁶⁵⁷ In a subsequent decision, the court denied defendant insurers' motion for reconsideration of the court's decision on issues related to the breach of contract count. *Foster v. Westchester Fire Ins. Co.*, 2012 U.S. Dist. LEXIS 88274 (W.D. Pa. June 26, 2012).

⁶⁵⁸ *Foster v. Westchester Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 106726, at *38 (W.D. Pa. Sept. 20, 2011).

⁶⁵⁹ *Foster v. Westchester Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 106726, at *39 (W.D. Pa. Sept. 20, 2011).

⁶⁶⁰ *Foster v. Westchester Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 106726, at *40 (W.D. Pa. Sept. 20, 2011).

⁶⁶¹ *Treadways LLC v. Travelers Indem. Co.*, 2012 U.S. App. LEXIS 5094, at *8 (3d Cir. Mar. 12, 2012) (footnote omitted).

⁶⁶² *Haines v. State Auto Prop. & Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 28437, at *21 (E.D. Pa. Mar. 25, 2010) (citing *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 751 n.9 (3d Cir. 1999)).

from Nova, Nationwide denied coverage under the “professional services” exclusion. Kay and the personal representative for her son subsequently filed suit against Nova and others in state court to recover for their injuries. Nova contended that Kay was a squatter, and one of her family members had apologized for starting the fire, but ultimately the parties settled for \$3 million. Nova paid a small part of that, \$50,000, and then assigned its rights against its insurers, including Nationwide, to Kay and the personal representative; the \$50,000 was to be reimbursed if Kay recovered against the insurers.

Nationwide then filed this declaratory judgment action to determine its coverage obligations for the settlement, and Nova filed a counterclaim for bad faith. Nationwide filed a motion for summary judgment. Judge Surrick of the Eastern District granted the motion. The court concluded that Nationwide’s policy did not cover the home, so Nationwide had no obligations under the policy for the Kay claims. Turning to the bad faith counterclaim, the court dismissed it in short order because without coverage, a bad faith claim could not exist:

Since Nationwide has no obligation to provide insurance coverage for the Kay Lawsuit, we will grant summary judgment to Counterclaim Defendant Nationwide on Nova Realty’s remaining claim for bad faith. Nationwide properly denied coverage here. Therefore Nova Realty cannot establish the necessary elements of this bad faith claim.⁶⁶³

(15) *Western World Ins. Co. v. Delta Prop. Mgmt. Inc.*, 2010 U.S. Dist. LEXIS 125296 (W.D. Pa. Nov. 29, 2010) (Schwab, J.)

This case is also discussed in §10:07(d). Delta owned and managed an apartment building. Western World provided general liability insurance for the property. Delta notified the insurer of a possible claim in 2008 after one tenant killed another tenant at the building. Western World informed Delta that it believed the assault and battery exclusion would likely preclude coverage, and reserved its rights to deny coverage in the future. When a wrongful death action was filed in 2009, naming Delta as a defendant, Delta again contacted Western World. In response, the insurer provided a defense but indicated that the punitive damages claim set forth in the complaint would not be covered. The response did not discuss the assault and battery exclusion. Several months later, Western World sent another letter declining coverage pursuant to the assault and battery exclusion and the punitive damages exclusion, but indicated that it would continue to provide a defense until the court ruled on its soon-to-be-filed declaratory judgment action.

Western World filed this declaratory judgment action seeking a declaration that it owed no coverage to Delta in the underlying suit. Delta filed several counterclaims, including one for bad faith. Before Judge Schwab of the Western District were the parties’ cross-motions for summary judgment. The court granted Western World’s motion for summary judgment on the bad faith counterclaim. The court examined the assault and battery exclusion and determined that it applied and precluded coverage. Turning to the bad faith claim, the court found that the 2009 letter did not act as a waiver of the express reservation of rights it set forth with the initial claim, and that Western World did not act in bad faith in subsequently denying coverage:

To the extent one could stretch the language of or omissions from the 2009 letter as some support for the position that Western waived rights previously and explicitly reserved, such a feat still would not come close to the clear and convincing evidence needed to establish waiver, estoppel or bad faith.

. . . [A] reasonable jury could not find, by clear and convincing evidence, that Western waived its reservation of rights or should otherwise be estopped from asserting said rights.⁶⁶⁴

(16) *Empire Fire & Marine Ins. Co. v. Jones*, 739 F. Supp. 2d 746 (M.D. Pa. 2010) (Blewitt, M.J.), adopted by, 739 F. Supp. 2d 746 (M.D. Pa. 2010) (Jones, J.)

Empire provided truckers’ liability insurance to defendant Jones’s business, a coal and trash hauling company. Jones sometimes used the services of Drumheiser on days when he needed extra help. On one such occasion, Drumheiser slipped and fell when he attempted to jump back onto the outside of the truck after loading a bag of trash; the truck ran over his leg, causing serious injuries. Empire filed a declaratory judgment action, seeking a declaration that it did not owe liability coverage with respect to Drumheiser’s injury. Drumheiser filed a counterclaim, including a claim for declaratory relief that he was entitled to liability coverage under the policy, and claims for breach of contract and bad faith. Before Magistrate Judge Blewitt of the Middle District were Empire’s and Drumheiser’s cross-motions for summary judgment. He recommended, and Judge Jones adopted, a finding in favor of Empire.

Drumheiser contended that Empire acted in bad faith in failing to provide first party and “liability coverage benefits.” The court found that the evidence in the record indicated that Empire did pay first party medical coverage, and because Drumheiser provided no evidence to the contrary, failed to create a genuine issue of material fact. The court further found that Empire accurately applied the policy’s liability provisions, and Drumheiser misapprehended

⁶⁶³ *Nationwide Mut. Fire Ins. Co. v. Nova Real Estate LLC*, 2011 U.S. Dist. LEXIS 20601, at *24 (E.D. Pa. Mar. 1, 2011) (citing *Morrison v. Mountain Laurel Assur. Co.*, 2000 Pa. Super. 43, 748 A.2d 689, 691 (Pa. Super. 2000)).

⁶⁶⁴ *Western World Ins. Co. v. Delta Prop. Mgmt. Inc.*, 2010 U.S. Dist. LEXIS 125296, at *12 (W.D. Pa. Nov. 29, 2010).

the purpose of a liability policy. According to the court, Drumheiser had not established that Jones was liable to him for his injuries, which would trigger coverage under the liability policy, so there was no bad faith:

[W]e find that Empire did not act in bad faith by failing to conduct an adequate investigation . . . under Empire’s policy. As stated, Mr. Drumheiser was entitled to benefits under Empire’s policy only in the event that he is sued for injuring some person or property while working for Mr. Jones. As discussed, Mr. Drumheiser is not entitled to recover on his liability claim under the policy. Though Mr. Drumheiser argues that “Empire has repudiated its obligation to provide the agreed upon benefits under the Policy by abjectly refusing to conduct any investigation” . . . he again incorrectly construes the insurance policy’s liability coverage.⁶⁶⁵

(17) *Becker v. Farmington Cas. Co.*, 2010 U.S. Dist. LEXIS 73902 (M.D. Pa. July 22, 2010) (Conner, J.)

Becker and her husband were sued in the underlying action by their grandson’s parents. The allegations stemmed from sexual abuse by Becker’s husband and Becker’s alleged negligence in allowing the abuse to occur. Becker sought defense in that action from Farmington, her homeowners’ insurance provider, but Farmington denied that it had a duty to defend her on several grounds. Becker then brought suit against Farmington seeking a declaration that Farmington owed her a duty to defend and indemnify. Farmington filed a motion to dismiss.

Judge Conner of the Middle District granted Farmington’s motion to dismiss. The primary question before the court was the contractual question of whether the court owed Becker a defense and indemnification where neither was owed to Becker’s husband, also a policyholder. The court relied on Pennsylvania case law and the unambiguous policy language for its conclusion that where the policy excluded coverage for intentional acts by “an insured” such exclusion applied to each other insured as well. The court concluded that Farmington had properly applied the policy language in denying Becker’s request for defense and indemnification and found that bad faith could not exist: “Based on the court’s interpretation of the insurance policy presented herein and the allegations in the underlying state tort action, the complaint does not trigger coverage and, therefore, Farmington has no duty to defend Becker in the underlying suit. This determination also precludes indemnification in the event Becker is found liable.”⁶⁶⁶

(18) *Yellowbird Bus Co., Inc. v. Lexington Ins. Co.*, 2010 U.S. Dist. LEXIS 69554 (E.D. Pa. July 13, 2010) (Robreno, J.), *aff’d*, 450 F. App’x 213 (3d Cir. 2011) (Chagares, J.)

In July 2006, one of Yellowbird’s school buses was in an accident with a truck, resulting in numerous injuries to the children on board the bus. Yellowbird had a \$1 million primary liability policy. Lexington was the excess insurer for Yellowbird. By November 2009, the party at fault in the accident had not yet been resolved. The 65 injury claims were consolidated in state court. By July 2010, only five had not been resolved, and the limits of the Lexington excess policy were close to exhausted.

Yellowbird filed suit seeking a declaration that the excess policy had no aggregate or occurrence limit, and alleging breach of contract and statutory bad faith on the grounds that Lexington was eroding the policy limits with defense costs. Lexington filed a motion to dismiss all claims. Judge Robreno of the Eastern District rejected Yellowbird’s reading of the policy and therefore granted Lexington’s motion to dismiss the declaratory judgment count. The court also granted the insurer’s motion to dismiss the contract and bad faith claims, although it gave Yellowbird leave to amend.

In dismissing the bad faith claim, the court set out the two prong *Terletsky* test and noted that typically “where an insurer has no duty to indemnify under the insurance policy, a claim for bad faith must be dismissed.”⁶⁶⁷ Because the court had found that Lexington had properly applied the provisions of the excess policy, it found that Yellowbird’s bad faith claim, which hinged on a finding of breach of contract, could not stand: “The current complaint does not sufficiently allege a bad faith insurance claim based on the interpretation of the Excess Policy set forth above.”⁶⁶⁸

The Third Circuit affirmed, in a decision authored by Judge Chagares. The court stated that “[w]e will also affirm the dismissal of the claim for . . . bad faith, which similarly rel[ies] on Yellowbird’s erroneous interpretation of the Lexington Policy.”⁶⁶⁹ The court also noted: “Yellowbird’s bad faith claim is also meritless insofar as it purports to rely on other conduct – such as ‘Lexington’s failure to honor Yellowbird’s requests for earlier engagement in discussions to settle.’”⁶⁷⁰

(19) *Morrison v. Wells Fargo Bank, N.A.*, 711 F. Supp. 2d 369 (M.D. Pa. 2010) (Smyser, M.J.)

In 2002, James Eugene Morrison entered into a mortgage for a mobile home on his father’s property with Provident Bank. Stewart Title Guaranty Company acted as the settlement agent and it conducted the title search, prepared the closing documents and issued a title insurance policy to Provident. The mortgage documents erroneously set forth a

⁶⁶⁵. *Empire Fire & Marine Ins. Co. v. Jones*, 739 F. Supp. 2d 746, 2010 U.S. Dist. LEXIS 101046, at *43 (M.D. Pa. Aug. 19, 2010).

⁶⁶⁶. *Becker v. Farmington Cas. Co.*, 2010 U.S. Dist. LEXIS 73902, at *20 (M.D. Pa. July 22, 2010).

⁶⁶⁷. *Yellowbird Bus Co., Inc. v. Lexington Ins. Co.*, 2010 U.S. Dist. LEXIS 69554, at *18 (E.D. Pa. July 13, 2010).

⁶⁶⁸. *Yellowbird Bus Co., Inc. v. Lexington Ins. Co.*, 2010 U.S. Dist. LEXIS 69554, at *20-21 (E.D. Pa. July 13, 2010).

⁶⁶⁹. *Yellowbird Bus Co., Inc. v. Lexington Ins. Co.*, 450 F. App’x 213, 218 (3d Cir. 2011).

⁶⁷⁰. *Yellowbird Bus Co., Inc. v. Lexington Ins. Co.*, 450 F. App’x 213, 218 n.3 (3d Cir. 2011) (citation to record omitted).

lien against the wrong property; property owned by James *Elder* Morrison, who lived in the same town, not the property owned by James Eugene Morrison. This mortgage was later assigned to Wells Fargo. In 2007, Wells Fargo filed a mortgage foreclosure action against James Eugene Morrison. James Elder Morrison's cousin, an attorney, saw the foreclosure notice and notified Wells Fargo that James Eugene Morrison did not own the property sought to be foreclosed and that there was another James E. Morrison who owned property in that town. Wells Fargo then made a claim under the title insurance policy; Stewart Title still did not discover its error and denied the claim. Wells Fargo eventually vacated the foreclosure judgment and dismissed that action.

In 2008, plaintiff James Elder Morrison subdivided the 90-acre property he owned. Because of the purported lien, there was a cloud on the title that affected the price at which he could sell some of the lots. In 2009, plaintiff filed suit against Wells Fargo seeking a release of the mortgage on his property. After the litigation began, Stewart Title provided Wells Fargo's defense. Believing that it would lead to settlement of the claim, Wells Fargo released the mortgage on plaintiff's property, but its attorney (provided by Stewart Title) never had the release recorded. Stewart Title later withdrew its defense on the grounds that the title issues had been resolved; in the course of a *lis pendens* action filed by Wells Fargo's attorney, James Eugene Morrison had the mortgage amount he owed paid off.

Plaintiff continued prosecuting his suit against Wells Fargo, which filed a third party complaint against Stewart Title, alleging, *inter alia*, bad faith in Stewart Title's failure to continue its defense. Stewart Title filed a motion for summary judgment. Magistrate Judge Smyser of the Middle District granted Stewart Title's motion as to the bad faith claim. The court ruled that the applicable title insurance policy clearly set forth that it would provide a defense against actions involving a claim adverse to the insured title. Stewart Title claimed that since the *lis pendens* action it had filed led to resolution and payoff of the mortgage, it was no longer required to continue to defend Wells Fargo in the underlying suit. The court agreed that the duty to defend terminated at the conclusion of the *lis pendens* action and thus, the claim of bad faith for failure to continue to defend Wells Fargo after that point could not stand:

Wells Fargo contends that Stewart Title acted in bad faith by refusing to continue to defend Wells Fargo. That claim necessarily fails in light of our conclusion that Stewart Title's obligations under the policy ended once the mortgage was paid in full. Accordingly, Stewart Title is entitled to summary judgment as to Wells Fargo's bad faith claim.⁶⁷¹

(20) *Scottsdale Ins. Co. v. City of Hazleton*, 2009 U.S. Dist. LEXIS 90029 (M.D. Pa. Sept. 28, 2009) (Caputo, J.), *aff'd*, 400 F. App'x 626 (3d Cir. 2010) (Rendell, J.)

Scottsdale Insurance Company issued the City of Hazleton a public entity policy of insurance. A coverage dispute arose out of a civil rights suit instituted against Hazleton. Hazleton sent notice of the suit to Scottsdale. Within a week, Scottsdale assigned a claims specialist and a law firm to represent the city. Hazleton also retained its own personal counsel, who billed the city directly. Several amended complaints were filed; Scottsdale continued to defend Hazleton pursuant to the reservation of rights. Hazleton lost the civil rights action, leading to an award of attorneys' fees and costs. Scottsdale defended Hazleton through an unsuccessful appeal.

Scottsdale refused to pay either the fees billed by the attorney that Hazleton retained privately or the attorney's fees and costs awarded in the underlying action. Scottsdale filed a declaratory judgment action. Judge Caputo of the Middle District ruled in favor of Scottsdale that it had no duty to cover the claim by Hazleton for its personal counsel fees, or for attorney's fees and costs awarded to the underlying plaintiffs. Accordingly, the court ruled, there was no bad faith:

It is well-settled that, where a court finds no duty to defend or indemnify, a bad faith claim cannot survive "because the court's determination that there was no potential coverage means that the insurer had good cause to refuse to defend [or indemnify]."⁶⁷²

The Third Circuit, in an opinion by Judge Rendell, affirmed summary judgment on the bad faith claim, stating that "[w]e adopt the District Court's cogent analysis. . . ."⁶⁷³

(21) *Letwin v. Rain & Hale LLC*, 2009 Phila. Ct. Com. Pl. LEXIS 96 (Phila. June 17, 2009) (New, J.)

The insurer denied coverage and a defense to its insureds for a workers' compensation claim petition because the allegations were specifically excluded under its general liability and umbrella liability insurance policies. The insureds filed suit and the insurer sought dismissal of the claims for breach of contract and bad faith. Judge New of the Philadelphia Court of Common Pleas found that based on the facts and policy language, the insurer was not in breach of contract because it did not owe a duty to defend or indemnify its insureds. As to the bad faith claim, the court stated, "Moreover, since this court finds that the insurer did not breach the duty to defend, a claim for bad faith cannot exist."⁶⁷⁴

⁶⁷¹ *Morrison v. Wells Fargo Bank, N.A.*, 711 F. Supp. 2d 369, 389 (M.D. Pa. 2010).

⁶⁷² *Scottsdale Ins. Co. v. City of Hazleton*, 2009 U.S. Dist. LEXIS 44861, at *41 (M.D. Pa. May 28, 2009) (quoting *Frog, Switch & Mfg. Co.*).

⁶⁷³ *Scottsdale Ins. Co. v. City of Hazleton*, 400 F. App'x 662, 629 (3d Cir. 2010) (quoting *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 751 n.9 (3d Cir. 1999)).

⁶⁷⁴ *Letwin v. Rain & Hale LLC*, 2009 Phila. Ct. Com. Pl. LEXIS 96, *13-14; n.17 (Phila. June 17, 2009).

(22) *Kister v. W.N. Tuscano Agency, Inc.*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 96 (Somerset Aug. 26, 2009) (Klementik, J.)

Kister was the sole proprietor of a home heating oil company. He sought insurance to cover the oil delivery truck used in his business. Kister retained a broker who contacted Tuscano, the insurer's agent, to obtain a policy. Kister eventually purchased a business auto policy from National Indemnity Company, provided through Tuscano, which contained a general pollution exclusion but also an added endorsement allowing pollution coverage resulting from an upset, overturn or collision of a "covered" auto. During the policy term, one of Kister's employees delivered oil to a customer, after which oil was discovered in the basement, on the ground and around the customer's oil tank. Kister remediated the site in accordance with recommendations from the Pennsylvania Department of Environmental Protection. Kister then filed a claim with National, which National denied on the grounds that the spill was excluded under the policy's pollution exclusion, and the claimed damage was not caused by an upset, overturn or collision of Kister's truck.

The customer sued Kister, who provided for his own defense because National had denied the claim. Kister then filed suit against National, Tuscano and the broker. National filed preliminary objections to Kister's bad faith cause of action under §8371. Judge Klementik of Somerset County Court of Common Pleas dismissed the bad faith count, finding that the insurer reasonably interpreted its own policy language:

We cannot find any allegations made by the Plaintiff [Kister] in the Complaint which would rise beyond a mere insinuation of bad faith on the part of National. As discussed above, National stated, by letter, its reasons for denying Kister's claim. National concluded that the damage suffered by the Plaintiff was excluded by the terms of the pollution exclusion and, because the spill did not occur as a result of an upset, overturn or collision of a "covered" auto, the conditions of endorsement M-4749a were not met. Upon review of the Plaintiffs [sic] Policy, specifically the exclusion and endorsement referenced above, we simply cannot conclude that National acted unreasonably in denying benefits under the policy. We believe that the Plaintiff has failed to show or bring forth any evidence to prove that National did not have a reasonable basis for denying this claim.⁶⁷⁵

(23) *Anglo Am. Inv., LLC v. Utica First Ins. Co.*, 2009 U.S. Dist. LEXIS 15506 (E.D. Pa. Feb. 26, 2009) (Pollak, J.)

In this case, Judge Pollack of the Eastern District dismissed a bad faith claim against Utica First Insurance, finding that the applicable policy contained an Assault and Battery Exclusion which precluded coverage for a claim made by the insured, Pizza Peddler. Because defendant did not have a duty to provide a defense to Pizza Peddler, defendant, as a matter of law, did not breach its contract with Pizza Peddler. "Similarly, defendant did not act in bad faith in violation of 42 Pa. Cons. Stat. §8371 when it refused to provide a defense."⁶⁷⁶

(24) *Pincus v. Chubb Grp. of Ins. Co.*, 2009 U.S. Dist. LEXIS 26599 (E.D. Pa. Mar. 27, 2009) (Ditter, J.)

The underlying plaintiff alleged Pincus sexually assault-ed and raped her. Pincus filed suit for bad faith, contending Great Northern failed to defend him and failed to provide indemnification when he was sued. Great Northern contended the policy terms and exclusions precluded defense and liability coverage. The court granted Great Northern's motion for summary judgment, finding no duty to defend, and therefore no bad faith. "A bad faith claim necessarily fails when the court makes 'a determination that there was no duty to defend, because the court's determination that there was no potential coverage means that the insurer had good cause to refuse to defend."⁶⁷⁷

(25) *Smalanskas v. Indian Harbor Ins. Co.*, 2008 Pa. Dist. & Cnty. Dec. LEXIS 233 (Lackawanna Feb. 15, 2008) (Nealon, J.), *aff'd without opinion*, 970 A.2d 490 (Pa. Super. Feb. 10, 2009)

In this case discussed in §§10:07(d) and 10:15, Smalanskas was defended in a liability action by Indian Harbor, subject to a reservation of rights to deny indemnity. In a later bad faith suit, Smalanskas claimed that Indian Harbor acted in bad faith in failing to conduct a timely and thorough investigation, which would have resulted in an earlier reservation of rights letter. Indian Harbor filed a motion for summary judgment, contending that because it never denied the claim, and instead provided a defense throughout the entire course of the underlying personal injury litigation, bad faith could not be found. Judge Nealon of the Lackawanna County Court of Common Pleas agreed, stating, "Since none of the defendants ever denied Smalanskas any benefits under the insurance policy, Section 8371 cannot serve as the basis for a bad faith claim in this case."⁶⁷⁸

⁶⁷⁵ *Kister v. W.M. Tuscano Agency, Inc.*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 96, at *6-7 (Somerset Aug. 26, 2009).

⁶⁷⁶ *Anglo Am. Inv., LLC v. Utica First Ins. Co.*, 2009 U.S. Dist. LEXIS 15506, at *16 (E.D. Pa. Feb. 26, 2009).

⁶⁷⁷ *Pincus v. Chubb Grp. of Ins. Co.*, 2009 U.S. Dist. LEXIS 26599, at *11-12 (E.D. Pa. Mar. 27, 2009) (citing *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 751 n.9 (3d Cir. 1999)).

⁶⁷⁸ *Smalanskas v. Indian Harbor Ins. Co.*, 2008 Pa. Dist. & Cnty. Dec. LEXIS 233, at *19-20 (Lackawanna Feb. 15, 2008), *aff'd without opinion*, 970 A.2d 490 (Pa. Super. Feb. 10, 2009).

(26) *Selective Way Ins. Co. v. RHJ Med. Ctr., Inc.*, 2008 U.S. Dist. LEXIS 98950 (W.D. Pa. Dec. 8, 2008) (Ambrose, C.J.)

Evanston Insurance Company denied a claim under a Specified Medical Professional Insurance Policy to RHJ Medical Center in connection with a Wrongful Death Action. Chief Judge Ambrose of the Western District granted Evanston's motion for summary judgment on the contract claim, stating, "I find that the Policy unambiguously does not provide coverage for the Wrongful Death Action. Since no coverage applies under the clear terms of the Policy, Evanston had no duty to defend or indemnify the Center with respect to the Wrongful Death Action."⁶⁷⁹ The court also granted summary judgment to the insurer on a bad faith claim, holding, "A finding by the court that an insurer had no duty to defend defeats a[n] insured's claim for bad faith."⁶⁸⁰

(27) *Everett Cash Mut. Ins. Co. v. Ins. Corp. of Hanover*, 2008 U.S. Dist. LEXIS 76815 (M.D. Pa. Sept. 30, 2008) (Connor, J.)

In this case, the court held that the liability insurer had no duty to provide coverage, and granted the insurer's motion for summary judgment on the contract claim. On the bad faith claim, the court also granted the insurer's summary judgment motion, holding, "Given the court's interpretation of the Policy, Hanover did not act in bad faith by virtue of its refusal to defend or indemnify Cupp. Rather, Hanover's interpretation of the Policy was in accord with the contract's objective scope."⁶⁸¹

(28) *Smith v. Cont'l Cas. Co.*, 2008 U.S. Dist. LEXIS 76818 (M.D. Pa. Sept. 30, 2008) (Jones, J.), *aff'd*, 347 F. App'x 812 (3d Cir. 2009) (Barry, J.)

In this case discussed in §10:07(d), interpreting the phrase "professional services" in the policy, Judge Jones of the Middle District granted summary judgment in favor of a liability insurer, holding, "As the Court has determined that Sprecher's activities upon which the Smiths' claims are premised do not fall within the definition of covered 'professional services,' Continental clearly had a reasonable basis for denying coverage."⁶⁸² This decision was affirmed by the Third Circuit, which held that "Continental clearly did have a reasonable basis for the denial of coverage."⁶⁸³

(29) *Prudential Prop. & Cas. Ins. Co. v. Boyle*, 2007 U.S. Dist. LEXIS 63690 (E.D. Pa. Aug. 29, 2007) (Kelly, J.) (homeowner's liability claim)

Prudential denied a liability claim under the Boyles' homeowner's policy because the loss did not assert an "occurrence" which, under the policy, excluded "negligent misrepresentation or omissions of any nature or kind in the sale of real or personal property." Judge Kelly of the Eastern District concluded that Prudential's interpretation of its policy was correct, and it had no duty to defend the Boyles, and therefore had no duty to indemnify them either. With respect to bad faith, the court ruled:

The bad faith claim also failed because there is no duty to defend. "[B]ad faith claims cannot survive a determination that there was no duty to defend, because the court's determination that there was no potential coverage means that the insurer had good cause to refuse to defend. . . ." "It follows that an insurer with no duty to defend or indemnify its insured could not have acted in bad faith in violation of §8371. . . ."⁶⁸⁴

(30) *Gardner v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 42471 (W.D. Pa. June 12, 2007) (Lancaster, J.), *aff'd*, 554 F.3d 553 (3d Cir. 1008) (Padova, J.) (homeowner's exclusion for property rented)

The facts of this case appear in §7:11. The court held that State Farm was correct in its decision to deny a defense in a slip and fall based upon an exclusion that provided the insurance would not apply if the subject premises were rented. According to the court, "under Pennsylvania law, plaintiff's claims for bad faith sounding either in contract or brought pursuant to 42 Pa. C.S.A. §8371 are contingent upon the success of the underlying breach of contract claim."⁶⁸⁵

⁶⁷⁹ *Selective Way Ins. Co. v. RHJ Med. Ctr., Inc.*, 2008 U.S. Dist. LEXIS 98950, at *15 (W.D. Pa. Dec. 8, 2008).

⁶⁸⁰ *Selective Way Ins. Co. v. RHJ Med. Ctr., Inc.*, 2008 U.S. Dist. LEXIS 98950, at *20-21 (W.D. Pa. Dec. 8, 2008) (citing *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 751 n.9 (3d Cir. 1999)).

⁶⁸¹ *Everett Cash Mut. Ins. Co. v. Ins. Corp. of Hanover*, 2008 U.S. Dist. LEXIS 76815, at *23-24 (M.D. Pa. Sept. 30, 2008).

⁶⁸² *Smith v. Cont'l Cas. Co.*, 2008 U.S. Dist. LEXIS 76818, at *44-45 (M.D. Pa. Sept. 30, 2008).

⁶⁸³ *Smith v. Cont'l Cas. Co.*, 347 F. App'x 812, 815 (3d Cir. 2009).

⁶⁸⁴ *Prudential Prop. & Cas. Ins. Co. v. Boyle*, 2007 U.S. Dist. LEXIS 63690, at *12 (E.D. Pa. Aug. 29, 2007) (citing *Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.*, 193 F.3d 742, 751 n.9 (3d Cir. 1999), and *Pizzini v. A.M. Int'l Specialty Lines Ins. Co.*, 249 F. Supp. 2d 569, 570 (E.D. Pa. 2003)).

⁶⁸⁵ *Gardner v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 42471, at *22 (W.D. Pa. June 12, 2007) (citing *Frog, Switch & Mfg. Co. v. Travelers and Lucker Mfg. v. Home*).

(31) *H.L. Libby Corp. v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 50433 (W.D. Pa. July 24, 2006) (Cercone, J.)

In this case finding no bad faith, the court stated, “[A]s the policy did not trigger a duty to defend, Defendants’ denial was clearly legitimate. It is axiomatic that where no duty to defend exists, a bad faith claim regarding the insurer’s denial of coverage must fail.”⁶⁸⁶

(32) *National Recovery Agency, Inc. v. AIG Domestic Claims, Inc.*, 2006 U.S. Dist. LEXIS 278898 (M.D. Pa. May 9, 2006) (Smyser, M.J.)

The facts of this case are discussed in §7:11. Plaintiff Diversified Billing Services (DBS) was insured under an errors and omissions policy issued by Illinois National. A third party filed an amended complaint that named DBS as a defendant. Illinois National denied coverage under the policy. DBS instituted an action for declaratory judgment and bad faith. Magistrate Judge Smyser of the Middle District granted summary judgment in favor of the insurer, finding that none of the counts in the underlying amended complaint were covered by the subject policy. According to the court, “As we have already determined that none of the counts in the amended complaint . . . are possibly within the coverage of the policy, it follows that the defendants cannot be seen to have acted in bad faith within the meaning of 42 Pa. C.S.A. §8371 in denying a defense to DBS.”⁶⁸⁷

(33) *USX Corp. v. Liberty Mut. Ins. Co.*, 444 F.3d 192 (3d Cir. 2006) (Greenberg, J.)

In this case arising out of the interpretation of an employer’s liability policy in connection with hundreds of asbestos claims, the Third Circuit wrote, “[W]e will affirm the grant of summary judgment in favor of Liberty Mutual on this claim because USX’s bad faith claim necessarily fails in light of our determination that Liberty Mutual correctly concluded that there was no potential coverage under the policy.”⁶⁸⁸

(34) *Nutrisystem, Inc. v. Nat’l Fire Ins. Co. of Hartford*, 2004 U.S. Dist. LEXIS 23496 (E.D. Pa. Nov. 19, 2004) (McLaughlin, J.)

The plaintiff corporation filed suit against its insurer when the insurer refused to defend the corporation in a lawsuit brought by several of the corporation’s franchisees. Judge McLaughlin of the Eastern District held that the insurance company was not obligated to defend the corporation in the underlying action because there was no coverage by virtue of exclusions for claims arising from a breach of contract, or claims arising from oral or written publication of material, if done with knowledge of its falsity. Citing *Frog, Switch*, the court also granted summary judgment in favor of the insurer on the §8371 claim, stating, “Under Pennsylvania law, ‘bad faith claims cannot survive a determination that there was no duty to defend, because the court’s determination that there was no potential coverage means that the insurer had good cause to refuse to defend.’”⁶⁸⁹

(35) *Philadelphia Indem. Ins. Co. v. Fed. Ins. Co.*, 2004 U.S. Dist. LEXIS 9686 (E.D. Pa. Mar. 26, 2004) (McGirr Kelly, J.)

On January 30, 2001, Philadelphia Indemnity was sued by its insured, Insureon.com, but failed to notify its insurers, Federal Insurance and Chubb, until May 2002. Philadelphia Indemnity and Insureon.com settled the suit for \$1.6 million in June 2002. Federal Insurance and Chubb initially refused to provide authority in contribution for the settlement on the basis that Philadelphia Indemnity’s notice of the claim may have been untimely under the policy language. The insurers ultimately sent Philadelphia Indemnity a check for \$350,000 in settlement of the coverage case.

Philadelphia Indemnity filed a lawsuit alleging, *inter alia*, breach of contract and bad faith. The insurers filed a motion for summary judgment. Judge James McGirr Kelly of the Eastern District granted the insurers’ motion for summary judgment. The court ruled first that Philadelphia Indemnity’s notice to the insured was untimely, and therefore the company did not fulfill the condition precedent to coverage under the policy.

With respect to the bad faith claim, the court ruled that the insurers’ conduct was reasonable. According to the court, under the applicable policy, Philadelphia Indemnity was required to obtain the insurers’ approval before incurring defense costs; instead, Philadelphia Indemnity had been defending itself for nearly 16 months prior to giving notice to the insurers. The insurers had appropriately issued a reservation of rights letter and, at the time, “reasonably believed that Philadelphia Indemnity had forfeited coverage under the policy by failing to timely comply with the notice provision.”⁶⁹⁰ Accordingly, the court ruled that the insurer’s action could not form the basis for a bad faith claim.

⁶⁸⁶ *H.L. Libby Corp. v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 50433, at *21 (W.D. Pa. July 24, 2006).

⁶⁸⁷ *National Recovery Agency, Inc. v. AIG Domestic Claims, Inc.*, 2006 U.S. Dist. LEXIS 27889, at *32 (M.D. Pa. May 9, 2006).

⁶⁸⁸ *USX Corp. v. Liberty Mut. Ins. Co.*, 444 F.3d 192, at *29 (3d Cir. 2006).

⁶⁸⁹ *Nutrisystem, Inc. v. Nat’l Fire Ins. Co. of Hartford*, 2004 U.S. Dist. LEXIS 23496, at *24 n.3 (E.D. Pa. Nov. 19, 2004) (citing *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 751 n.9. (3d Cir. 1999)).

⁶⁹⁰ *Philadelphia Indemn. Ins. Co. v. Fed. Ins. Co.*, 2004 U.S. Dist. LEXIS 9686, at *30 (E.D. Pa. May 26, 2004).

(36) *TIG Specialty Ins. Co. v. Koken*, 855 A.2d 900 (Pa. Commw. 2004) (per curiam)

In a case dealing with the language of a directors and officers liability insurance policy exclusion, the Commonwealth Court sided with the insurer in finding no coverage, and agreed that the bad faith claim should be dismissed as well, stating, “given our determination that TIG’s denial of coverage was appropriate, the bad faith claim necessarily failed.”⁶⁹¹

(37) *Miller v. Quincy Mut. Fire Ins. Co.*, 2003 U.S. Dist. LEXIS 24095 (E.D. Pa. Dec. 4, 2003) (Yohn, J.)

In this case arising out of the alleged sexual harassment of an employee, the insurer, Quincy Mutual, disclaimed coverage for defense and indemnity to the defendants in the sexual harassment suit. Judge Yohn of the Eastern District agreed with the insurer that it was not obligated under the policy language to provide a defense or indemnity with respect to that suit. In the later bad faith action, the court granted the insurer’s motion to dismiss, stating, “I also find that Quincy did not act in bad faith. . . . [Plaintiff’s] claim that Quincy acted in bad faith fails because there was no coverage and Quincy never had a duty to defend the underlying suit.”⁶⁹²

(38) *Women’s Christian All. v. Exec. Risk Indem., Inc.*, 2003 U.S. Dist. LEXIS 12188 (E.D. Pa. July 3, 2003) (Surrick, J.)

The insured sought coverage under a liability insurance policy for litigation arising out of a claim of disability discrimination by one of the insured’s former employees. The insurer had denied coverage because notice of the claim was untimely. In granting the insurer’s motion for summary judgment, Judge Surrick of the Eastern District found that under a claims made policy, the insurance company did not need to show prejudice before denying a claim that was untimely submitted. Since the insurer properly denied coverage, the court ruled that plaintiff’s bad faith claim was without merit, and entered judgment in favor of the insurer.

(39) *Pizzini v. Am. Int’l Specialty Lines Ins. Co.*, 249 F. Supp. 2d 569 (E.D. Pa. 2003) (Brody, J.)

Citing *Frog, Switch & Manufacturing Co.* and *Lucker*, Judge Brody granted a liability insurer’s motion for summary judgment, holding, “Under Pennsylvania law, a bad faith claim is contingent on the success of the underlying breach of contract claim.”⁶⁹³ According to the court, “[a]n insurer with no duty to defend or indemnify its insureds could not have acted in bad faith in violation of §8371.”⁶⁹⁴ In a footnote, the court recognized that “only in rare circumstances, for example, where a procedural shortcoming bars the breach of contract claim, may a bad faith claim survive the dismissal of the breach of contract claim.”⁶⁹⁵

(40) *Coregis Ins. Co. v. Salmanson & Falcao, LLC*, 2002 U.S. Dist. LEXIS 8992 (E.D. Pa. May 13, 2002) (Hutton, J.)

In this case, Judge Hutton of the Eastern District granted the insurer’s motion for summary judgment on the insured’s bad faith counterclaim. The court reasoned that because the insurer’s denial of indemnification was proper and reasonable, the insured could not maintain a bad faith claim on this ground, noting that “the court of appeals has consistently dismissed bad faith denial of coverage claims in cases in which there is no duty to defend and indemnify.”⁶⁹⁶

(41) *Green Mach. Corp. v. Zurich Am. Ins. Grp.*, 2001 U.S. Dist. LEXIS 13378 (E.D. Pa. Aug. 24, 2001) (McLaughlin, J.)

Judge McLaughlin of the Eastern District granted the insurer’s motion for summary judgment, holding that the underlying claims for patent infringement did not constitute “advertising injury” under the policy and thus upholding the insurer’s denial of coverage. The court also dismissed the plaintiff’s bad faith claim, holding that, “Under Pennsylvania law, ‘bad faith claims cannot survive a determination that there was no duty to defend, because the court’s determination that there was no potential coverage means that the insurer had good cause to refuse to defend.’”⁶⁹⁷

(42) *Home Ins. Co. v. Powell*, 1997 U.S. Dist. LEXIS 8213 (E.D. Pa. June 9, 1997) (Reed, J.)

This case involved a professional liability insurance policy and whether the insurer was obligated to defend an attorney accused of malpractice. Judge Reed held that there was no duty to defend and indemnify, and “if an insurer has no duty to defend or indemnify its insured, the insured cannot maintain a bad faith cause of action.”

⁶⁹¹ *TIG Specialty Ins. Co. v. Koken*, 2004 Pa. Commw. LEXIS 579, at *41 (Pa. Commw. July 8, 2004).

⁶⁹² *Miller v. Quincy Mut. Fire Ins.*, 2003 U.S. Dist. LEXIS 24095, at *37 (E.D. Pa. Dec. 4, 2003).

⁶⁹³ *Pizzini v. American Am. Int’l Specialty Lines Ins. Co.*, 249 F. Supp. 2d 569, 570 (E.D. Pa. 2003).

⁶⁹⁴ *Pizzini v. American Am. Int’l Specialty Lines Ins. Co.*, 249 F. Supp. 2d 569, 570 (E.D. Pa. 2003).

⁶⁹⁵ *Pizzini v. American Am. Int’l Specialty Lines Ins. Co.*, 249 F. Supp. 2d 569, 570 (E.D. Pa. 2003).

⁶⁹⁶ *Coregis Ins. Co. v. Salmanson*, 2002 U.S. Dist. LEXIS 8992, at *18 (E.D. Pa. May 13, 2002).

⁶⁹⁷ *Green Mach. Corp.*, 2001 U.S. Dist. LEXIS 13378, at *18 (E.D. Pa. Aug. 24, 2001) (quoting *Frog Switch & Mfr. Co. v. Travelers Ins. Co.*, 193 F.3d 742 (3d Cir. 1999)).

(43) *Hyde Athletic Indus., Inc. v. Cont'l Cas. Co.*, 969 F. Supp. 289 (E.D. Pa. 1997) (Cahn, C.J.)

In this environmental clean-up case, the policyholders filed suit against numerous insurers alleging that they acted in bad faith in refusing to defend and/or indemnify the policyholders in connection with an environmental liability action. The insurers had denied coverage on several bases, including the existence of a “pollution exclusion” in the applicable policy. The Eastern District, per Chief Judge Cahn, held that there can be no bad faith where there is no duty to defend or indemnify. The court further noted that it was not bad faith for an insurance company to give its own interest the same consideration it would give to the insured’s interests:

While an insurance company has a duty to accord the interest of its insured the same consideration it gives its own interests, an insurer is not “bound to submerge its own interest in order that the insured’s interest may be made paramount,” . . . and an insurer does not act in bad faith by investigating and litigating legitimate issues of coverage. The court granted summary judgment in favor of the insurers on the bad faith claim.

(44) *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808 (3rd Cir. 1994) (Becker, J.)

In this case, the Third Circuit ruled that the insurer, The Home Insurance Company, properly disclaimed coverage for a third party lawsuit because there was no “property damage” as defined by the policy language. In a footnote, the Third Circuit determined that the policy-holder’s bad faith claim was also subject to dismissal, stating, “Because we find that The Home was in breach of neither its duty to defend nor its duty to indemnify, it did not act in bad faith and did not violate 42 Pa. Cons. Stat. Section 8371.”⁶⁹⁸

(45) *NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos.*, 2009 U.S. Dist. LEXIS 92991 (E.D. Pa. Oct. 1, 2009) (Baylson, J.)

This case is discussed in greater detail in §10:07(a). Defendant Empire, an auto liability insurer, exhausted its policy limits in settling two claims against the plaintiff-insureds, then denied coverage for a third claim because the limits had been exhausted. The policy language provided that the duty to defend and indemnify were terminated once the policy limits were paid out. In a bad faith action, plaintiffs contended that the earlier settlements were completed in bad faith, leaving them open to personal liability.

Judge Baylson of the Eastern District rejected plaintiffs’ claims, finding that plaintiffs “have not pointed to a single case where an insurer settling ‘too early’ has been found to be in breach of good faith.”⁶⁹⁹ Instead, the court ruled, “an insurer is under no obligation to wait to settle a claim until all possible claims have been filed.”⁷⁰⁰ The court granted the insurer’s motion for judgment on the pleadings, and dismissed the breach of contract and bad faith complaint.

§10:03 Insurer Correctly Applies Policy Provisions in Determining First Party Claim

§10:03(a) — Cases, Auto

(1) *Bish v. Am. Collectors Ins., Inc.*, 2017 U.S. Dist. LEXIS 35205 (W.D. Pa. Mar. 13, 2017) (Eddy, M.J.)

Plaintiff Mr. Bish was hit by a car when he was a pedestrian alongside a road, and after resolution of his claim against the other driver, he sought UIM benefits from his antique auto carriers, ACI and ABI. The carriers denied the claim on the grounds that it was not covered under their policies. Plaintiff and his wife filed a bad faith suit against the carriers, which moved to dismiss. Magistrate Judge Eddy of the Western District granted the motion.

The court reviewed the policy language and determined that it did not apply to the claim. Because the bad faith claim was premised on the denial of coverage, the court found that the bad faith claim could not survive: “Because plaintiffs cannot state a breach of contract claim against ABI or ACI, it follows that their remaining claims for bad faith and loss of consortium likewise must be dismissed with prejudice as these claims are predicated on the denial of benefits under the antique automobile insurance policy.”⁷⁰¹

(2) *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 63209 (W.D. Pa. Apr. 14, 2015) (Mitchell, M.J.), adopted by, 2015 U.S. Dist. LEXIS 62716 (W.D. Pa. May 13, 2015) (Conti, J.)

Plaintiff was the named insured under an auto policy with Titan, and because he resided with his mother, was an insured under her auto policy with defendant State Farm. Following an accident, he sought first party medical benefits from State Farm, which paid the benefits and then was reimbursed by Titan. Plaintiff then sought extraordinary medical benefits from State Farm, which denied coverage. Plaintiff then filed this breach of contract and bad faith action and State Farm filed a motion to dismiss. Magistrate Judge Mitchell of the Western District recommended granting the motion, and Judge Conti subsequently adopted the order.

⁶⁹⁸ *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 821 (3d Cir. 1994).

⁶⁹⁹ *NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos.*, 2009 U.S. Dist. LEXIS 92991, at *31 (E.D. Pa. Oct. 1, 2009).

⁷⁰⁰ *NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos.*, 2009 U.S. Dist. LEXIS 92991, at *33 (E.D. Pa. Oct. 1, 2009) (citing *Anglo-Am. Ins. Co. v. Molin*, 670 A.2d 194, 198 (Pa. Commw. Ct. 1995)).

⁷⁰¹ *Bish v. Am. Collectors Ins., Inc.*, 2017 U.S. Dist. LEXIS 35205, at *12 (W.D. Pa. Mar. 13, 2017).

The court concluded that because there was an auto policy with higher priority than the State Farm policy, State Farm properly denied coverage. The court then turned to the bad faith claim, which was premised on an alleged bad faith denial of coverage and recommended dismissing that claim: “[B]ecause Plaintiff cannot state a claim for breach of the insurance contract, his bad faith claim also must fail because State Farm was under no obligation to provide extraordinary medical benefits to Plaintiff under his mother’s policy and therefore had a reasonable basis for denying coverage of said benefits.”⁷⁰² Judge Conti subsequently adopted the recommendation without substantive discussion.

(3) *Davis v. Allstate Prop. & Cas. Co.*, 2014 U.S. Dist. LEXIS 138022 (E.D. Pa. Sept. 30, 2014) (Gardner, J.)

Plaintiff’s husband died following an auto accident and plaintiff thereafter sought UIM benefits from their auto carrier, defendant Allstate. Allstate maintained that plaintiff had reduced the amount of UIM benefits under the policy by signing a step-down form, and paid out the limits it contended applied; plaintiff contended that such reduction was not valid because her husband did not also sign the form, and therefore, she was entitled to higher limits. Plaintiff filed suit, alleging breach of contract and both common law and statutory bad faith. Defendant Allstate filed a motion to dismiss. Judge Gardner of the Eastern District granted the motion as to the bad faith claims.

The court concluded that the step-down form worked to reduce the amount of available UIM benefits, even though only plaintiff, and not her husband, signed the form. Turning to the §8371 claim, the court held: “plaintiff’s bad faith claim fails as a matter of law because a correct determination of coverage precludes a bad faith claim predicated on a theory that the insurer unreasonably denied coverage.”⁷⁰³

(4) *Rogers v. Harleysville Ins.*, Berks Co. CCP No.: 14-674 (Jan. 21, 2016), *aff’d*, 2016 Pa. Super. Unpub. LEXIS 3339 (Pa. Super. Sept. 13, 2016) (Platt, J.) (commercial auto policy and inland marine policy claims)

Plaintiff-appellant had a commercial auto policy and an inland marine policy with defendant-appellee Harleysville. After his work vehicle was destroyed in a fire, he sought several types of benefits from appellee: replacement cost for the vehicle; replacement cost of the tools inside the vehicle; the cost of the rental van; and benefits for lost revenue. Appellee filed a summary judgment motion, which was granted by the Berks County Court of Common Pleas; appellant appealed. The Superior Court affirmed, in this decision written by Judge Platt.

The appeals court found that trial court appropriately concluded that the auto policy provided for damages to the van of actual cash value, not replacement cost, and therefore the benefits paid were proper under the contract and could not have been in bad faith: “[B]ased on the insurance policy’s clear and unambiguous language, Appellant failed to prove either that Appellee breached the terms of the policy or acted in bad faith by refusing to reimburse Appellant for the replacement cost of the van, and instead offering him cash value.”⁷⁰⁴ The appeals court also concluded that the other types of benefits, sought under the inland marine policy, either were properly calculated and paid or were properly denied as not covered under that policy. As a result, the court held that “Appellant failed to establish that Appellee breached the insurance policy or acted in bad faith in denying the uncovered claims.”⁷⁰⁵

(5) *Albert v. Erie Ins. Exch.*, 2013 PA Super. 59 (Mar. 20, 2013) (Lazarus, J.)

Appellant insured was involved in an automobile accident, and was joined in the underlying personal injury action as an additional defendant. The insured had a personal automobile policy with appellee Erie Insurance, which provided counsel to defend its insured in the suit. During the course of the suit, the insured was deposed, which resulted in the insured losing wages and incurring travel expenses. Erie’s policy provided that the company would pay “reasonable expenses anyone we protect may incur at our request to help us investigate or defend a claim or suit.” The insured sued Erie for recovery of these costs, alleging counts for breach of contract and bad faith. The insured also sought a declaratory judgment that Erie was obligated to notify policyholders of provisions relating to lost wages and expenses.

The Court of Common Pleas of Philadelphia County granted the insurer’s preliminary objections. The insured appealed. The Superior Court, in a majority opinion by Judge Lazarus, affirmed the order.

Following its decision that Erie had no duty to affirmatively notify its policyholders of the relevant policy provisions and therefore did not breach the contract, the court turned to the bad faith claim. The court concluded that because the insurer had not breached the contract, the bad faith claim was legally insufficient: “[B]ecause Erie had no duty to inform the insureds of the benefit, and no duty to pay the reimbursement benefits in the absence of a request, [the insured] could not establish a claim for bad faith.”⁷⁰⁶ The dissent, written by Judge Colville, agreed with dismissal of the bad faith claim, also noting that the claim could not stand because Erie had not denied a claim for benefits.⁷⁰⁷

⁷⁰² *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 63209, at *13 (W.D. Pa. Apr. 14, 2015).

⁷⁰³ *Davis v. Allstate Prop. & Cas. Co.*, 2014 U.S. Dist. LEXIS 138022, at *25 (E.D. Pa. Sept. 30, 2014).

⁷⁰⁴ *Rogers v. Harleysville Ins.*, 2016 Pa. Super. Unpub. LEXIS 3339, at *11-12 (Pa. Super. Sept. 13, 2016).

⁷⁰⁵ *Rogers v. Harleysville Ins.*, 2016 Pa. Super. Unpub. LEXIS 3339, at *14 (Pa. Super. Sept. 13, 2016).

⁷⁰⁶ *Albert v. Erie Ins. Exch.*, 2013 PA Super. 59, 2013 Pa. Super. LEXIS 146, at *17 (Mar. 20, 2013).

⁷⁰⁷ *Albert v. Erie Ins. Exch.*, 2013 PA Super. 59, 2013 Pa. Super. LEXIS 146, at *18 (Mar. 20, 2013).

(6) *Mihalisis v. Progressive N. Ins. Co.*, 2009 U.S. Dist. LEXIS 91192 (M.D. Pa. Apr. 2, 2009) (Nealon, J.)

Mrs. Mihalisis was getting out of her car in a store parking lot when she slipped on ice and injured herself. Progressive provided the auto policy to Mr. and Mrs. Mihalisis and denied first party medical benefits on the grounds that the injuries did not arise out of use or maintenance of a motor vehicle. Mr. and Mrs. Mihalisis filed suit alleging breach of contract, and bad faith. Progressive filed a motion to dismiss, which Judge Nealon of the Middle District granted. The court analyzed the case law and held that Progressive properly applied the policy provisions in determining that Mrs. Mihalisis's injuries did not arise out of her use or maintenance of a motor vehicle. The court granted Progressive's motion to dismiss all claims, including the §8371 claim.

(7) *Nationwide Mut. Ins. Co. v. Brown*, 2005 U.S. Dist. LEXIS 25417 (W.D. Pa. Sept. 8, 2005) (Hardiman, J.)

Plaintiff husband and wife were injured in an accident where the husband was operating his motorcycle with his wife as passenger. Judge Hardiman of the Western District found in favor of the insurer on the coverage issue, holding that the couple's claim was precluded by a valid household exclusion and set-off provision from recovering UM benefits under their two other policies. The court granted summary judgment in favor of the insurer with respect to a bad faith claim based on this aspect, stating, "The Court's ruling regarding the household exclusion and the set-off clause disposes of the Brown's claim that Nationwide acted in bad faith when it relied upon those provisions."⁷⁰⁸

(8) *Corley v. Infinity Leader Ins. Co.*, 113 F. App'x. 478 (3d Cir. 2004) (Van Antwerpen, J.)

The plaintiff was seriously injured on a motorcycle operated by her husband when an automobile turned in front of the motorcycle. She recovered the monetary policy limits from the insurer of the automobile and the insurer covering her husband's motorcycle. The plaintiff also submitted a UIM claim to Infinity, which provided coverage pursuant to a commercial policy on a dump truck issued to her husband. Infinity denied the claim on the grounds that the motorcycle was not a listed vehicle on the commercial policy.

Judge Van Antwerpen of the Third Circuit affirmed the opinion by Judge Lancaster of the Western District and found in favor of the insurer. The Third Circuit ruled that the commercial policy did not provide UIM coverage for accidents arising out of the use of the motorcycle. The plaintiff claimed that Infinity acted in bad faith because it refused to arbitrate the dispute as provided under the UIM provision of the policy. The court rejected this argument, finding that the dispute whether the plaintiff's injuries were covered by the dump truck policy fell outside the arbitration clause, and therefore the company did not act in bad faith.

(9) *Nationwide Mut. Ins. Co. v. Harris*, 53 Pa. D. & C.4th 117 (Fayette 2001) (Solomon, J.)

The insurer filed a declaratory judgment action against Harris alleging that her UIM claim was not covered under the policy. In response, Harris alleged that the insurer acted in bad faith when it filed the declaratory judgment action because it knew that the policy provided for arbitration in the event of a dispute.

Judge Solomon of Fayette County agreed with the insurer that the coverage issue was not subject to the arbitration clause. Therefore, according to the court, "since the . . . policy does not require that this matter be submitted to arbitration, the bad faith claim made by [Harris] will be dismissed."⁷⁰⁹

(10) *Booze v. Allstate Ins. Co.*, 750 A.2d 877 (Pa. Super. 2000) (Beck, J.)

In this class action lawsuit, the plaintiffs alleged that the automobile insurers violated the Pennsylvania Motor Vehicle Financial Responsibility Law. With respect to limited tort option forms used in the application process, the Superior Court rejected the plaintiffs' bad faith claim, noting that the defendant insurers used tort coverage selection forms provided by the Pennsylvania Department of Insurance. The court stated that it "would not find that [the insurers] committed bad faith in using documents approved by the very body which regulates them."⁷¹⁰

(11) *Zampirri v. Hartford Ins. Co.*, 1993 U.S. Dist. LEXIS 17579 (E.D. Pa. Dec. 14, 1993) (Kelly, J.), *aff'd without opinion*, 31 F.3d 1175 (3d Cir. 1994)

The plaintiff was a Pennsylvania resident insured by the defendant Hartford in Pennsylvania. The plaintiff was involved in an auto accident in New Jersey with a New Jersey resident. The insured sought to recover against the New Jersey driver, but was barred from doing so by New Jersey's "Deemer Statute," which subjects out-of-state drivers to a "serious injury" threshold in order to recover. The insured then sought to recover underinsured motorist benefits from his own insurer, Hartford. Hartford denied his claim on the ground that its obligation to provide uninsured motorist benefits had not been triggered because the New Jersey driver's policy was not exhausted. The plaintiff alleged that the insurer's failure to provide prior notice of the limitations of his insurance coverage constituted bad faith under §8371. The court disagreed with the plaintiff's contention and concluded that the insurer had no duty to explain every contingency that could affect its coverage outside of Pennsylvania.⁷¹¹

⁷⁰⁸ *Nationwide Mut. Ins. Co. v. Brown*, 2005 U.S. Dist. LEXIS 25417, at *17-19 (W.D. Pa. Sept. 8, 2005).

⁷⁰⁹ *Nationwide Mut. Ins. Co. v. Harris*, 53 Pa. D. & C.4th 117, 121 (Fayette 2001).

⁷¹⁰ *Booze v. Allstate Ins. Co.*, 2000 Pa. Super. LEXIS 376, at *11 (Apr. 12, 2000).

⁷¹¹ For a case following *Zampirri*, see *Treski v. Kemper Nat'l Ins. Co.*, 674 A.2d 1106 (Pa. Super. 1996).

(12) Ervais v. Fireman’s Fund Ins. Co., 1992 U.S. Dist. LEXIS 8249 (E.D. Pa. June 11, 1992) (Yohn, J.)

The insurer denied automobile liability benefits because the claimant son was a student living away from home and was therefore not a “family member” under the policy. The court held that the insurer had reasonable and legitimate grounds to dispute the claim and was therefore not acting in bad faith.

(13) Guglielmelli v. State Farm Mut. Auto. Ins. Co., 2014 U.S. Dist. LEXIS 173340 (E.D. Pa. Dec. 16, 2014) (Goldberg, J.)

Plaintiff was injured in an auto accident, following which he sought UIM benefits from his auto carrier, defendant State Farm. Following a dispute about the validity of a sign-down form reducing the amount of UIM benefits and the application of stacking based on a subsequently purchased commercial policy, plaintiff filed this breach of contract and bad faith action. The parties filed cross motions for summary judgment. Judge Goldberg of the Eastern District granted State Farm’s motion and denied plaintiff’s.

The court concluded that the sign-down form was valid and bound plaintiff and that the subsequently-purchased commercial policy did not provide for stacking with respect to the personal policy. Thus, “[b]ecause I find that State Farm provided Plaintiff with the amount of money due under the policy, judgment is granted in State Farm’s favor with regard to Plaintiff’s bad faith claim brought under 42 Pa. C.S. §8371.... Where the policy does not provide for the specific coverage requested, an insurer has good cause to deny coverage.”⁷¹²

(14) Hackbarth v. Nationwide Mut. Ins. Co., 2014 U.S. Dist. LEXIS 92971 (W.D. Pa. July 9, 2014) (Cohill, J.)

Plaintiff slipped and fell while getting into his car in an icy parking lot. He sought first party benefits from his auto insurer, defendant Nationwide, which denied benefits under the policy. Plaintiff filed this declaratory judgment and bad faith suit. Nationwide filed a motion to dismiss. Senior Judge Cohill of the Western District of Pennsylvania granted the motion. The court concluded that defendant was entitled to dismissal of the declaratory judgment claim because the policy did not provide coverage under the circumstances because the injury did not result from use of a motor vehicle as a motor vehicle. Therefore, the bad faith denial of benefits claim could not stand, a conclusion the plaintiff did not dispute.⁷¹³

(15) Costello v. Gov’t Emps. Ins. Co., 2010 U.S. Dist. LEXIS 28511 (M.D. Pa. Mar. 25, 2010) (Vanaskie, J.)

This case is also discussed in §§10:07(a), 10:13(a) and 10:17. Plaintiffs were insured by defendant GEICO for the car they owned. In the course of plaintiff Mr. Costello’s employment with the state, he was driving a state-owned car when he was in an accident. GEICO subsequently paid a first party benefit claim for medical and wage loss benefits. Thereafter, plaintiffs notified defendant of a possible underinsured motorist (UIM) claim. GEICO advised plaintiffs that the “regular use” exclusion might result in a denial of the claim. Following plaintiffs’ submission of the UIM claim, GEICO investigated and denied the claim.

Plaintiffs filed suit alleging, *inter alia*, bad faith. GEICO filed a motion for judgment on the pleadings, which was granted by Judge Vanaskie of the Middle District. Given that the “regular use” exclusion had been well litigated in the courts, the court ruled that defendant GEICO acted reasonably: “As the ‘regular use’ exception is applicable in this situation, has been historically enforced, and is not a violation of public policy, ...there is no basis to find that Defendants [sic] acted in bad faith.”⁷¹⁴ The court concluded that “no reasonable jury could find under a clear and convincing evidence standard that these actions amount to reckless disregard.”⁷¹⁵

(16) McCleester v. State Farm Mut. Auto. Ins. Co., 2009 U.S. Dist. LEXIS 90345 (M.D. Pa. Sept. 30, 2009) (Vanaskie, J.)

In February 2005, plaintiff was driving a truck on the highway in the course of his employment. A boy threw a rock that went through his windshield and caused him serious injury. Following the accident, plaintiff began receiving workers’ compensation benefits. Plaintiff also sought, through counsel, wage loss benefits from his personal auto policy insurer, defendant State Farm. State Farm denied those benefits based on the facts as it understood them, from a letter written by plaintiff’s attorney; plaintiff’s attorney never made plaintiff available for a statement as requested by State Farm. The reason for State Farm’s denial was that the injuries did not arise out of maintenance or use of a motor vehicle.

Plaintiff filed suit alleging breach of contract, statutory bad faith, and seeking a declaration that the policy provided first party wage loss benefits. Following discovery, the parties filed cross motions for summary judgment. Judge Vanaskie of the Middle District granted defendant State Farm’s motion.

Following analysis of the case law, the court concluded that State Farm had correctly interpreted the policy provision because it was not the use or maintenance of the motor vehicle that caused the injury, it was the intentional

⁷¹² *Guglielmelli v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 173340, at *22 n.11 (E.D. Pa. Dec. 16, 2014).

⁷¹³ *Hackbarth v. Nationwide Mut. Ins. Co.*, 2014 U.S. Dist. LEXIS 92971, at *27 (W.D. Pa. July 9, 2014) (quoting *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360, 370 (E.D. Pa. 2011), and *Wiedinmyer v. Harleysville Mut. Ins. Co.*, 42 Pa. D. & C.4th 204 (Montgomery 1999)).

⁷¹⁴ *Costello v. Gov’t Emps. Ins. Co.*, 2010 U.S. Dist. LEXIS 28511, at *25-26 (M.D. Pa. Mar. 25, 2010) (citation omitted).

⁷¹⁵ *Costello v. Gov’t Emps. Ins. Co.*, 2010 U.S. Dist. LEXIS 28511, at *26 (M.D. Pa. Mar. 25, 2010).

act of a third party throwing a rock. Turning to the bad faith claim, Judge Vanaskie concluded, “Because Defendant had a reasonable basis for denial of coverage, and it has been determined that Plaintiff’s injuries were not covered by the policy, Defendant is entitled to summary judgment on the bad faith claim.”⁷¹⁶ Moreover, the court noted that even if it determined that defendant must provide coverage, “the unsettled nature of the law in Pennsylvania in this area would preclude a finding that State Farm acted unreasonably in denying coverage.”⁷¹⁷

§10:03(b) — Cases, Property

(1) *Brown v. Everett Cash Mut. Ins. Co.*, 2017 Pa. Super. LEXIS 161 (Pa. Super. Mar. 10, 2017) (Lazarus, J.)

Plaintiff Mrs. Brown owned a home with her father, Scott, as joint tenants with a right of survivorship. They had a homeowner’s policy with defendant Everett Cash, from which they sought benefits after the home burned down. After adjusting the claim, Everett Cash issued a check payable to both Brown and Scott, but Scott refused to endorse it and the check eventually expired. The Plaintiffs Brown then filed a bad faith action against insurer Everett Cash, which filed a summary judgment motion. The trial court granted the motion and in this opinion, authored by Judge Lazarus, the Superior Court affirmed as to the bad faith claim.

The Browns contended that Everett Cash acted in bad faith in issuing one check with both Mrs. Brown and Scott as payees, rather than issuing separate checks to each. The court concluded that the policy specifically provided for payment of the insureds with one check only, and Brown and Scott were unwilling to enter into an agreement to the contrary or to consent to Everett Cash proceeding with an interpleader action. Therefore, “the check could only issue in both Brown’s and Scott’s names. This [bad faith] claim has no merit.”⁷¹⁸

(2) *Dougherty v. Allstate Prop. & Cas. Ins. Co.*, 681 F. App’x 112 (3d Cir. 2017) (Krause, J.)

Dougherty’s home was damaged by water when a pipe leaked. He sought coverage under his homeowner’s policy with defendant Allstate. Allstate denied the claim under the maintenance exclusion, finding Dougherty had failed to maintain the furnace, and plaintiff then filed this breach of contract and bad faith suit. Allstate filed a summary judgment motion, which the district court granted. On appeal, Judge Krause of the Third Circuit authored this opinion affirming the trial court’s decision.

The court reviewed the coverage aspect of the case and found that the maintenance exclusion did apply as evidence showed the furnace had not been serviced for seven years. Therefore, “[b]ecause we conclude that the maintenance exclusion was properly applied, Allstate by definition had a reasonable basis to deny Dougherty’s claim.”⁷¹⁹ The court also noted that even if it were to take Allstate’s subjective reasoning into consideration, it still correctly applied the policy where the expert had detailed the problems with the furnace, where the temperature of the home was below freezing and where Dougherty had initially described the damage to the home as caused by “water-freeze.”

(3) *Blackwell v. Allstate Ins. Co.*, 2015 U.S. Dist. LEXIS 115155 (E.D. Pa. Aug. 31, 2015) (Rufe, J.)

In this case, discussed in more detail in §§10:07(b) and 10:13(b), plaintiff submitted a claim to his homeowner’s insurer, defendant Allstate, after a pipe burst at his home and caused damage. After plaintiff concluded all of the claims submitted had not be resolved to his satisfaction, he filed this bad faith action Allstate moved for summary judgment on the statutory bad faith claim. Judge Rufe of the Eastern District granted the motion.

Although the court concluded that all of the claims were time-barred, the court also explained that Allstate was entitled to summary judgment on the bad faith claim. The court concluded that Allstate’s decision not to pay the later-submitted claim for furnace replacement was properly denied as untimely because it had paid for previous servicing of the furnace and that servicing had detected no problems. Further, plaintiff failed to show that Allstate knew that the initial checks paid for the claims were incomplete or inadequate: “The record evidence, including the contractor’s deposition testimony, indicates that Allstate had issued checks in amounts that Plaintiff’s own contractor agreed were sufficient to restore the property to its previous condition.”⁷²⁰

(4) *Porter v. Safeco Ins. Co.*, 2017 U.S. Dist. LEXIS 17142 (M.D. Pa. Feb. 6, 2017) (Carlson, M.J.), adopted by, 2017 U.S. Dist. LEXIS 43498 (M.D. Pa. Mar. 24, 2017) (Mariani, J.)

This claim, discussed in more detail in §10:13(b), related to fire damage to two adjoining townhomes, both owned by plaintiff Porter. Safeco made payments relating to one of the homes, but declined to make payments on the second after it concluded that the second property was not insured under its policy. Porter believed he was entitled to payments relating to the second property, so he filed this breach of contract and bad faith action. After discovery, Safeco filed a motion for summary judgment. Magistrate Judge Carlson of the Middle District recommended that the

⁷¹⁶ *McCleester v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 90345, at *20-21 (M.D. Pa. Sept. 30, 2009).

⁷¹⁷ *McCleester v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 90345, at *21 n.6 (M.D. Pa. Sept. 30, 2009).

⁷¹⁸ *Brown v. Everett Cash Mut. Ins. Co.*, 2017 Pa. Super. LEXIS 161, at *20 (Pa. Super. Mar. 10, 2017).

⁷¹⁹ *Dougherty v. Allstate Prop. & Cas. Ins. Co.*, 681 F. App’x 112, 117 (3d Cir. 2017).

⁷²⁰ *Blackwell v. Allstate Ins. Co.*, 2015 U.S. Dist. LEXIS 115155, at *14 (E.D. Pa. Aug. 31, 2015).

motion be granted, and Judge Mariani subsequently adopted the recommendation, overruling plaintiff's objections as to the breach of contract count.

The court concluded that Safeco's policy applied only to the one property and thus Safeco had not breached the contract by declining coverage for the other. Turning to the bad faith claim, the court explained that "[t]he plaintiff has not shown that the undisputed evidence provides a basis for asserting by clear and convincing evidence that Safeco acted in bad faith when it . . . correctly disput[ed] Porter's claims regarding the scope of this insurance coverage"⁷²¹

(5) *Collins v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 60436 (E.D. Pa. June 17, 2010) (Yohn, J.)

A storm damaged Collins's house, including the roof and adjacent portions of the interior. Allstate, which provided the homeowner's policy, covered the part of the claim relating to the interior damage but denied coverage for any exterior repair beyond the damaged section of the roof. Collins filed suit, claiming a breach of contract for not replacing the entire roof where the slate tiles could not be matched, and bad faith in rendering that decision. Allstate filed a motion for summary judgment. Judge Yohn of the Eastern District granted the insurer's motion.

The court analyzed a Pennsylvania case with a similar fact pattern, *Greene v. United Services Auto. Ass'n*,⁷²² and noted that in that case, the Pennsylvania Superior Court had concluded that, under the policy language, repairing the damaged portion of the roof required only "like" or "similar" shingles, not an exact match. Accordingly, the court ruled, "Given the similarity of the facts of *Greene* to the facts of this case, Allstate had a reasonable legal basis to deny coverage for more than the damaged slopes of the Property under the Policy. . . . The terms of the Policy in this case ("like kind and quality" and "equivalent construction") are similar to the "like construction" term of the policy in *Greene*, which did not require "replacement with the identical item damaged," but only "repair of the damaged slope . . . with shingles *similar* to the damaged shingles."⁷²³

(6) *Sanders v. State Farm Ins. Co.*, 47 Pa. D. & C.4th 129 (Delaware 2000) (Bradley, J.), *aff'd without opinion*, 777 A.2d 516 (Pa. Super. 2001)

In this case, Judge Bradley of the Delaware County Court of Common Pleas held that where an insurer reasonably exercises its policy rights—such as requesting documentation for a property claim, requiring a proof of loss, or taking an examination under oath—such acts do not constitute bad faith:

[The insurer] did request that [the policyholder] prepare an affidavit of theft, give a phone recorded statement, testify at an examination under oath and provide documentation to support a claim for a rebuilt engine. As all of these are consistent with the terms and conditions of the policy, they cannot be viewed as indicia of bad faith.⁷²⁴

(7) *White v. Metro. Direct Prop. & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 102959 (E.D. Pa. July 29, 2014) (Buckwalter, J.)

Plaintiffs' home was damaged in a rainstorm the day after the City of Philadelphia issued a violation notice deeming their home unsafe; they sought coverage under their homeowners' policy with defendant Metropolitan. Defendant denied coverage, so plaintiffs filed this breach of contract and bad faith action. Defendant filed a motion for summary judgment. Judge Buckwalter of the Eastern District of Pennsylvania granted the motion.

The court concluded that plaintiffs' policy did not provide coverage because the loss was not sudden and accidental under the weather conditions exclusion. The court also determined that the deterioration exclusion and hidden decay exception precluded coverage. Having found no coverage, the court concluded there could be no bad faith denial of coverage claim: "As explained in detail above, Defendant's denial of benefits was not only reasonable, but correct under the Policy language. Absent a showing of an unreasonable denial, Plaintiffs are not entitled to recover on their bad faith claim."⁷²⁵

(8) *Viscounte v. Liberty Mut. Grp.*, 2012 U.S. Dist. LEXIS 177228 (E.D. Pa. Dec. 14, 2012) (Sitarski, M.J.)

Plaintiffs had a homeowner's policy with defendant insurer, with whom they filed a claim after a flood caused damage to their home. The insurer concluded that the sump pump endorsement applied, and limited coverage to the \$10,000 policy limits applicable in that endorsement. Plaintiffs maintained that they were entitled to coverage under the general policy. When the parties could not resolve their dispute, plaintiffs filed this breach of contract and bad faith action. The insurer filed a motion for summary judgment. Magistrate Judge Sitarski of the Eastern District granted the motion.

⁷²¹ *Porter v. Safeco Ins. Co.*, 2017 U.S. Dist. LEXIS 17142, at *19-20 (M.D. Pa. Feb. 6, 2017).

⁷²² *Greene v. United Servs. Auto. Ass'n*, 936 A.2d 1178 (Pa. Super. 2007).

⁷²³ *Collins v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 60436, at *22 (E.D. Pa. June 17, 2010) (footnote omitted, emphasis in original) (quoting *Greene v. United Servs. Auto. Ass'n*, 936 A.2d 1178, 1186 (Pa. Super. 2007)).

⁷²⁴ *Sanders v. State Farm Ins. Co.*, 47 Pa. D. & C.4th 129, 139 (Delaware 2000).

⁷²⁵ *White v. Metro. Direct Prop. & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 102959, at *34 (E.D. Pa. July 29, 2014).

The court concluded that the insurer properly applied the sump pump endorsement, and then turned to the bad faith claim. It held that because the plaintiffs' contract claim had fallen, the claim for bad faith in denial of coverage must also fall: "Generally, when a contract is correctly interpreted, there is no bad faith."⁷²⁶

(9) *Dameshek v. Encompass Ins. Co. of Am.*, 2012 U.S. Dist. LEXIS 87570 (M.D. Pa. June 25, 2012) (Kane, C.J.)

Plaintiffs' home was insured by defendant insurer. In 2009, a fire damaged their home, and when plaintiffs made a claim, were informed by the adjuster that the policy provided benefits for alternate housing during the time period of repairs, not to exceed one year. Repairs to the home took longer than one year, and when defendant refused to pay additional living expenses ("ALE"), plaintiffs filed suit, alleging bad faith. Defendant moved for summary judgment. Chief Judge Kane of the Middle District granted defendant's motion as to the bad faith claim, as is also discussed in §10:25.

Having found that defendant insurer was entitled to summary judgment on the breach of contract claim, the court turned to the bad faith claim. The court noted that it was "undisputed that Defendant paid Plaintiffs all of the ALE payments required by the insurance policy. Therefore, summary judgment is warranted . . ."⁷²⁷

(10) *Hamm v. Allstate Prop. & Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 159348 (W.D. Pa. Nov. 7, 2012) (Hornak, J.)

Plaintiffs had a homeowner's policy with defendant Allstate. After they noticed bulging of a stone veneer wall at the home, they filed a claim with Allstate in November 2008. The adjuster handling the matter determined, after inspection, that the damage was not covered because it was caused by deterioration. In May 2010, the rear stone veneer collapsed and plaintiffs' filed a claim for the resulting damage to the home, contending, as they had in 2008, that winds from a storm had caused the damage to the wall. Allstate sent 2 inspectors, both of whom concluded that lack of maintenance had caused the collapse. Plaintiffs filed this breach of contract and bad faith action. Defendant Allstate filed a motion for summary judgment. Judge Hornak of the Western District granted the motion, as is discussed in more detail in §10:07(b).

The court granted summary judgment on the coverage claim, and then turned to the bad faith claim. The court noted that the plaintiffs had notice of the wall bulging for about 2 years before the collapse and had not done anything to fix it. The court concluded that "the record amply demonstrates that Allstate had a reasonable basis to deny coverage under the policy."⁷²⁸ Allstate had inspected the property in 2008 and after the 2010 collapse and had properly considered the results of both in making its decision to deny the claim. Because plaintiffs had not shown by clear and convincing evidence that Allstate did not have a reasonable basis for denying coverage, the court did not examine the second prong of the bad faith test.

(11) *Mabrat v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 176386 (E.D. Pa. Dec. 12, 2012) (Baylson, J.)

When plaintiff purchased a two-family apartment building in 2007, she sought insurance through Allstate. On the application, she indicated that she intended to live in the building. She lived in the building until 2009, when she moved out. In 2011, the building was damaged by fire. Allstate denied the claim on the grounds that the policy required the named insured to live in the insured building. Following the denial, plaintiff filed this breach of contract and bad faith action. The parties filed cross motions for summary judgment. Judge Baylson of the Eastern District granted Allstate's motion and denied plaintiff's.

The court concluded that Allstate did not breach its contract, but rather, had appropriately applied the policy provisions. Turning to the bad faith claim, the court concluded that because the insurer had properly denied coverage, as a matter of law, the insurer was entitled to judgment on the bad faith claim:

Since there is no evidence that Allstate deceived [plaintiff] about the Policy's residency requirement, and since Allstate's denial of coverage was based on a correct reading of this provision, it cannot be said that Allstate had "no good reason" to deny coverage.⁷²⁹

(12) *United States Fire Ins. Co. v. Kelman Bottles*, 2012 U.S. Dist. LEXIS 48684 (W.D. Pa. Apr. 5, 2012) (Schwab, J.) (exclusions under commercial property policy)

U.S. Fire provided an all risks commercial property policy to defendant Kelman. Kelman filed a claim under the policy after a furnace at its glass manufacturing facility leaked and caused damage. U.S. Fire denied coverage based on several exclusions in its policy, the inherent vice exclusion, the wear and tear exclusion, and the design defect exclusion. U.S. Fire filed this declaratory judgment action seeking a declaration that it did not owe coverage under the policy. Kelman filed counterclaims, including counterclaims for breach of contract and statutory bad faith. The parties

⁷²⁶ *Viscounte v. Liberty Mut. Grp.*, 2012 U.S. Dist. LEXIS 177228, at *14 (E.D. Pa. Dec. 14, 2012).

⁷²⁷ *Dameshek v. Encompass Ins. Co. of Am.*, 2012 U.S. Dist. LEXIS 87570, at *13 (M.D. Pa. June 25, 2012) (citation to record omitted).

⁷²⁸ *Hamm v. Allstate Prop. & Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 159348, at *34 (W.D. Pa. Nov. 7, 2012).

⁷²⁹ *Mabrat v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 176386, at *17 (E.D. Pa. Dec. 12, 2012).

filed cross motions for summary judgment. Judge Schwab of the Western District granted the U.S. Fire’s motion, in this opinion also discussed in §§5:04(c), 10:07(b), and 10:21.

The court first examined the breach of contract claim, and determined that the insurer was entitled to summary judgment on that claim because the policy did not provide coverage under the circumstances. Turning to the bad faith claim, the court concluded that because U.S. Fire properly denied coverage, the claim that the insurer denied coverage in bad faith could not stand: “To the extent that Kelman’s claim is predicated upon the denial of coverage without any reasonable basis, that claim is now foreclosed by this Court’s Opinion finding that U.S. Fire did not breach its contract with Kelman.”⁷³⁰

(13) *Pfister v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 81324 (W.D. Pa. July 26, 2011), later proceeding at, 2011 U.S. Dist. LEXIS 92556 (W.D. Pa. Aug. 18, 2011) (Schwab, J.) (homeowner’s policy appraisal provision)

Plaintiffs’ home was damaged when a shower drain was blocked. State Farm, their homeowner’s carrier, valued the claim at just over \$16,000, and paid the claim. Plaintiffs contended that, based on several estimates, their claim should have been valued at more than \$152,000. They filed suit, alleging a bad faith claim. A motion to dismiss the bad faith claim in the first amended complaint is discussed in §10:19; following that dismissal, plaintiffs filed a second amended complaint, which also included a bad faith claim. State Farm filed a motion to dismiss. Judge Schwab of the Western District of Pennsylvania granted the motion, in an opinion also addressed in §§7:01 and 10:07(b).

Plaintiffs averred that State Farm improperly failed to respond to their demand for appraisal or mediation. The court explained that the policy did not require either appraisal or mediation under the circumstances. Appraisal was designed to assist parties in disputes over the value of a claim, not, as was the case here, to resolve a dispute over the “scope of coverage.”⁷³¹ Thus, the court concluded that plaintiffs’ bad faith allegations failed to state a claim.

(14) *Mu’Min v. Allstate Prop. & Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 94365 (E.D. Pa. Aug. 17, 2011) (Buckwalter, J.) (homeowner’s policy)

Plaintiff purchased a home in Philadelphia, and applied for a homeowner’s policy with Allstate. At the time of the application, plaintiff told the agent that he was planning to renovate the property and planned to move in a few weeks; the application reflected that the property was plaintiff’s primary residence. Allstate issued the policy, and within the next two months, there were two fires at the property which caused serious damage. Allstate’s investigation and interview of plaintiff determined that plaintiff stayed at the property a couple of nights a week, and lived at another residence he owned the rest of the nights. The investigation also concluded that the second fire was intentional. As a result of the investigations, Allstate denied coverage. This suit followed, seeking recovery for breach of contract and bad faith. Allstate filed a motion for summary judgment on the bad faith claim, which Judge Buckwalter of the Eastern District granted.

The court found that Allstate had properly denied coverage under the policy, and explained that such a decision compelled a finding that Allstate had not acted in bad faith:

The current bad faith claim before the Court cannot get past the initial element—lack of a reasonable basis for denying benefits. As explained in great detail above, Defendant’s denial of benefits was not only reasonable, but correct under the Policy language. Absent a showing of an unreasonable denial, Plaintiff is not entitled to recover on his bad faith claim.⁷³²

(15) *Caroselli v. Allstate Prop. & Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 83515 (E.D. Pa. Aug. 16, 2010) (Schiller, J.)

Caroselli had a homeowner’s policy with Allstate. After his house burned down in a fire, he sought to collect on the policy. Allstate paid him actual cash value, minus depreciation, for the replacement, approximately \$253,000. Caroselli contended that he was owed a greater amount (120% of the replacement cost) under the “building structure reimbursement extended limits endorsement” he had purchased. Allstate denied that it had to provide the extended coverage, because Caroselli neither insured his home for 100% of replacement cost nor rebuilt the property, one of which was required by the endorsement. Caroselli filed a putative class action suit, alleging breach of contract and bad faith. Allstate filed a motion to dismiss the complaint, which Judge Schiller of the Eastern District granted.

The court agreed with Allstate’s reading of the policy, entitling Caroselli to the lower amount of \$253,000, not the greater amount of \$304,000, and concluded that the breach of contract count should be dismissed. The court further concluded that because Allstate properly interpreted the policy, it had a reasonable basis for its claims decision, which precluded a bad faith claim:

The bad faith claim arises from Allstate’s purported failure to pay actual cash value benefits to Caroselli and members of the putative class although such benefits are, according to the Complaint, clearly required by the

⁷³⁰ *United States Fire Ins. Co. v. Kelman Bottles*, 2012 U.S. Dist. LEXIS 48684, at *47 (W.D. Pa. Apr. 5, 2012).

⁷³¹ *Pfister v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 92556, at *5 (W.D. Pa. Aug. 18, 2011).

⁷³² *Mu’Min v. Allstate Prop. & Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 94365, at *44 (E.D. Pa. Aug. 17, 2011).

language of the Policy. . . . As noted in this Court’s discussion regarding Plaintiff’s breach of contract claim, Allstate properly paid to Caroselli the limits of liability pursuant to the clear language of the Policy. Therefore, Allstate had a reasonable basis for failing to pay additional monies to Caroselli and he cannot make out a bad faith claim against Allstate.⁷³³

(16) *Bomgardner v. State Farm Fire & Cas.*, 2010 U.S. Dist. LEXIS 96379 (E.D. Pa. Sept. 15, 2010) (McLaughlin, J.) (exclusion for faulty workmanship)

Bomgardner operated a concrete company that installed a concrete floor as a subcontractor at a project for which DTM was the general contractor. DTM concluded that the floor was improperly installed, and, through its counsel, demanded from Bomgardner over \$25,000 in repair costs. Bomgardner sought coverage for this claim through his business liability insurer, State Farm, which denied coverage on the grounds that the installation was not an “occurrence,” but rather, was caused by faulty workmanship, which was excluded under the policy. State Farm relied in part upon a report by an expert retained by State Farm. State Farm later refused Bomgardner’s requests to provide that report on the grounds that it was protected by the work product doctrine.

Bomgardner filed a declaratory judgment action, also seeking recovery for breach of contract and bad faith. State Farm turned over the expert report without objection during pre-pleading discovery. State Farm filed a motion to dismiss, which Judge McLaughlin of the Eastern District granted.

The court resolved the coverage decision in State Farm’s favor, finding the policy excluded coverage. On the bad faith claim, Bomgardner alleged that State Farm’s refusal to turn over the expert report prior to litigation and its denial of coverage were in bad faith. The court concluded that even assuming the allegations to be true, “they do not amount to bad faith conduct on the part of [State Farm].”⁷³⁴ Specifically, the court concluded that because State Farm properly denied coverage, under *Terletsky*, “Bomgardner’s claim for recovery under §8371 must fail.”⁷³⁵

(17) *Berko Investments, LLC v. State Nat’l Ins. Co., Inc.*, 2010 U.S. Dist. LEXIS 73144 (E.D. Pa. July 20, 2010) (DuBois, J.)

Plaintiffs owned and operated a restaurant and had a commercial property insurance policy with State National. One night, the roof began to leak; a patron at the restaurant at the time was a contractor, who examined the leaking area and made a short-term fix of the gutter. The contractor returned the next day to finish a temporary fix of the problem. Plaintiffs then hired a roofer who replaced the roof. After the roof was replaced, plaintiffs submitted a claim that the roof was damaged by wind and sought coverage. State National denied the claim on the ground that its investigation was prejudiced because the entire roof had been replaced before its inspection, so it could not investigate the cause of damage or whether replacement was necessary. It claimed that this violated the notice and cooperation provisions of the insurance policy, which required that insureds give prompt notice of damage, to take steps to prevent further loss, and to preserve any property necessary for examination.

Following a bench trial, Judge DuBois of the Eastern District entered a verdict for State National. Most of the opinion addressed the coverage issue. The parties agreed that plaintiffs did not provide timely notice of the claim, and centered their dispute around whether State National suffered any prejudice as a result. The court agreed with State National that it had been prejudiced. According to the court, plaintiffs should have left the temporary fix in place—as the contract required—until State National could inspect the roof because that fix would have sufficiently protected the property until after the inspection. The court also rejected plaintiffs’ argument that State National could have “cured” any prejudice by interviewing the contractor and roofer and by examining two photographs that had been taken prior to the roof replacement. Under the contract, State National was entitled to inspect the property for itself. Because the court found that plaintiffs had breached the contract, “plaintiffs’ claim of bad faith is moot.”⁷³⁶

(18) *Colella v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 31895 (E.D. Pa. Apr. 1, 2010) (Joyner, J.), *aff’d*, 407 F. App’x 616 (3d Cir. 2011) (Barry, J.) (homeowner’s water damage exclusion)

Plaintiffs owned a home that was insured by defendant State Farm. Plaintiffs suffered water damage that caused significant damage to their basement and submitted a claim to State Farm. The insurer sent a plumber to investigate, who concluded that the water was coming from a pipe leaking underneath the portion of the home sitting on a concrete slab. The insurer denied coverage based on policy language excluding losses caused by “water below the surface of the ground” Plaintiffs filed suit alleging breach of contract and bad faith. Defendant filed a motion for summary judgment. Judge Joyner of the Eastern District granted summary judgment in favor of the insurer.

Plaintiffs argued that the defendant’s allegedly unreasonable interpretation of the policy exclusion established bad faith. The court rejected plaintiffs’ argument in large part because there was no controlling case law interpreting the exclusion at issue:

⁷³³ *Caroselli v. Allstate Prop. & Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 83515, at *18-19 (E.D. Pa. Aug. 16, 2010) (citation to record omitted; citing *Kelly v. Nat’l Liab. & Fire Ins. Co.*, 2010 WL 2736953, at *3 (E.D. Pa. July 12, 2010)).

⁷³⁴ *Bomgardner v. State Farm Fire & Cas.*, 2010 U.S. Dist. LEXIS 96379, at *15 (E.D. Pa. Sept. 15, 2010).

⁷³⁵ *Bomgardner v. State Farm Fire & Cas.*, 2010 U.S. Dist. LEXIS 96379, at *15 (E.D. Pa. Sept. 15, 2010).

⁷³⁶ *Berko Investments, LLC v. State Nat’l Ins. Co., Inc.*, 2010 U.S. Dist. LEXIS 73144, at *18 (E.D. Pa. July 20, 2010).

Plaintiffs attempt to argue that Defendant's decision to deny coverage was against established case law. However, neither this Court, nor any of the parties, have been able to cite a single case from this jurisdiction that is directly on point to this factual scenario. Therefore, it is impossible that Defendant's decision was counter to established case law. Nor is it persuasive that Defendant failed to conduct a legal search for precedent before denying Plaintiffs' claim. This omission is at most negligent, which is not sufficient to prove bad faith on the part of Defendant. Additionally, Plaintiffs have not presented any evidence of an industry-wide standard that Defendant deviated from.⁷³⁷

Accepting the reasoning of the district court, the Third Circuit, in an opinion by Judge Barry, affirmed.

(19) 151 First Side Assocs., L.P. v. Peerless Ins. Co., 2010 U.S. Dist. LEXIS 23093 (W.D. Pa. Mar. 11, 2010) (Cercone, J.)

Peerless issued a builder's risk policy to plaintiff First Side relating to a construction project. Plaintiff High Concrete was a subcontractor who was responsible for fabricating and installing concrete panels and balcony slabs. After plaintiff High Concrete had fabricated some of the panels (55 of more than 600 needed), its manufacturing facility was destroyed by fire, which destroyed the panels that had already been made and were awaiting delivery and installation. High Concrete was not a named insured under the policy. Plaintiff First Side submitted a soft cost claim under the policy but never submitted a claim for the actual loss of the panels already manufactured. When Peerless denied the claims, plaintiffs sued for breach of contract and bad faith. Peerless filed a motion for summary judgment. Western District Judge Cercone concluded that Peerless did not breach the contract in denying the claim because the policy did not cover the losses claimed. The court further granted summary judgment on the bad faith claim, stating, "Having found that Peerless is not in breach of the contract, Plaintiffs' bad faith claim also fails."⁷³⁸

(20) Pisano v. Nationwide Mut. Fire Ins. Co., 2009 U.S. Dist. LEXIS 98213 (E.D. Pa. Oct. 21, 2009) (Goldberg, J.)

Pisano owned three contiguous commercial properties in Philadelphia that flooded after a rainstorm. Pisano submitted a claim with his commercial building insurer, Nationwide; the policy excluded coverage for damages caused by a flood, or by surface or ground water that seeps into the building. Pisano told Nationwide that a drain line from the roof had separated, which he believed was the sole cause of the damage to the first floor and basement. Nationwide sent a contractor to inspect the properties, and he reported that while the roof drain line had caused some of the damage, the extent of the water and mud in the basement indicated that the damage was primarily from ground water.

Determining that the basement damage was caused primarily by ground water, surface water and flood water, Nationwide denied that aspect of Pisano's claim. The company agreed to cover the damage to the first floor. Pisano filed a complaint alleging breach of contract and bad faith. Judge Goldberg of the Eastern District granted Nationwide's motion to dismiss the breach of contract and bad faith counts.

The court examined the contractual language relating to the breach of contract claim and noted that the policy specifically excluded coverage if any portion of water damage came from flooding or surface or ground water. There was no dispute between Pisano and Nationwide that at least some of the flooding in the basement was caused by one or more of these sources. The court held that the contractual language precluded coverage for the water damage in the basement. Thus, according to the court, there could be no bad faith:

As we agree with Nationwide that Pisano's claim for basement damage should be excluded from coverage, and Nationwide's partial denial was proper, Count II [bad faith] should be dismissed. In any event, Pisano's bad faith claims would be dismissed because he has failed to present any evidence that Nationwide did not have a reasonable basis for partially denying coverage.⁷³⁹

(21) Hered LLC v. Seneca Ins. Co., Inc., Docket No. 3:CV-06-0255 (M.D. Pa. Feb. 13, 2009) (Judge Vanaskie)

Plaintiff's building suffered damages in a fire, allegedly in excess of \$3.4 million. Defendant Seneca made two advance payments to plaintiff, totaling over \$95,000, but ultimately denied the claim, stating that it did not owe coverage because the plaintiff made misrepresentations regarding whether the sprinkler system in the building was functioning. Plaintiff sued, alleging breach of contract and bad faith. The insurer filed a counterclaim based in part on plaintiff's alleged misrepresentations and sought a declaration that it did not owe coverage. The parties filed cross motions for summary judgment. Magistrate Judge Blewitt recommended that the motions largely be denied and Judge Vanaskie subsequently adopted the report.

In the one aspect of Seneca's motion that was granted, plaintiff had argued that Seneca acted in bad faith by failing to make additional advance payments. The magistrate judge recommended, and the court agreed, that failure to make advance payments could not provide the basis for a bad faith claim. Plaintiff did not object to this portion of the report,

⁷³⁷. *Colella v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 31895, at *14 (E.D. Pa. Apr. 1, 2010).

⁷³⁸. *151 First Side Assocs., L.P. v. Peerless Ins. Co.*, 2010 U.S. Dist. LEXIS 23093, at *17 (W.D. Pa. Mar. 11, 2010).

⁷³⁹. *Pisano v. Nationwide Mut. Fire Ins. Co.*, 2009 U.S. Dist. LEXIS 98213, at *17 (E.D. Pa. Oct. 21, 2009).

and the court granted Seneca's motion in that regard: ". . . Seneca is entitled to summary judgment to the extent that the bad faith claim is premised upon delay in making advance payments as there was no obligation to make any advance payments."⁷⁴⁰

(22) *White v. W. Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 99034 (M.D. Pa. Dec. 8, 2008) (Blewitt, M.J.)

Plaintiffs were insured under a homeowner's policy issued by West American Insurance Company. West American denied coverage with respect to plaintiffs' claims for damages to their trailer and personal property based in part upon the Water Damages Exclusion in the policy. Magistrate Judge Blewitt of the Middle District agreed with the insurer that there was no coverage for the claims. Finding that the insurer correctly applied the policy, the court held that there was no bad faith:

In this case, the Defendant properly denied coverage of the Plaintiffs' claim under the Water Damage Exclusion of the Plaintiffs' homeowners' insurance policy. Since the Plaintiffs' claim was properly denied by Defendant, there can be no showing under a clear and convincing standard that there was bad faith.⁷⁴¹

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

In this case discussed in §10:07(b), a homeowners' insurance company determined that plaintiff's claim was not covered by the policy since it was due to termite infestation, which the policy did not cover. Judge O'Neill of the Eastern District granted the insurer's motion for summary judgment on the breach of contract claim, finding that the policy unambiguously excluded coverage for structural damage to plaintiff's walls due to termite damage. The court also granted the insurer's motion for summary judgment as to bad faith.

(24) *Santora v. Commercial Union Ins. Co.*, 1998 U.S. Dist. LEXIS 2366 (E.D. Pa. Feb. 25, 1998) (Waldman, J.)

Demand for appraisal as provided for under a property insurance policy does not constitute bad faith. In this case, the plaintiff submitted a property loss claim of approximately \$60,000. Following its investigation, the insurer disagreed with the plaintiff's valuation of the damage and issued a check in the amount of approximately \$10,000. The policyholder instituted a lawsuit, and the insurance company invoked the appraisal provision of the policy. The lawsuit was stayed pending appraisal. The appraisal award was approximately \$16,000, and the insurer tendered the difference. Judge Waldman held that the policyholder produced no evidence that the investigation or the demand for appraisal was in bad faith, and granted summary judgment in favor of Commercial Union.

(25) *Salera v. State Farm Fire & Cas. Co.*, 2005 Phila. Ct. Com. Pl. LEXIS 531 (Phila. Dec. 1, 2005) (Bernstein, J.)

The plaintiff filed a class action complaint alleging that the insurer breached the terms of his homeowners' policy and acted in bad faith by failing to pay a general contractor's overhead and profit. The court held that the insurer was not obligated to pay overhead and profit because no general contractor was hired. As for the bad faith claim, the court ruled, "Since there was no breach of contract, plaintiff's bad faith claim, strictly derivative of the breach of contract claim, must also be denied."⁷⁴²

(26) *Hudgins v. Travelers Home & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 107775 (E.D. Pa. July 31, 2013) (Yohn, J.)

The facts of this case are discussed in detail in §9:03(b). After plaintiff's home burned down in February 2009, she filed a claim with her homeowner's carrier, Travelers. There was a question of whether plaintiff's mentally ill son started the fire, so Travelers sent a reservation of rights letter, but advanced some funds on the policy. Following the son's examination under oath (EUO), Travelers accepted coverage. In January 2011, when an appeal from an earlier bad faith action was still pending, plaintiff filed this bad faith suit. After this suit was filed, the Superior Court affirmed the judgment in the first suit. Travelers filed a motion for summary judgment on the bad faith claims. Judge Yohn of the Eastern District of Pennsylvania granted the motion in part and denied it in part.

Plaintiff asserted that Travelers acted in bad faith by requiring her son's EUO. The court disagreed, in part due to the court's decision in the earlier-filed action, and in part because the policy provided for such: "[P]laintiff cannot contend that Travelers interpreted the contract in bad faith when it correctly required [the son] to submit to an EUO."⁷⁴³

⁷⁴⁰ *Hered LLC v. Seneca Ins. Co.*, Docket No. 3:CV-06-0255 (M.D. Pa. Feb. 13, 2009), slip op. at 30 n.13 (citing *Zappile v. Amex Assur. Co.*, 928 A.2d 251, 256-57 (Pa. Super. 2007)).

⁷⁴¹ *White v. W. Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 99034, at *41 (M.D. Pa. Dec. 8, 2008).

⁷⁴² *Salera v. State Farm Fire & Cas. Co.*, 2005 Phila. Ct. Com. Pl. LEXIS 531, at *5. Judge Bernstein denied bad faith claims in a virtually identical context in *Mee v. Safeco Ins. Co. of Am.*, 2005 Phila. Ct. Com. Pl. LEXIS 527 (Phila. Nov. 29, 2005) and *Crowley v. Travelers Prop. & Cas. Ins. Co.*, 2006 Phila. Ct. Com. Pl. LEXIS 185 (Phila. Apr. 10, 2006).

⁷⁴³ *Hudgins v. Travelers Home & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 107775, at *24 (E.D. Pa. July 31, 2013).

(27) *Cozza v. State Farm Fire & Cas. Co.*, No. 2-CV-02380 (E.D. Pa.) (Davis, J.), *aff'd*, 440 F. App'x 73 (3d Cir. 2011) (3d Cir. July 28, 2011) (Fisher, J.)

After plaintiffs' home was damaged as a result of water leaking from an underground drain pipe, plaintiffs submitted a claim to their homeowner's carrier, State Farm. After State Farm denied their claim, this breach of contract and bad faith action ensued. Judge Davis of the Eastern District granted State Farm's motion for summary judgment, and the Third Circuit affirmed.

The Third Circuit agreed with the district court's conclusion that the policy excluded damage caused by subsurface water and, therefore, State Farm did not breach the contract. The court also agreed that where there was no breach of contract, the bad faith claim could not stand:

Where the sole basis for a bad-faith claim is the denial of coverage, there can be no bad-faith claim if the insurer was correct as a matter of law in denying coverage. *Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.*, 193 F.3d 742, 751 n.9 (3d Cir. 1999). Here, as State Farm did not err in denying Cozza's claim, the District Court did not err in dismissing her bad faith claim.⁷⁴⁴

(28) *Verdetto v. State Farm Fire & Cas. Co.*, 837 F. Supp. 2d 480 (M.D. Pa. 2011), *reconsideration denied*, 2012 U.S. Dist. LEXIS 29593 (M.D. Pa. Mar. 6, 2012) (Caputo, J.), *aff'd*, 510 F. App'x 209 (3d Cir. 2013) (Cowen, J.)

In this case, discussed in greater detail in §10:07(b), State Farm suspected that its insureds committed arson and misrepresented the personal property losses in their claim. As part of its investigation, State Farm requested authorizations for financial and telephone records and requested receipts for the lost contents. Plaintiffs refused to provide these, and State Farm denied coverage on the grounds that the policy was void due to plaintiffs' lack of cooperation. After plaintiffs filed this bad faith action, State Farm filed a motion for summary judgment. Judge Caputo of the Middle District granted the motion, and subsequently, denied plaintiffs Verdetto's motion for reconsideration. The court found that State Farm was justified in voiding the policy as it did: "Given the Verdetto's [sic] refusal to turn over the records they were contractually obligated to provide, it was equally reasonable for State Farm to ultimately deny the claim for lack of cooperation."⁷⁴⁵

The Third Circuit affirmed, in a decision authored by Judge Cowen. The court noted that "a thorough investigation into a questionable claim" is not in bad faith.⁷⁴⁶ The court also explained that State Farm properly voided the policy for the plaintiffs' failure to cooperate under the policy terms because "[t]he record is abundantly clear that the Verdetto's repeatedly failed to provide State Farm with financial and telephone records that they were required to turn over."⁷⁴⁷

(29) *Fry v. Phoenix Ins. Co.*, 2014 U.S. Dist. LEXIS 131504 (E.D. Pa. Sept. 19, 2014) (Stengel, J.)

Plaintiffs made a claim with their homeowner's carrier, defendant Phoenix, in 2011 for water damage to an exterior wall and in 2012 for collapse of the same wall. After plaintiff filed this breach of contract and bad faith action, Phoenix filed a motion for summary judgment. Judge Stengel of the Eastern District granted the motion.

The court first granted summary judgment on the contract claims, based on application of the collapse clause due to visible decay and failure to remedy that decay and based on the fact that the 2011 and 2012 claims were not sudden or accidental. Turning to the bad faith claim, the court concluded that "[b]ecause I find as a matter of law that Phoenix had reasonable bases for denying the 2011 and the 2012 claims, I also find that it is entitled to summary judgment on the Fry's claim under §8371 as well."⁷⁴⁸

(30) *Mirarchi v. Seneca Specialty Ins. Co.*, 2011 U.S. Dist. LEXIS 80871 (E.D. Pa. July 22, 2011) (Pratter, J.), *aff'd*, 564 F. App'x 652 (3d Cir. 2014) (Ambro, J.)

Plaintiff's commercial property, which was insured by defendant Seneca, was damaged by fire. Believing Seneca acted in bad faith in the claims process, as discussed more fully in §10:13(b), Plaintiff filed this bad faith action. Seneca filed a motion for summary judgment on the bad faith claim. Judge Pratter of the Eastern District granted defendant Seneca's motion.

Plaintiff contended that Seneca improperly used depreciation in calculating the amount it owed plaintiff under the policy and improperly included a provision allowing it to use depreciated value in the insurance contract. The court found that nothing in the policy, applicable statutes, or case law prevented Seneca from using depreciated value or including such a contract term. Therefore, it could not find that Seneca had acted in bad faith in making those calculations: "[I]t was not unreasonable for Seneca to depreciate the actual cash value of the loss, nor was it contrary

⁷⁴⁴ *Cozza v. State Farm Fire & Cas. Co.*, 440 F. App'x 73, 75-76 (3d Cir. 2011).

⁷⁴⁵ *Verdetto v. State Farm Fire & Cas. Co.*, 837 F. Supp. 2d 480, 484 (M.D. Pa. 2011).

⁷⁴⁶ *Verdetto v. State Farm Fire & Cas. Co.*, 510 F. App'x 209, 211 (3d Cir. 2013) (quoting *Nw. Mut. Life Ins. Co. v. Babayan*, 430 F.3d 121, 138 (3d Cir. 2005)).

⁷⁴⁷ *Verdetto v. State Farm Fire & Cas. Co.*, 510 F. App'x 209, 211-12.

⁷⁴⁸ *Fry v. Phoenix Ins. Co.*, 2014 U.S. Dist. LEXIS 131504, at *30 (E.D. Pa. Sept. 19, 2014).

to Pennsylvania law to include a contract provision limiting partial loss recoveries to actual cash value minus depreciation.⁷⁴⁹

The district court's grant of summary judgment was affirmed by the Third Circuit.

(31) *Neshaminy Constructors, Inc. v. Federal Ins. Co.*, 2012 U.S. Dist. LEXIS 86079 (E.D. Pa. June 21, 2012) (Savage, J.)

Plaintiff contracted with a governmental agency to reconstruct a bridge, which required repairs after plaintiff used defective concrete forms during the project. Plaintiff filed a claim with its inland marine insurance policy with defendant Federal, which denied the claim. Following the denial, plaintiff filed this breach of contract and bad faith suit. The parties filed cross motions for summary judgment. Judge Savage of the Eastern District granted the insurer's motion and denied plaintiff's motion. The court concluded that the policy did not cover the loss, and explained that "[b]ecause there is no coverage under the contract for [plaintiff's] claim, there can be no bad faith."⁷⁵⁰

§10:03(c) — Cases, Life/Health/Disability/Other

(1) *First Nat'l Bank of Pa. v. Transamerica Life Ins. Co.*, 2017 U.S. Dist. LEXIS 104082 (W.D. Pa. July 6, 2017) (Eddy, M.J.)

In 2013, plaintiff FNB acquired bank-owned life insurance policies when it merged with another bank; that bank had purchased life insurance policies from Transamerica. FNB surrendered the policies and contended that Transamerica did not pay it the proper amounts on them after surrender. FNB filed this contract and bad faith suit, and after discovery, Transamerica filed a motion for summary judgment. Magistrate Judge Eddy of the Western District granted the motion.

The court considered the contract claim and determined that Transamerica properly calculated the amounts owed on the surrendered policies. The court then considered the bad faith count and determined that "[b]ecause both of JP Morgan's reasons for withholding the Bank Enhancement Amount were correct, then, by FNB's own concession, Transamerica was reasonably justified in deducting the Bank Enhancement Amount from the amount it paid to FNB."⁷⁵¹

(2) *Whitmoyer Ford, Inc. v. Republic Franklin Ins. Co.*, 2010 U.S. Dist. LEXIS 32607 (E.D. Pa. Apr. 2, 2010) (Golden, J.)

Plaintiffs owned several automotive dealerships. A hailstorm caused significant damage to many of the cars on plaintiffs' lots. Plaintiffs submitted a claim under their commercial insurance policy to Republic Franklin. The insurer applied a co-insurance penalty pursuant to the policy, which plaintiff claims had never applied in any prior claim and should not have been applied here. Plaintiffs filed suit seeking declaratory judgment that defendant owed further amounts under the policy and seeking recovery for defendant's alleged bad faith. Defendant counterclaimed for declaratory relief, asking the court to declare it had no further obligations under the policy. Before Judge Golden of the Eastern District were cross motions for summary judgment; Judge Golden granted the insurers' motion as to both the contract and bad faith claims.

The policy language permitted the insurer to apply the co-insurance penalty if the value of the cars on plaintiffs' lots exceeded the policy limits. In this case, the value of the cars on the lots exceeded the policy limits by 5.96%, so Republic Franklin deducted 5.96% of the value of the claimed losses as the penalty. Plaintiffs argued that because they had reported additional inventory to defendant, it should recover the value of that additional inventory fully. However, the court concluded that the policy language did not allow plaintiffs to "increase their level of insurance at will by reporting new autos to Defendant."⁷⁵² Having found that defendant correctly interpreted the contract, the court held that the bad faith claim could not stand: "Because the Court holds that the insurer had a reasonable basis for applying the policy's co-insurance provision, it also dismisses Plaintiff's bad faith claim."⁷⁵³

(3) *Serino v. Prudential Ins. Co. of Am.*, 706 F. Supp. 2d 584 (M.D. Pa. 2009) (Kosik, J.)

Serino purchased a disability policy. Many years later, when he was 54, he became disabled and sought coverage pursuant to its terms. Prudential paid him benefits until he turned 65, at which point it terminated benefits pursuant to the policy terms that stopped benefits at age 65. Serino filed suit for breach of contract, alleging that under the policy he was due disability payments for life; he also sued for bad faith in its termination of benefits. Prudential answered and filed counterclaims, including a claim for a declaration that Serino was no longer entitled to benefits under the policy.

⁷⁴⁹ *Mirarchi v. Seneca Specialty Ins. Co.*, 2013 U.S. Dist. LEXIS 40513, at *33 (E.D. Pa. Mar. 22, 2013).

⁷⁵⁰ *Neshaminy Constructors, Inc. v. Fed. Ins. Co.*, 2012 U.S. Dist. LEXIS 86079, at *11 (E.D. Pa. June 21, 2012).

⁷⁵¹ *First Nat'l Bank of Pa. v. Transamerica Life Ins. Co.*, 2017 U.S. Dist. LEXIS 104082, at *44-45 (W.D. Pa. July 6, 2017).

⁷⁵² *Whitmoyer Ford, Inc. v. Republic Franklin Ins. Co.*, 2010 U.S. Dist. LEXIS 32607, at *9 (E.D. Pa. Apr. 2, 2010).

⁷⁵³ *Whitmoyer Ford, Inc. v. Republic Franklin Ins. Co.*, 2010 U.S. Dist. LEXIS 32607, at *12 n.3 (E.D. Pa. Apr. 2, 2010) (citing *Condio v. Erie Ins. Exch.*, 899 A.2d 1136 (Pa. Super. 2006)).

Prudential filed a motion for summary judgment on both the breach of contract and bad faith claims. As to the contract claim, Judge Kosik of the Middle District held that Prudential properly interpreted the policy provisions. On the bad faith claim, Serino argued that Prudential acted unreasonably in failing to give effect to its sales agent's representations that disability payments would continue for life. The court noted that no evidence existed in the record indicating that Prudential knew about the agent's representation regarding the duration of payments and that the contract prevented such contractual modifications. The court found there was no bad faith:

In light of the plain language of the Policy, Prudential's termination of Serino's benefits was not in bad faith. The Policy expressly gives Prudential a reasonable basis for denying Serino benefits after his sixty-fifth birthday. For this reason, we will therefore grant Prudential's Motion for Summary Judgment with regard to Serino's bad faith claim.⁷⁵⁴

(4) *Kidd v. Prudential Ins. Co. of America*, 2008 U.S. Dist. LEXIS 2934 (M.D. Pa. Jan. 15, 2008) (Blewitt, M.J.)

The plaintiff filed a complaint against defendant Prudential, asserting a breach of contract and bad faith claim with respect to defendant's denial of plaintiff's demand for a death benefit under her late husband's Prudential term life insurance policy. The company denied the claim because the decedent had allowed the policy to lapse and had not reinstated the policy as allowed under the policy terms.

Magistrate Judge Blewitt of the Middle District granted summary judgment in favor of Prudential, finding that the insurer had properly concluded that death benefits were not payable because the policy had lapsed. There was no bad faith, according to the court, "since decedent was not insured at the time of his May 20, 2003 death and Defendant Prudential was not contractually obligated to pay Plaintiff's death benefit claim. . . . Thus, the present case presents no factual disputes on the issues of whether Plaintiff had a reasonable belief that the policy was reinstated and of entitlement to payment of her death benefit claim."⁷⁵⁵

(5) *Licon v. Metro. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 86515 (E.D. Pa. Sept. 13, 2007) (Dalzell, J.)

In this case involving a life insurance policy, Judge Dalzell of the Eastern District applied the rule that when the insurer prevails on the breach of contract count the bad faith claim fails as a matter of law. According to the court, "[b]ad faith on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy." . . . Given that we have already found that MetLife's refusal to pay was consistent with the bounds of coverage expressed in the policy, such refusal cannot have been 'frivolous or unfounded.'⁷⁵⁶ The court dismissed the bad faith claim.

(6) *Still v. Great N. Ins. Co.*, 254 F. App'x 125 (3d Cir. 2007) (per curiam)

The insurer prevailed on the coverage portion of the case dealing with the business pursuits exclusion in the applicable policy. Although not challenged by the insured, the Third Circuit noted that the dismissal of the bad faith claim was proper because the insurer prevailed on the coverage issue:

Still does not appear to challenge the District Court's dismissal of his bad faith claim. We note, however, that such dismissal was proper. See *USX v. Liberty Mut. Ins. Co.*, 444 F.3d 192, 202 (3d Cir. 2006) (stating that a bad faith claim necessarily fails in the face of a determination that the insurer correctly concluded that there was no potential coverage under the policy).⁷⁵⁷

(7) *Pittas v. Hartford Life Ins. Co.*, 513 F. Supp. 2d 493 (Pa. 2007) (Ambrose, J.) (health benefit)

Plaintiff was insured under a policy that provided \$300.00 a day in hospital treatment benefits. The plaintiff, seriously injured in an automobile accident, submitted a claim for benefits in March 2004. The insurer requested a toxicology report to determine whether the insured was intoxicated at the time of the accident, which would be excluded by policy terms. The insurer requested a toxicology report in June 2004, which was not received until October 2004. The claims adjuster with the insurer misread the toxicology report, and denied the claim in November 2004. When the misreading was brought to the attention of the insurer by plaintiff's counsel on an appeal of the denial, the insurer reversed its decision and in January 2005 agreed to pay the plaintiff \$300.00 per day. Plaintiff instituted an action against the insurer. The plaintiff alleged that the daily benefits should have been \$600.00 per day, as a result of other communications received from the insurer. The plaintiff also alleged that the insurer delayed the handling of the claim in bad faith. Finally, the plaintiff alleged that the insurer acted in bad faith because it violated the UIPA and related regulations by failing to communicate in a timely manner with the plaintiff. Judge Ambrose of the Western District denied plaintiff's arguments and granted the insurer's motion for summary judgment.

The court concluded that the insurer had appropriately calculated the daily benefits at \$300.00 a day. According to the court, "A plaintiff cannot prevail on a bad faith claim. . . where there is no breach of an underlying contractual obligation."⁷⁵⁸ As to the allegations of undue delay, the court held that there was no bad faith. According to the court,

⁷⁵⁴ *Serino v. Prudential Ins. Co. of Am.*, 706 F. Supp. 2d 584, 592 (M.D. Pa. 2009) (footnote omitted).

⁷⁵⁵ *Kidd v. Prudential Ins. Co. of Am.*, 2008 U.S. Dist. LEXIS 2934, at *48 (M.D. Pa. Jan. 15, 2008).

⁷⁵⁶ *Licon v. Metro. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 86515, at *6 (E.D. Pa. Sept. 13, 2007) (citations omitted).

⁷⁵⁷ *Still v. Great Northern Ins. Co.*, 254 F. App'x 125, 128 n.3 (3d Cir. 2007).

⁷⁵⁸ *Pittas v. Hartford Life Ins. Co.*, 513 F. Supp. 2d 493, 504 (W.D. Pa. 2007).

“a delay of seven months after receiving notice of the claim, without more, . . . is not clear and convincing evidence of bad faith.”⁷⁵⁹

With respect to the alleged failure to timely respond to plaintiff’s counsel, the court found no evidence that this was a “common practice” of the insurer, and further added that “mere failure to respond to a letter cannot alone suffice to establish the existence of statutory bad faith.”⁷⁶⁰

(8) *Tate v. U.S. Fin. Life Ins. Co.*, 2006 U.S. Dist. LEXIS 62603 (W.D. Pa. Sept. 1, 2006) (McVerry, J.)

The plaintiff widow alleged that the insurer acted in bad faith by denying that the life insurance policy at issue was in force and by failing to pay death benefits. Citing *Wise v. American General Life Insurance Company*,⁷⁶¹ Judge McVerry of the Western District held there was no bad faith:

[L]ike the plaintiff in *Wise*, Plaintiff in this case cannot present any evidence of USFL denying benefits under a policy without any reasonable basis to do so. . . . [T]here was no policy in force and no contract of insurance existed between the parties. Thus, the Court finds and rules that USFL is entitled to summary judgment on Plaintiff’s claim for bad faith.⁷⁶²

(9) *McGeehan v. Am. Gen. Assur. Co.*, 2004 U.S. Dist. LEXIS 23295 (E.D. Pa. Nov. 12, 2004) (Gardner, J.)

The plaintiff beneficiary sued the insurer for benefits under a life insurance policy. The insurer counterclaimed for rescission, alleging that there was fraud in the application. Judge Gardner of the Eastern District granted summary judgment in favor of the insurer, finding that there was a material misrepresentation made in bad faith in connection with the insurance application. Finding no coverage, the court also granted judgment in favor of the insurer on the §8371 bad faith claim.

(10) *Yoder v. Am. Travelers Life Ins. Co.*, 814 A.2d 229 (Pa. Super. 2003) (Todd, J.), *appeal denied*, 821 A.2d 588 (Pa. 2003)

In 1989, the insured obtained a long-term care policy that was “guaranteed renewable” so long as the insured paid the premiums. In 1998, the insured sought coverage after entering a nursing home, and was denied by the insurer on the basis that the insurance contract required a three-day hospital stay within the 30 days prior to entering the nursing home. In response to the coverage denial, the insured brought an action seeking declaratory judgment and alleging bad faith. The plaintiff alleged that the insurer breached the duty of good faith and fair dealing when it failed to inform her of a change in the law that potentially rendered invalid the exclusion contained in her policy. The law was changed in 1992 when the Pennsylvania legislature enacted P.L. 1129, No. 148, which prohibited “prior institutionalization” exclusions of the type contained in the plaintiff’s policy.

The trial court dismissed plaintiff’s bad faith claim. The Superior Court, in an opinion by Judge Todd, affirmed the dismissal because the plaintiff failed to comply with the Rules of Appellate Procedure in specifying issues complained of. However, the court added that even if the issue were not waived, “[W]e can find no support in Pennsylvania law for such an extraordinary duty. [Plaintiff] has cited no case that suggests that an insurer has a duty to inform its insureds of ongoing changes in the law that might affect [sic] their coverage, and we could find none.”⁷⁶³

(11) *Barrer v. Metro. Life Ins. Co.*, 151 F. Supp. 2d 617 (E.D. Pa. July 17, 2001) (Joyner, J.)

Judge Joyner of the Eastern District held that a life insurer interpreted and enforced the policy properly. Finding that there “clearly was no coverage at the time and no reasonable expectation of coverage,”⁷⁶⁴ the court granted summary judgment in favor of the insurer as to both the breach of contract and bad faith claim.

(12) *Kitsock v. Baltimore Life Ins. Co.*, 2014 U.S. Dist. LEXIS 2155 (M.D. Pa. Jan. 8, 2014) (Schwab, M.J.)

Plaintiff’s decedent died after falling out of his bed and hitting his head. Plaintiff then sought accidental death benefits from defendant life insurer Baltimore, which denied coverage for these benefits. Following the declination, plaintiff filed this bad faith action. Defendant filed a motion for summary judgment. Magistrate Judge Schwab of the Middle District of Pennsylvania granted the motion.

The court examined the facts relating to the decedent’s cause of death, and determined that there was no coverage for accidental death benefits because the death did not meet the policy definition of “accidental.” Without discussion, the court also concluded that “there is no basis to conclude that the defendant...acted in bad faith in denying accidental death benefits in this case....”⁷⁶⁵

⁷⁵⁹ *Pittas v. Hartford Life Ins. Co.*, 513 F. Supp. 2d 493, 502 (W.D. Pa. 2007).

⁷⁶⁰ *Pittas v. Hartford Life Ins. Co.*, 513 F. Supp. 2d 493, 503 (W.D. Pa. 2007) (citing *Employers Mut. Cas. Co. v. Loos*, 2007 U.S. Dist. LEXIS 14236 (W.D. Pa. Feb. 28, 2007)).

⁷⁶¹ *Wise v. Am. Gen. Life Ins. Co.*, 459 F.3d 443 (3d Cir. 2006).

⁷⁶² *Tate v. U.S. Fin. Life Ins. Co.*, 2006 U.S. Dist. LEXIS 62603 (W.D. Pa. Sept. 1, 2006).

⁷⁶³ *Yoder v. American Am. Travelers Life Ins. Co.*, 814 A.2d 229, 233-34 (Pa. Super. 2003).

⁷⁶⁴ *Barrer v. Metro. Life*, 151 F. Supp. 2d 617 (E.D. Pa. 2001).

⁷⁶⁵ *Kitsock v. Baltimore Life Ins. Co.*, 2014 U.S. Dist. LEXIS 2155, at *21-22 (M.D. Pa. Jan. 8, 2014).

§10:05 Insurer's Interpretation of Policy, Though Wrong, Was Reasonable

§10:05(a) — Cases, Auto

(1) *Douglas v. Discover Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 131601 (Sept. 29, 2015), reconsideration denied, 2015 U.S. Dist. LEXIS 163781 (M.D. Pa. Dec. 7, 2015) (Mariani, J.)

Plaintiff was involved in an auto accident, following which he sought UIM benefits from defendant auto insurer. When those benefits were denied on the grounds that plaintiff had waived such coverage, despite plaintiff's position that the waiver form was invalid under Pennsylvania case law, plaintiff filed this bad faith suit. The parties filed cross motions for summary judgment. Judge Mariani of the Middle District granted defendant's motion with respect to the bad faith claim and subsequently denied plaintiff's motion for reconsideration.

The court concluded that there were genuine issues of material fact regarding UIM coverage, and that the defendant had reasons other than the waiver form to support its decision to deny coverage. Because the invalidity of the waiver form was only one reason the insurer had relied upon in its decision, the court stated that: "even if the waiver form is invalid, Plaintiff still needs to show that nothing else precludes him from coverage."⁷⁶⁶ The court further explained that defendant had raised other issues to support its conclusion that the waiver form applied, and while those arguments had been unsuccessful, they were not in bad faith: "The record contains no reason to believe that Defendant's legal arguments have been raised dishonestly. Instead, it simply appears that Defendants have hewn to good faith but unavailing legal theories. This does not qualify as bad faith conduct under the standards set forth above."⁷⁶⁷ The court reiterated this decision in its opinion denying reconsideration, noting:

[E]ven though Defendant knew about *Vaxmonsky's* holding since December 2007, it continuously made reasonable, good faith arguments in the intervening time that *Vaxmonsky* did not apply to the facts of this case. . . . While these arguments were unsuccessful, that is not by itself evidence of bad faith. . . . Plaintiffs essentially ask the Court to infer bad faith because Defendant did not surrender this lawsuit and pay their claim when judicial decisions began to turn against it, notwithstanding the fact that Defendant had other avenues to challenge those decisions by reconsideration and appeal. But Defendant's decision to litigate a reasonable but unpersuasive legal position cannot amount to bad faith under the existing case law.⁷⁶⁸

(2) *Trustgard Ins. Co. v. Campbell*, 2016 U.S. Dist. LEXIS 163606 (W.D. Pa. Nov. 28, 2016) (Schwab, J.)

Plaintiffs were injured in an auto accident, following which they sought UIM benefits from their auto insurer, Trustgard. Trustgard concluded that, plaintiffs' position to the contrary, plaintiffs were not entitled to stack UIM coverage. Decision on stacking depended upon whether the vehicle involved in the accident was added to the policy by endorsement or whether it was added by virtue of the "newly acquired vehicle" clause. Whether Trustgard was required to seek a waiver of stacking depended on how the vehicle was added. Plaintiffs contended that because the vehicle was added by endorsement, Trustgard's failure to provide a stacking waiver mandated stacked coverage. Trustgard filed this declaratory judgment action seeking a declaration that it did not owe stacked UIM coverage. The Campbells filed counterclaims, including one for statutory bad faith. The parties filed cross motions for summary judgment. Judge Schwab of the Western District granted Trustgard's motion and denied the Campbells' motion.

The court, in an earlier decision, concluded that the Campbells should receive stacked benefits under their policy. However, with respect to the bad faith claim, "the Court does not find that Trustgard's legal position was unreasonable," because the law was not settled.⁷⁶⁹ Trustgard had been able to support its decision with reasonable authority and the Pennsylvania Supreme Court had recently granted allocatur on the stacking issue. Therefore, the court concluded that it "cannot find that Trustgard's position in denying stacked benefits to the Campbells was bad faith."⁷⁷⁰

(3) *Olender v. Nat'l Cas. Co.*, 2012 U.S. Dist. LEXIS 117731 (E.D. Pa. Aug. 21, 2012) (Tucker, J.)

Defendant provided a commercial garage insurance policy for the business of plaintiff's husband. Plaintiff was driving a car owned by her husband's business at the time of the accident at issue. She settled with the tortfeasor for his bodily injury limits, and then sought UIM coverage with defendant. Defendant maintained that plaintiff's husband had limited UIM coverage to \$35,000. Plaintiff maintained that the amount of coverage was \$100,000. The UIM selection/rejection form had both options signed and dated. When the parties could not resolve their dispute as to the

⁷⁶⁶ *Douglas v. Discover Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 131601, at *31 (M.D. Pa. Sept. 29, 2015).

⁷⁶⁷ *Douglas v. Discover Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 131601, at *32-33 (M.D. Pa. Sept. 29, 2015).

⁷⁶⁸ *Douglas v. Discover Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 163781, at *12-13 (M.D. Pa. Dec. 7, 2015) (citing *American Int'l Ins. Co. v. Vaxmonsky*, 916 A.2d 1106 (Pa. Super. Ct. 2006)).

⁷⁶⁹ *Trustgard Ins. Co. v. Campbell*, 2016 U.S. Dist. LEXIS 163606, at *6 (W.D. Pa. Nov. 28, 2016).

⁷⁷⁰ *Trustgard Ins. Co. v. Campbell*, 2016 U.S. Dist. LEXIS 163606, at *7 (W.D. Pa. Nov. 28, 2016).

available limits, plaintiff filed this breach of contract and bad faith suit. The parties filed cross motions for summary judgment. Judge Tucker of the Eastern District granted defendant's motion as to the bad faith claim.

Plaintiff argued that defendant's refusal to tender the undisputed amount of UIM coverage without a release was in bad faith. The court disagreed, finding that either parties' interpretation of the selection form was reasonable, and that the ambiguity would be resolved in the insured's favor. The court stated: "[T]he Court find that Defendant's position regarding the policy limit was in good faith and based on the designations of the selection/rejection form. Accordingly, Plaintiff's claim for bad faith must fail."⁷⁷¹

(4) *Aumen v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 31360 (M.D. Pa. Mar. 8, 2011) (Prince, M.J.), adopted by, 2011 U.S. Dist. LEXIS 31166 (M.D. Pa. Mar. 24, 2011) (Jones, J.) (auto exclusion for "use of vehicle for fee")

Plaintiff Mr. Aumen was in an accident that occurred while he was making deliveries in his employer's van in the scope of his employment. After the accident, he submitted a UIM claim to his personal auto insurer, defendant Nationwide, which initially denied the claim and later settled it. Plaintiffs Mr. and Mrs. Aumen filed a bad faith suit contending in part that the insurer had not conducted a reasonable investigation. Magistrate Judge Prince recommended that the insurer's motion for summary judgment be granted, and Judge Jones of the Middle District subsequently adopted the report and recommendation and granted the insurer's motion.

Plaintiffs contended that the initial denial of the claim stemmed largely from Nationwide's failure to properly investigate the legal grounding for the denial. Plaintiffs argued that the insurer's failure at the time of the initial claims decision should be the focus of the bad faith analysis, not case law the insurer subsequently discovered. The insurer countered that its claims analyst was "a seasoned employee" who was well-trained and well-versed in exclusions to policies. The claims analyst, it was argued, reasonably interpreted the policy exclusion pertaining to the "use of a vehicle for a fee" to exclude coverage in this case, where the plaintiff was making deliveries in the scope of his employment, and his employer was charging customers for such deliveries.

The court agreed with the insurer, stating, "[W]hether her interpretation of the application of the exclusion was correct or not, given her background in handling insurance claims and her belief that she had all the necessary information to make a determination, it cannot be concluded that she acted in bad faith by reaching that decision quickly."⁷⁷² Furthermore, the court found that the case law indicated that there was an ambiguity in the language of the exclusion. A Pennsylvania Superior Court decision issued near the time of the claim denial supported Nationwide's interpretation of the exclusion, although the Pennsylvania Supreme Court later reversed that interpretation, finding the term "fee" ambiguous.

The court held that it would interpret the term in the insured's favor in its coverage decision, but, because the term was ambiguous, the court opined that it was reasonable for the insurer to have interpreted it as it did, whether or not Nationwide had researched the case law prior to its claims decision:

[R]egardless of whether Defendant knew of such case law at the time it made its initial determination to deny coverage or whether such holding supported its position as to the interpretation of the term "fee" within the exclusion, the undeniable conclusion is that its interpretation was reasonable. . . . Consequently, Plaintiff [sic] has not established a bad faith claim and summary judgment in favor of the Defendant is warranted.⁷⁷³

This case is also discussed in §§10:07(a), 10:13(a), and 10:23.

(5) *Blaylock v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 1098 (M.D. Pa. Jan. 7, 2008) (Caldwell, J.)

In this case, discussed in §10:07(a), in granting a UM insurer's motion for summary judgment as to bad faith, Judge Caldwell of the Middle District wrote:

[W]hen a company loses litigation over coverage, it does not automatically follow that the insured is entitled to compensation on a bad faith claim. . . . *see also Alexander v. Provident Life & Accident Ins. Co.*, 2003 U.S. Dist. LEXIS 4498, 2003 WL 23757578, at *5 (M.D. Pa. 2003) ("The law allows for the possibility that an insurer makes an incorrect decision."⁷⁷⁴)

(6) *Stanford v. Nat'l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323 (E.D. Pa. Nov. 3, 2014) (Tucker, C.J.)

This factually complicated UM/UIM case spanned a period of 17 years, and the facts are discussed in detail in §10:17. Following arbitration, plaintiff filed a complaint against NGM among others, alleging bad faith. NGM filed a motion for summary judgment after discovery concluded. Judge Tucker of the Eastern District granted the insurer's motion. The court concluded that although NGM wrongly determined that Delaware stacking law would apply to the

⁷⁷¹ *Olender v. Nat'l Cas. Co.*, 2012 U.S. Dist. LEXIS 117731, at *14 (E.D. Pa. Aug. 21, 2012).

⁷⁷² *Aumen v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 31360, at *12-13 (M.D. Pa. Mar. 8, 2011).

⁷⁷³ *Aumen v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 31360, at *16-17 (M.D. Pa. Mar. 8, 2011) (citing *Bostick v. ITT Hartford Grp., Inc.*, 56 F. Supp. 2d 580, 587 (E.D. Pa. 1999), and *Jung v. Nationwide Mut. Fire Ins. Co.*, 949 F. Supp. 353, 359 n.7 (E.D. Pa. 1997)).

⁷⁷⁴ *Blaylock v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 1098, at *22-23 (M.D. Pa. Jan. 7, 2008).

claim, which would have limited the amount of UIM benefits, NGM nonetheless had not acted in bad faith because it was a reasonable conclusion that Delaware law might apply.⁷⁷⁵

§10:05(b) — Cases, Property

(1) *United States Fire Ins. Co. v. Kelman Bottles*, 538 F. App'x 175 (3d Cir. 2013) (Roth, J.) (commercial property insurance policies)

Defendant Kelman was a company that manufactured glass, and as part of the business, had a glass melting furnace that leaked, causing damage. Kelman sought coverage under two policies: an all risk policy with plaintiff US Fire; and an equipment breakdown policy with third-party defendant CNA. When the claims were denied, US Fire brought this declaratory judgment action and Kelman filed a bad faith counterclaim. Judge Schwab of the Western District of Pennsylvania granted summary judgment to US Fire on the bad faith claim. This decision is discussed in the “Case Law Archive” at §§10:03(b), 10:07(b), and 10:21. Kelman appealed. The Third Circuit, in this opinion authored by Judge Roth, affirmed the decision to grant summary judgment on the bad faith claim to US Fire.

The appellate court concluded that there was a genuine issue of material fact as to whether the inherent vice exclusion and additional coverage extensions applied, and so it reversed the district court’s decision on contract interpretation. However, the Third Circuit affirmed as to bad faith because Kelman made no showing that the claims decision had been unreasonable:

Notwithstanding our reversal of summary judgment on Kelman’s breach of contract claim, we will affirm the District Court’s grant of summary judgment for US Fire on Kelman’s bad faith claim because Kelman cannot show clear and convincing evidence of bad faith for any of its four allegations of bad faith.⁷⁷⁶

Kelman argued that several of US Fire’s experts conceded that their study of the involved furnace and the incident in question suggested that the exclusions relied upon by US Fire did not apply. The Third Circuit rejected this argument:

Without more, this proffer would not allow a jury to conclude by clear and convincing evidence that US Fire’s denial of the claim was unreasonable or that US Fire knew or recklessly disregarded its lack of a reasonable basis to deny the claim. . . . The fatal defect in Kelman’s claim is that it relies on the absence of evidence of good faith rather than clear and convincing evidence of bad faith. Consequently, we will affirm the District Court’s grant of summary judgment to US Fire on Kelman’s bad faith claim.⁷⁷⁷

A different insurer, CNA, filed its own motion for summary judgment regarding Kelman’s breach of contract and bad faith claims. The district court decision as to the bad faith claim against CNA is discussed in §§8:04(b), 10:07(d), 10:11, and 10:25.

(2) *Luse v. Liberty Mut. Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 67608 (M.D. Pa. July 7, 2010) (Rambo, J.), *aff’d*, 411 F. App'x 462 (3d Cir. 2011) (per curiam)

This case, involving fire damage at the Luses’ condominium, is discussed in greater detail in §10:07(b). The Luses claimed that Liberty Mutual notified them in bad faith that its policy was secondary to the condominium policy and that Liberty Mutual failed to indicate that additional living expenses would be available under its policy. Judge Rambo of the Middle District rejected this argument in short order because the Liberty Mutual policy, in fact, was secondary to the condominium policy and there was no indication that any living expenses would be needed. At most, the court stated, the failure to notify the Luses of this policy term at the initial inspection was negligence, and could not serve as a basis for a bad faith claim:

Liberty’s failure to apprise the Luses on the first inspection of the home that any additional living expenses would be covered by Liberty does not establish bad faith. Mr. Kishbaugh [Liberty’s employee] informed Mrs. Luse that Liberty’s coverage was secondary to that of the condominium association, a representation which was true, except for the fact that the Luses had additional living expense coverage through Liberty. At the initial inspection, Mr. Kishbaugh did not believe additional living expense coverage would be necessary because in his judgment it was a small incident, he was not aware of any health concerns, and no one requested that the family be relocated. Thus, the fact that Mr. Kishbaugh did not know that Liberty provided this coverage at the time of the inspection cannot be said to be bad faith. This is particularly true given that Liberty never denied Plaintiff’s [sic]

⁷⁷⁵ *Stanford v. Nat’l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323, at *16-21 (E.D. Pa. Nov. 3, 2014).

⁷⁷⁶ *United States Fire Ins. Co. v. Kelman Bottles*, 538 F. App'x 175, 183 (3d Cir. 2013).

⁷⁷⁷ *United States Fire Ins. Co. v. Kelman Bottles*, 538 F. App'x 175, 183 (3d Cir. 2013).

the right to relocate, and paid all of Plaintiff's' [sic] relocation expenses once relocation was requested. As such, Plaintiff's [sic] have failed to show bad faith on the part of Liberty.⁷⁷⁸

The Third Circuit, in this *per curiam* decision, affirmed, noting that the information given to the Luses at the initial meeting was not in bad faith:

We reach the same conclusion as to Liberty's failure to initially inform Mrs. Luse about the availability of primary policy coverage. The information Mr. Kishbaugh initially gave Mrs. Luse was not incorrect, but incomplete. Because Mr. Kishbaugh determined that the condominium was liveable and no request for relocation was made, Mr. Kishbaugh had a reasonable basis for failing to give Mrs. Luse full information concerning her living expenses at that time.⁷⁷⁹

(3) *El Bor Corp. v. Fireman's Fund Ins. Co.*, 787 F. Supp. 2d 341 (E.D. Pa. 2011) (Robreno, J.)

Plaintiff Juniata was a fitness facility that had a property insurance policy with Fireman's Fund. In early 2009, plaintiff's owner noticed a stain on the ceiling, but did nothing about it until February 2009, when he contacted a public adjuster. The public adjuster notified the insurer of the claim in mid-April 2009, but did not submit an estimate until May 18, 2009. On June 4, 2009, Fireman's Fund retained an independent adjuster to perform an inspection, which was completed several days later and after which that adjuster notified the insurer that an expert was needed to inspect the roof. The insurer did not retain an engineering expert until after plaintiff filed a breach of contract and bad faith suit. The expert opined that the damage was caused by an improperly constructed and maintained roof. Therefore, Fireman's Fund denied the claim under a policy exclusion, and agreed to pay only for the replacement of certain interior finishes damaged by the leak.

The insurer filed a motion for summary judgment as to the breach of contract and bad faith claims. Judge Robreno of the Eastern District denied the motion on the breach of contract claim, finding a question of fact whether plaintiff's claim was covered by the policy. However, the court granted the insurer's motion as to the bad faith claim. The court held that even though the insurer's interpretation of its policy could not be found to be correct at that stage of the proceedings, it was not unreasonable:

[I]t cannot be said that Defendant's reliance on the policy exclusions cited was unreasonable. Defendant's engineer found that the weight of the snow and ice could not have caused the damage to [plaintiff's] roof, and noted the roof was poorly constructed and maintained. . . . These findings, which were cited in the denial letter, provide reasonable grounds to deny benefits.⁷⁸⁰

(4) *Kao v. Markel Ins. Co.*, 708 F. Supp. 2d 472 (E.D. Pa. 2010) (Brody, J.)

Plaintiffs owned two buildings in Philadelphia, each of which contained a multi-unit dwelling on the second and third floors and commercial space on the first floor. The residential apartments were rented out. An interior door separated the two buildings. The police, executing a drug-related search warrant for one of the buildings, damaged the doors to each of the apartments in both buildings, and also caused some damage to an office door on the first floor. Plaintiffs notified Markel Insurance, the insurer for the buildings. Markel retained an outside adjuster to investigate. The adjuster relayed the information about the police search he learned from plaintiffs and attempted to obtain a copy of the police report. Over three months later, the insurer and the adjuster were still awaiting the police report (they never asked for the search warrant). At that time, Markel instructed the adjuster to send a letter denying the claim based on the investigation to date under the policy exclusion for "governmental acts."

Plaintiffs subsequently filed suit, alleging breach of contract and bad faith. The insurer filed a motion for summary judgment, which Judge Brody of the Eastern District granted as to the bad faith claim and denied as to the breach of contract claim. The court noted that although the Pennsylvania Supreme Court had not ruled squarely on the issue, the Third Circuit had indicated that the Pennsylvania Supreme Court would likely follow the bad faith analysis of *Terletsky v. Prudential Prop. & Cas. Ins. Co.*⁷⁸¹ According to the court, "To prove bad faith, an insured must show by clear and convincing evidence that the insurer '[1] did not have a reasonable basis for denying benefits under the policy and . . . [2] knew or recklessly disregarded its lack of reasonable basis in denying the claim."⁷⁸²

As for the contractual claim, the court ruled that Markel was incorrect in its determination of policy coverage, because the exclusionary language was ambiguous. As for bad faith, however, the court concluded that plaintiffs did not meet the high standard of proof because it was not unreasonable for the insurer to conclude that acting pursuant to a facially valid search warrant would fall within the exclusion:

Though Markel was ultimately incorrect in its determination of policy coverage in this case, because the applicability of the Exclusion was ambiguous, Markel's interpretation that any facially valid government order sufficed to preclude coverage was not devoid of a reasonable basis. Defendants

⁷⁷⁸ *Luse v. Liberty Mut. Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 67608, at *15 (M.D. Pa. July 7, 2010).

⁷⁷⁹ *Luse v. Liberty Mut. Fire Ins. Co.*, 411 F. App'x 462, 466 (3d Cir. 2011).

⁷⁸⁰ *El Bor Corp. v. Fireman's Fund Ins. Co.*, 787 F. Supp. 2d 341, 349 (E.D. Pa. 2011).

⁷⁸¹ *Terletsky v. Prudential Property & Casualty Ins. Co.*, 649 A.2d 680 (Pa. Super. 1994).

⁷⁸² *Kao v. Markel Ins. Co.*, 708 F. Supp. 2d 472, 480 (E.D. Pa. 2010) (quoting *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. 1994)).

reasonably believed, based on what Plaintiffs told them, that the damage caused was done pursuant to a facially valid warrant. At worst, Defendants were negligent in assuming that the warrant was facially valid, and in denying coverage before obtaining a copy of the warrant. Defendants' reliance on Plaintiffs' explanation of the cause of damage and on the assumption that the warrant was likely to be valid does not rise to the level of reckless disregard necessary to show bad faith.⁷⁸³

(5) *Rock-Epstein v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 76042 (E.D. Pa. Sept. 29, 2008) (Schiller, J.)

In this homeowner's case, discussed in §10:07(b), Judge Schiller of the Eastern District observed that even "a reasonable but incorrect interpretation of an insurance policy and the law is not bad faith."⁷⁸⁴

(6) *Smith v. Westfield Ins. Co.*, 2007 U.S. Dist. LEXIS 43996 (E.D. Pa. June 15, 2007) (Robreno, J.)

Westfield denied plaintiffs' homeowners' claim based in part upon an exclusion for construction defects. Judge Robreno of the Eastern District held that there were factual issues as to causation, which precluded the granting of the insurer's motion for summary judgment on the coverage question. However, the court granted Westfield's motion for bad faith. The court held that the position taken by the insurer was "perfectly reasonable," adding:

Westfield did a thorough investigation and made a reasonable finding. That the determination may turn out to be incorrect does not mean that it had a dishonest purpose or was made with reckless disregard for the truth.⁷⁸⁵ The court granted Westfield's summary judgment motion for statutory bad faith.

(7) *Albert v. Nationwide Ins. Co.*, 2001 U.S. Dist. LEXIS 16435 (M.D. Pa. May 22, 2001) (Caputo, J.)

The plaintiffs made a claim pursuant to their dwelling fire insurance policy. The structural damages to the property were classified by the insurer as a partial loss. The insurer inspected the property and calculated a total estimate of repairs. The insurer then deducted depreciation from this estimate in order to arrive at the actual cash value of the repairs.

The insurer notified the plaintiffs in writing as to the amounts of its estimates. At the same time, the insurer notified the plaintiffs that they owed payment of back property taxes as well as fees for debris removal, for which a sum of cash from the insurance proceeds needed to be escrowed pursuant to a local municipal ordinance. Dissatisfied with the resolution of the claim, the plaintiffs sued the insurer for breach of contract and bad faith pursuant to §8371.

Judge Caputo of the Middle District granted the plaintiffs' motion for summary judgment on the contract claim regarding the issue of whether an insurer may deduct depreciation in calculating actual cash value in the case of a partial loss. Analyzing the applicable policy provisions as well as Pennsylvania case law, the court held that "in this case, depreciation cannot be deducted to obtain the actual cash value in a partial loss."⁷⁸⁶

However, the court granted summary judgment in favor of the insurer on the bad faith claim. The court held that "[p]laintiffs have failed to show by clear and convincing evidence that [the insurer] acted in bad faith [in] providing Plaintiffs with their estimate,"⁷⁸⁷ adding that "even though there is a dispute as to the amount of the loss, there is no evidence that [the insurer's] estimates were unreasonable or that they knew that the amount of the loss was clear."⁷⁸⁸

The court also held that the insurer did not act in bad faith by deducting depreciation from the actual cash value estimates because "[p]laintiffs have failed to show with clear and convincing evidence that [the insurer's] reliance on [existing Pennsylvania case law] was made in bad faith."⁷⁸⁹ According to the court, when the company asserted that it was entitled to withhold depreciation, case law existed within Pennsylvania which justified that position. Further, the court held that the insurer did not act in bad faith by withholding certain insurance proceeds for tax and debris removal as such actions were consistent with a local municipal ordinance which the insurer was bound to follow.

(8) *Guadagnini v. Lagioia*, 1996 U.S. Dist. LEXIS 11104 (E.D. Pa. July 29, 1996) (Giles, J.)

In this case, the insurer relied upon the "earth movement exclusion" and the "paved surfaces" limitation in a policy, and denied coverage for collapse of the insured's parking lot. Although a subsequent decision of the Pennsylvania Supreme Court held that the earth movement exclusion was inapplicable, Judge Giles of the Eastern District found that there had been no bad faith since that opinion came down after the insurer denied coverage. Moreover, with respect to reliance on the paved surfaces limitation, the court held that the insurer's position was correct.

⁷⁸³. *Id.*

⁷⁸⁴. *Rock-Epstein v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 76042, at *20 (E.D. Pa. Sept. 29, 2008) (citing *Bostick v. ITT Hartford Group, Inc.*, 56 F. Supp. 2d 580, 587 (E.D. Pa. 1999)).

⁷⁸⁵. *Smith v. Westfield Ins. Co.*, 2007 U.S. Dist. LEXIS 43996, at *14 (E.D. Pa. June 15, 2007).

⁷⁸⁶. *Albert v. Nationwide Ins. Co.*, 2001 U.S. Dist. LEXIS 16435, at *15 (M.D. Pa. May 22, 2001).

⁷⁸⁷. *Albert v. Nationwide Ins. Co.*, 2001 U.S. Dist. LEXIS 16435, at *20 (M.D. Pa. May 22, 2001).

⁷⁸⁸. *Albert v. Nationwide Ins. Co.*, 2001 U.S. Dist. LEXIS 16435, at *32 (M.D. Pa. May 22, 2001).

⁷⁸⁹. *Albert v. Nationwide Ins. Co.*, 2001 U.S. Dist. LEXIS 16435, at *21 (M.D. Pa. May 22, 2001).

(1) *MP III Holdings, Inc. v. Hartford Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 72370 (E.D. Pa. June 30, 2011) (Davis, J.) (claim under commercial liability policy)

MP III was a business that trained truck drivers. It had an Educator's Legal Liability Policy through defendant Hartford. MP III sold student loans to SFC, which securitized them. Because of a high default rate, SFC collapsed in early 2002. MP III was subsequently named in several lawsuits, essentially for fraudulently inducing SFC to make tuition loans; primarily at issue was litigation in the Pennsylvania Court of Common Pleas for Philadelphia County. That case involved the sale of all of MP III's stock to a competitor, and as part of the transaction, the new owner was to be responsible for a loan PBB had made to MP III. PBB filed suit when it was not repaid, naming MP III as one of several defendants. MP III filed a cross claim against Leeds Weld, contending that Leeds Weld had interfered with the merger.

In 2005, MP III filed a breach of contract action against Hartford, contending that it had breached its duty to defend. That suit was settled following the court's decision that Hartford owed a defense. The settlement agreement, apparently executed in March 2007, included an agreement to pay past fees and ongoing defense costs under a reservation of rights, among other things.

In October 2006, just before trial in the PBB action, PBB and MP III entered into a "Settlement Agreement and General Release," in which they agreed to dismiss their claims with prejudice to resolve any issues remaining after resolution of the Leeds Weld claims (primarily regarding how any recovery should be distributed) through mediation or arbitration. The agreement expressly released all claims PBB and MP III had pursued against one another in the litigation. After the agreement was executed, the court dismissed PBB's claims. The claim against Leeds Weld remained, and in January 2008 resulted in a finding that Leeds Weld was not liable to MP III.

MP III wished to appeal the ruling, and notified Hartford of its intentions. (MP III's appeal was ultimately unsuccessful.) Hartford's counsel indicated that it did not believe that MP III was entitled to coverage for costs associated with the appeal because those "affirmative claims" fell outside the policy and it believed that the PBB agreement had effectively ended all of the claims to which MP III was entitled to defense and/or indemnification. Therefore, Hartford maintained, it was not responsible for any defense costs or indemnification after the time the agreement was executed, but indicated that should any further claims arise, it would consider them in due course (it also communicated this position to its reinsurer). MP III disagreed with Hartford's position, contending that PBB continued to be entitled to recovery against it and continued to have claims it might press against it in arbitration.

In June and October 2008, Hartford filed two declaratory judgment actions in state court to resolve issues about whether MP III continued to be owed a defense and whether Hartford had concealed the existence of an umbrella policy issued to MP III; the actions were consolidated. The court found that Hartford's defense obligations continued following the PBB agreement, but Hartford eventually obtained summary judgment on the issue relating to the umbrella policy. MP III separately filed this action in October 2008, in which the only count was for bad faith.

In April 2009, during the pendency of the declaratory judgment action, PBB and MP III entered into mediation. Once PBB demanded mediation, Hartford indicated that it would provide a defense subject to a reservation of rights, and inquired whether MP III would defend on the grounds that the agreement precluded these claims. MP III responded that the release did not preclude the claims asserted by PBB and that such a defense would be baseless because the intent of the release was merely to put the claims aside until such time as they were mediated or arbitrated. The June 2009 mediation resulted in a settlement; Hartford paid defense costs associated with the mediation and indemnified MP III for the settlement amount.

After this time, the parties filed cross motions for summary judgment in the bad faith case. Judge Davis of the Eastern District granted Hartford's and denied MP III's in an opinion also discussed in §§5:04(a) and 10:25.

MP III contended that Hartford terminated its defense in bad faith. The court disagreed, finding Hartford entitled to summary judgment, stating: "we rest our conclusion in this case on the bottom-line black-and-white point that Hartford's coverage position, and the accordant way it conducted itself, was not unreasonable."⁷⁹⁰ The court rejected MP III's argument that Hartford's duty to defend was based solely on the allegations in the complaint involving the PBB claims, and thus the language of the PBB agreement had no effect on Hartford's obligations: "Pennsylvania law is clear that the duty to defend may be affected by the settlement, dismissal, or discontinuation of an underlying action."⁷⁹¹

The court found that Hartford's interpretation of the PBB agreement reasonably led it to conclude that all claims had been dismissed, so there were no claims to defend. Moreover, the court found that it was reasonable for Hartford to conclude that, on the basis of the PBB agreement, there could be no future claims:

Similarly, it was also not an unreasonable position that, given the interplay between the language of the PBB Agreement and the outcome of MP III's affirmative claims against Leeds Weld, there could be no claims in the future. Based on counsel for MP III's own statement that the damages in mediation

⁷⁹⁰ *MP III Holdings, Inc. v. Hartford Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 72370, at *55 (E.D. Pa. June 30, 2011).

⁷⁹¹ *MP III Holdings, Inc. v. Hartford Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 72370, at *62 (E.D. Pa. June 30, 2011).

or arbitration would be limited to what MP III got from Leeds Weld, which appears twice in the record, combined with the fact that MP III lost its claim against Leeds Weld, it was not an unreasonable position that mediation or arbitration could not occur, and therefore Hartford had no duty to defend or indemnify MP III against PBB. While, in hindsight, this position may not have been correct, it was not unreasonable.⁷⁹²

(2) *Victoria Ins. Co. v. Li He Ren*, 2008 U.S. Dist. LEXIS 44674 (E.D. Pa. June 9, 2008) (Padova, J.)

In this case, discussed in §10:09, Judge Padova of the Eastern District held that an insurer does not act in bad faith by investigating and litigating legitimate issues of coverage, adding, “This is true even when the insurer takes a coverage position that is ultimately found to be meritless.”⁷⁹³

(3) *Hollingsworth v. State Farm Fire & Cas. Co.*, 2005 U.S. Dist. LEXIS 3694 (E.D. Pa. Mar. 9, 2005) (Padova, J.)

Plaintiffs sued their insurer, State Farm, for breach of a rental dwelling insurance contract and bad faith arising out of alleged vandalism that occurred on two occasions to the insured property. State Farm ultimately offered to pay approximately \$6,000 in compromise of the claim for the first loss. While that claim was pending, the plaintiffs claimed to have suffered another vandalism loss. This loss was denied by State Farm because the property had been vacant for more than 30 days and an exclusion in the policy excluded coverage for losses caused by “vandalism. . . if the dwelling has been vacant for more than 30 consecutive days immediately before the loss.”

Although there were issues of material fact that prevented the entry of summary judgment on the breach of contract count, Judge Padova of the Eastern District granted State Farm’s motion for summary judgment on the bad faith count. The court found that the term “vacant” as used in the policy’s vandalism exclusion was ambiguous. The court therefore concluded that where the property was rendered uninhabitable by the first loss, the vacancy clause would be suspended until the insurer elected to either pay the loss or repair the damage caused by the loss.

The plaintiff argued that the insurer acted in bad faith by unreasonably interpreting the term “vacant.” However, the court noted that there was no controlling Pennsylvania law on the meaning of the term “vacant,” and other jurisdictions had accepted State Farm’s interpretation of the clause. Therefore, according to the court, there was no bad faith:

The court has already concluded. . . that defendant’s interpretation of the term “vacant” was reasonable, although unavailing, as matter of law. Under Pennsylvania law, “bad faith cannot be found where the insurer’s conduct is in accordance with a reasonable but incorrect interpretation of the insurance policy.”⁷⁹⁴

(4) *McCrink v. People’s Benefit Life Ins. Co.*, 2005 U.S. Dist. LEXIS 5072 (E.D. Pa. Mar. 29, 2005) (Davis, J.)

The insurer issued a group policy that provided \$100,000 in benefits due to accidental death, but excluded coverage if the insured died as a result of operating a motorcycle. A key coverage issue concerned whether the insured was “operating” the motorcycle at the time of his death. It was the plaintiff beneficiary’s position that the decedent was not driving the motorcycle, but had it on and was revving the engine when it lurched into the street and dragged him into the path of an oncoming car. The insurer concluded that the acts of the insured constituted operating a motorcycle and therefore denied coverage.

In a bad faith action, plaintiff argued that the defendant insurer failed to construe properly the policy language, including the term “operating,” and failed to conduct a fair and complete investigation. The defendant filed a motion for summary judgment on the bad faith count, which was granted by Judge Davis of the Eastern District.

With respect to the bad faith standard, the court observed as follows:

Although an insurer need not have been motivated by an improper purpose, such as ill will or self-interest, negligence does not rise to the level of bad faith. . . . As such, bad faith cannot be found where the insurer’s conduct is in accordance with a reasonable but incorrect interpretation of the insurance policy and the law. . . . Furthermore, an insurer is not required to show the process by which it reached its conclusion was flawless or that the investigatory methods it employed eliminated possibilities at odds with its conclusion.⁷⁹⁵

Although the court ultimately disagreed with the insurer’s interpretation of the term “operating” under the policy, the court found that the insurer did not act in bad faith:

⁷⁹² *MP III Holdings, Inc. v. Hartford Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 72370, at *67-68 (E.D. Pa. June 30, 2011).

⁷⁹³ *Victoria Ins. Co. v. Li He Ren*, 2008 U.S. Dist. LEXIS 44674, at *7-10 (E.D. Pa. June 9, 2008) (citing *Bostick v. ITT Hartford Grp., Inc.*, 56 F. Supp. 2d 580, 587 (E.D. Pa. 1999); *Aetna Cas. & Sur. Co. v. Ericksen*, 903 F. Supp. 836, 841 (M.D. Pa. 1995), and *Employers Mut. Cas. Co. v. Loos*, 476 F. Supp. 2d 478, 496 (2007)).

⁷⁹⁴ *Hollingsworth v. State Farm Fire & Cas. Co.*, 2005 U.S. Dist. LEXIS 3694, at *25 (E.D. Pa. Mar. 9, 2005) (citations omitted).

⁷⁹⁵ *McCrink v. People’s Benefit Life Ins. Co.*, 2005 U.S. Dist. LEXIS 5072, at *34-35 (E.D. Pa. Mar. 29, 2005) (citations omitted).

. . . [S]o long as the insurance company adopts a reasonable construction of the policy, and then uses its reasonable construction to shape the contours of an otherwise thorough investigation, a plaintiff cannot meet her burden of establishing bad faith by clear and convincing evidence.

The defendant's construction of the term "operating" was reasonable. . . . [W]ithout dispositive case law defining the term "operating" in an insurance policy, no reasonable juror could attribute defendant bad faith for proceeding according to a reasonable, vernacular understanding of the term "operating," even without first surveying the cloudy landscape of Pennsylvania case law.⁷⁹⁶

In light of its interpretation of the term "operating," the court also held that the insurer's investigation was reasonable:

It is clear that defendant construed the motorcycle exclusion in a reasonable, albeit ultimately erroneous, manner. It is also clear that, using this reasonable construction as a guide, the defendant conducted a fair and thorough investigation and made a reasoned assessment of the claim based upon this record.

Using the defendant's reasonable construction of the policy as the gauge to determine whether defendant acted in bad faith by denying coverage, this Court finds that the factual record supported defendant's conclusion that the insured's death was the result of putting the vehicle into motion.⁷⁹⁷

(5) *Resource America, Inc. v. Certain Underwriting Members of Lloyd's*, 69 Pa. D. & C. 4th 496, 509 (Phila. 2004)

Lloyd's, a second level excess D&O insurer, refused to participate in a \$7 million class action settlement because it believed that the insured breached the duty to cooperate on several grounds. Judge Sheppard of the Philadelphia Court of Common Pleas denied Lloyd's motion for summary judgment, holding that the insurer failed to substantiate its claim that the insured violated its duty to cooperate. However, the court granted Lloyd's summary judgment on the bad faith claim, stating, "In this case, the court does not find that Lloyd's acted in bad faith in defending this action because it put forth legitimate, albeit not winning, arguments to justify its refusal to consent" to the underlying settlement.⁷⁹⁸

(6) *Atlantic Cas. Ins. Co. v. Epstein*, 2004 U.S. Dist. LEXIS 18725 (E.D. Pa. Sept. 15, 2004) (Buckwalter, J.)

A homeowner's insurer refused to defend a lawsuit against its insured arising out of a heating oil leak on the insured property, based upon the "pollution exclusion" clause in the policy. Judge Buckwalter held that the exclusion did not apply to home heating oil, and the insurer was obligated to provide a defense. However, he denied the insured's bad faith claim, stating,

[The insurer's] reasonable basis for denying the claim under the Policy was that their [sic] interpretation of the policy's exclusion clause included barring claims for damages attributable to Heating Oil. Although this Court did not agree with this interpretation given the various factors discussed above, it is not a wholly unreasonable or reckless interpretation. Because there is no evidence in the record that Plaintiff acted in bad faith, the Defendant is not entitled to [bad faith damages].⁷⁹⁹

(7) *Rector, Wardens & Vestryman of St. Peter's Church in the City of Philadelphia v. American Nat'l Fire Ins. Co.*, 2002 U.S. Dist. LEXIS 625 (E.D. Pa. Jan. 14, 2002) (Hutton, J.)

In this case, two liability insurers filed a motion for summary judgment, seeking a declaration that the applicable policies imposed no duty to defend a lawsuit alleging racial discrimination; they further sought an order dismissing the plaintiff's bad faith claim. Judge Hutton of the Eastern District disagreed with the insurance companies' position on the coverage issue but granted the insurers' motion for summary judgment on the issue of bad faith. The court held that the insurers were "not reckless in debating whether their policies covered the allegations in the underlying lawsuit,"⁸⁰⁰ and that a "reasonable but incorrect interpretation of an insurance provision does not rise to the level of bad faith."⁸⁰¹

(8) *Township of Center v. Nationwide Mut. Ins. Co.*, 55 Pa. D. & C.4th 28 (Butler 2001) (Shaffer, J.)

The defendant insurers issued a commercial liability policy to Center Township. Two individuals sued Center Township as well as a township engineer (Olsen). The insurers refused to defend the township engineer, claiming that he was not an "executive officer" as defined in the policy. The township filed a declaratory judgment action seeking to

⁷⁹⁶ *Id.* at *35-38.

⁷⁹⁷ *Id.* at *43, *44, and *47.

⁷⁹⁸ *Resource America, Inc. v. Certain Underwriting Members of Lloyd's*, 69 Pa. D. & C.4th 496, 509 (Phila. 2004).

⁷⁹⁹ *Epstein*, 2004 U.S. Dist. LEXIS 18725, at *18.

⁸⁰⁰ *Id.* at *33.

⁸⁰¹ *Id.* (quoting *Scranton Dunlap, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2000 U.S. Dist. LEXIS 11010 (E.D. Pa., 2000)).

declare the engineer as an insured under the policy, and further requested costs and attorneys' fees in pursuing the declaratory judgment action. Judge Shaffer of the Butler County Court of Common Pleas held that the term "executive officer" in the insurance policy was ambiguous and subject to different interpretations, and therefore the defendants should have defended the township engineer in the underlying action. However, the court refused to reimburse the plaintiff for costs, expenses and legal fees, because the insurers had a reasonable basis for their position.⁸⁰²

(9) *Highlands Ins. Group v. Vanbuskirk*, 1999 U.S. Dist. LEXIS 8532 (E.D. Pa. June 9, 1999) (McGirr Kelly, J.)

The Vanbuskirks' child was injured in an accident that involved a deep fryer. They sued the manufacturer of the fryer, which in turn filed a third party complaint against Mrs. Vanbuskirk alleging that she negligently supervised her child. The Vanbuskirks requested that Highlands Insurance defend and indemnify Mrs. Vanbuskirk under a homeowners' policy. Highlands assumed the defense subject to a reservation of rights, then filed a declaratory judgment action, arguing that the family member exclusion in the policy excluded coverage.

Highlands' position was based upon an amendment to the Vanbuskirks' homeowner's policy; prior to the change, the lawsuit would have been covered. The factual question as to whether the notice of the amendment given to the Vanbuskirks was adequate was submitted to a jury in the declaratory judgment action. The jury found that the notification was inadequate to give them notice of the applicable change in their policy. The Vanbuskirks then sued under §8371, seeking attorneys' fees for defense of the declaratory judgment action.

Judge James McGirr Kelly of the Eastern District held that Highlands' position was a reasonable one, notwithstanding the jury decision that the notice was insufficient, and therefore the company had not acted in bad faith. In denying the policyholder's petition for attorneys' fees and costs, the court stated that, "[i]t cannot be said that Highlands had no reasonable basis for bringing this action, and therefore an award of attorneys' fees would be inappropriate and the motion shall be denied."⁸⁰³

(10) *Kearns v. Minnesota Mut. Life Ins. Co.*, 75 F. Supp. 2d 413 (E.D. Pa. 1999) (Reed, J.)

Plaintiff Kearns was a chiropractor insured by Minnesota Mutual for disability and business overhead expenses (BOE). The plaintiff asserted that he was unable to perform his occupational duties due to a herniated lumbar disc. Applying a definition of "gross earnings" in the policy, Minnesota Mutual denied the BOE benefits. The plaintiff later asserted that Minnesota Mutual performed the calculation incorrectly. On cross-motions for summary judgment, the court concluded that the plaintiff's interpretation of the policy was correct.

Notwithstanding the court's finding in favor of the plaintiff on the contract claim, the court granted Minnesota Mutual's motion for summary judgment with respect to bad faith. Noting the exacting standard for bad faith, the court held that there was no evidence that Minnesota Mutual's denial of coverage was unfounded, frivolous, or dishonest. The court stated further that "Minnesota Mutual's interpretation of its policy, although contrary to the language of the policy in the opinion of this court, was not motivated by ill will or a desire to defraud [plaintiff]."⁸⁰⁴

(11) *Aetna Cas. & Sur. Co. v. Ericksen*, 903 F. Supp. 836 (M.D. Pa. 1995) (McClure, Jr., J.)

In this case, Aetna refused to indemnify and defend in reliance upon the "business pursuits exclusion" in the policy. Judge McClure of the Middle District held that the exclusion did not apply, but held further that Aetna had not acted in bad faith. Recognizing that Aetna's position was "of considerable merit," the court stated that, "[w]e see no bad faith in refusing to defend and indemnify based on a reasonable interpretation of the language of the policy, though we have reached a different conclusion."⁸⁰⁵ In rejecting the bad faith claim, the court took note of the fact that Aetna, as opposed to the plaintiff, had initiated the declaratory judgment action, stating, "It also should be noted that it was Aetna, not the Ericksens, which brought this action to determine the rights of the parties in relation to the policy at issue."⁸⁰⁶

(12) *Easy Corner, Inc. v. State Nat'l Ins. Co., Inc.*, 2014 U.S. Dist. LEXIS 155308 (E.D. Pa. Nov. 3, 2014) (Robreno, J.)

Plaintiff bar sought coverage under its CGL policy with defendant State National after a manager caused destruction to the facility. After defendant denied coverage under the dishonesty or criminal act exclusion and the theft by entrustment exclusion, plaintiff filed this breach of contract and bad faith suit. Defendant moved for summary judgment. Judge Robreno of the Eastern District granted the motion as to the bad faith claim.

The court concluded that the criminal act exclusion did not apply, as the manager's last day as such had preceded the destruction and concluded that the theft by destruction exclusion did apply to the claims for theft. Turning to the bad faith claim, the court concluded that just because defendant incorrectly denied coverage on some of the

⁸⁰² *Township of Center v. Nationwide Mut. Ins. Co.*, 55 Pa. D. & C.4th at 34-35.

⁸⁰³ *Vanbuskirk*, 1999 U.S. Dist. LEXIS 8532, at *5.

⁸⁰⁴ *Kearns v. Minnesota Mut. Life Ins. Co.*, 75 F. Supp. 2d 413, 421 (E.D. Pa. 1999).

⁸⁰⁵ *Aetna Cas. & Sur. Co. v. Ericksen*, 903 F. Supp. 836, 841 (M.D. Pa. 1995).

⁸⁰⁶ *Aetna Cas. & Sur. Co. v. Ericksen*, 903 F. Supp. 836, 841 (M.D. Pa. 1995).

claims, that did not mandate a finding of bad faith. The court held: “Plaintiff has pointed to no facts of record showing that Defendant’s denial of coverage rose above ‘mere negligence or bad judgment’ or that Defendant acted out of self-interest or ill will. Rather, under Plaintiff’s reasoning, virtually every incorrect denial of insurance coverage would constitute bad faith merely by virtue of being incorrect.”⁸⁰⁷

§10:06 Insurer’s Investigation and Claims Decision Was Reasonable

§10:07(a) — Cases (Auto Claims)

(1) *Rossi v. Progressive Ins.*, 813 F. Supp. 2d 643 (M.D. Pa. 2011) (Caputo, J.) (UIM claim dispute)

Rossi was in an auto accident in January 2007. In February 2008, he made a claim with Progressive for the entire amount of UIM benefits, \$30,000. The claims specialist examined the police report and witness statement from a Mr. Enders and spoke with an adjuster at Allstate, which insured the other driver. Allstate’s policy with the other driver had \$100,000 policy limits, but Allstate, which was contesting liability, had valued Rossi’s claim at \$20,000-\$25,000. Six months later, Progressive reviewed a new statement of witness Enders that Rossi’s attorney had recently obtained. Because Enders’s statements were inconsistent, Progressive performed a scene investigation and subsequently requested various medical records to evaluate Rossi’s injuries. A parallel property damage investigation was going forward, with Allstate and Progressive entering into an arbitration to determine which company should be liable for the damages: the arbitration found that Rossi was 80 percent at fault. Progressive’s claims specialist evaluated Rossi’s damages in January 2009 to be approximately \$30,000, well within the Allstate coverage limit.

When the parties were unable to resolve the claim, Rossi and his wife brought this bad faith and breach of contract suit against Progressive in April 2009. As discovery progressed, Progressive continued to believe that Rossi had a significant problem with liability and that he could not support his claim for lost wages. In December 2009, Progressive offered to settle for \$10,500. This offer was rejected by Rossi. The offer was increased to \$15,000 in January 2010 following an IME, because Progressive was concerned that a jury might find that a pre-existing injury and pre-existing disability precluding him from working attributable in part to the accident. Rossi again rejected the offer. In February 2010, Progressive again increased the settlement offer, to \$20,000, based upon estimated trial expenses. Several days later, the parties agreed to settle for the UIM limits of \$30,000. Allstate subsequently settled Rossi’s claim for \$130,000.

In the bad faith action, Progressive filed a motion for summary judgment, which was granted by Judge Caputo of the Middle District. The plaintiffs argued that Progressive’s investigation was not as thorough as it should have been. They claimed Progressive should have interviewed Enders and attempted to determine whether there were any other witnesses, performed a more thorough scene investigation including measurements, and retained an accident reconstructionist. Plaintiffs also argued that Progressive never provided a written estimation of liability, never determined whether he could have made the left hand turn if the other driver had been driving the speed limit, and had discussed keeping the other driver’s intoxication out of the case.

The court concluded that there was no evidence from which it could conclude that Progressive acted in a dishonest manner or with ill will: “Rossi has failed to point to facts showing that Progressive acted with an improper motive. Thus, summary judgment is appropriate and will be granted in favor of Progressive.”⁸⁰⁸ The court found that Progressive’s investigation was “objectively reasonable” and no evidence showed “dilatatory conduct, dishonesty, obfuscation, or malice.”⁸⁰⁹

. . . Because Rossi failed to yield the right-of-way, it was reasonable for Progressive to investigate liability—notwithstanding the fact that McGroarty [the other driver] was driving while intoxicated and speeding. In light of Progressive’s knowledge that Rossi had been unemployed for some time and was receiving payments after having been adjudicated disabled, it was also reasonable for Progressive to dispute Rossi’s damages. Indeed, from Progressive’s vantage point, it was doubtful that Rossi’s injuries would even implicate the UIM policy, as it appeared that Rossi’s documented out-of-pocket medical expenses were well within the \$100,000 threshold of McGroarty’s policy limit. In the absence of a viable loss-of-earnings claim, it would have appeared to Progressive that Rossi could be made whole without resorting to a UIM claim.

Rossi argues that Progressive’s conduct in contesting liability on the “sole” basis that Rossi made a left turn was improper because making a left turn at that intersection “was not in and of itself illegal.” However, it is undisputed that McGroarty would have had the right-of-way and that Rossi failed to yield. Although some evidence suggested that McGroarty may have accelerated into the intersection at a high rate of speed, it was reasonable for Progressive to question whether Rossi’s negligence was a substantial contributing factor to the collision. Indeed, an inter-company arbitration found Rossi’s

⁸⁰⁷ *Easy Corner, Inc. v. State Nat’l Ins. Co., Inc.*, 2014 U.S. Dist. LEXIS 155308, at *21 (E.D. Pa. Nov. 3, 2014) (footnote omitted).

⁸⁰⁸ *Rossi v. Progressive Ins.*, 813 F. Supp. 2d 643, 653 (M.D. Pa. 2011).

⁸⁰⁹ *Rossi v. Progressive Ins.*, 813 F. Supp. 2d 643, 653 (M.D. Pa. 2011).

contributory negligence to be 80%. In light of these facts, no reasonable inference of bad faith can be drawn from Progressive's investigation of liability.

Rossi also argues that the incident was not fully investigated as quickly and fully as it ought to have been. However, considering the lack of evidence that Rossi's injuries would exceed the amount covered by McGroarty's policy, the pace and scope of Progressive's investigation does not suggest bad faith.⁸¹⁰

(2) *Schifino v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 174574 (W.D. Pa. Dec. 13, 2013) (McVerry, J.) (UIM claim dispute)

Plaintiff was injured in an auto accident. Following settlement of his personal injury claim with the tortfeasor for the bodily injury limits of \$50,000, plaintiff sought UIM benefits from his auto insurer, GEICO. Plaintiff provided some records to GEICO in support of his claim, but the parties were unable to agree on the value of the claim, so plaintiff filed this breach of contract and bad faith suit. The matter proceeded to a bench trial. Judge McVerry of the Western District of Pennsylvania entered a verdict on the bad faith count in favor of GEICO. This decision is also discussed in §§10:11, 10:19, 10:25, and in great detail in §10:17.

The court found that plaintiff failed to prove that GEICO acted in bad faith during the investigation of the UIM claim. The adjuster reviewed the records provided by plaintiff's counsel, who had indicated that he would provide additional records as he received them, but did not do so. The court noted that the records that were provided showed that plaintiff had a number of pre-accident medical problems that bore directly on the claimed injuries. The adjuster, the court found, appropriately discussed the matter with the manager, and properly made offers based on the review of records. Although there were aspects of the investigation that were less than ideal, the court concluded that GEICO did not act in bad faith:

The conduct of GEICO is certainly not free from criticism in its initial handling of the claim—[the adjuster] mistook the number of Plaintiff's pre-accident procedures and may have overlooked the second lumbar procedure. GEICO initially reported that Plaintiff had limited tort coverage, and there are inconsistent statements regarding how the valuation was reached—but the Court finds that this conduct is more indicative of poor judgment than bad faith. Thus, even if GEICO could be faulted for failing to make a more thorough inquiry into Plaintiff's preexisting and post-accident medical condition(s), Plaintiff has not met his burden to show clear and convincing evidence of bad faith.⁸¹¹

(3) *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302 (W.D. Pa. Mar. 20, 2014) (Gibson, J.)

About three years after plaintiff was in an auto accident, he sought UIM benefits from his auto carrier, Nationwide, in May 2010. Nationwide requested additional records. Plaintiff gave an EUO in September 2010, and Nationwide sought an IME and a dermatologist's review. The review was complete in January 2011. The IME was scheduled in early 2011, but was ultimately done in January 2012 due to plaintiff's travel restrictions. After the parties were unable to resolve the claim, plaintiff brought this breach of contract and statutory bad faith action, and the parties were eventually able to resolve the UIM claim for \$50,000 following mediation. The parties filed cross motions for summary judgment. Judge Gibson of the Western District granted Nationwide's motion and denied plaintiff's, as is discussed in greater detail in §10:17.

Plaintiff alleged that Nationwide acted in bad faith in making him attend an IME in Pittsburgh, which was problematic, given the travel restrictions his physician had place on him. Although the court noted that Nationwide was provided with disability slips that indicated plaintiff was required to be able to stand and stretch and prohibited him from sitting for longer than an hour, plaintiff testified that he drove 3 hours each way for business trips every other week. Nationwide had told plaintiff's counsel that it would be willing to make travel accommodations for the 1 hour trip to Pittsburgh, but when plaintiff's counsel continued to object, Nationwide chose a physician closer to plaintiff's home: "Plaintiffs have failed to show with clear and convincing evidence that Nationwide acted in bad faith by scheduling an IME in Pittsburgh."⁸¹²

(4) *Page v. Infinity Indem. Ins. Co.*, 2014 U.S. Dist. LEXIS 13790 (E.D. Pa. Jan. 31, 2014) (Shapiro, J.)

Plaintiffs' car was destroyed by a fire when it was parked on their block overnight. The next day, they contacted their auto insurer, defendant Infinity. Defendant sent an investigator to their home that day for a recorded statement and to being investigation. Plaintiffs shared recent utility bills with the adjuster who was assigned to the claim. After the initial investigation, defendant noted some red flags, including that the fire department had noted arson as a possible cause of the fire and that plaintiffs had a number of unpaid loans that had been referred to collections, and referred the claim to the special investigation unit. At the time of the plaintiffs' third recorded statement, they were asked for bank statements and about several things that showed up on their credit report. Plaintiffs then retained

⁸¹⁰ *Rossi v. Progressive Ins.*, 813 F. Supp. 2d 643, 653 (M.D. Pa. 2011).

⁸¹¹ *Schifino v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 174574, at *63-64 (W.D. Pa. Dec. 13, 2013).

⁸¹² *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302, at *31 (W.D. Pa. Mar. 20, 2014).

counsel, who did not provide certain materials requested by defendant, including additional bank statements, police report from a recent robbery of their home in which they allegedly lost cash and valuable items, and the named of dealerships plaintiffs had recently visited in looking for a new car. Defendant eventually denied the claim based on plaintiffs' failure to cooperate. Plaintiffs then filed this bad faith litigation. After litigation began, plaintiffs provided the requested information, and defendant paid the claim. Defendant filed a motion for summary judgment on the bad faith claim. Judge Shapiro of the Eastern District of Pennsylvania denied the motion, as discussed in §9:09, but in doing so, explained that the red flags identified by defendant did justify an investigation: "These 'red flags' justified defendant's investigation into plaintiffs' finances, plaintiff Page's car shopping, and the burglary to determine whether plaintiffs had an incentive to set fire to their own car or commit fraud."⁸¹³

(5) *Goddard v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 5974 (E.D. Pa. Jan. 16, 2014) (O'Neill, J.)

Plaintiff was in an auto accident in 1998 when he was struck by an underinsured driver. It is not clear when the UIM claim was made, but the parties agreed to arbitration upon the completion of an independent medical examination (IME). Plaintiff refused to attend an IME, and defendant thereafter denied the claim, closing the file in 2007. Plaintiff filed this bad faith action in 2011. Defendant filed a motion for summary judgment. Judge O'Neill of the Eastern District of Pennsylvania granted the motion.

State Farm maintained that it could not be liable for bad faith because plaintiff's breach of the policy's cooperation clause prejudiced its investigation. The court agreed. Noting that a prejudicial breach of the cooperation clause results in the insurer being released from its own obligations under the contract, the court found that plaintiff had failed to meet his obligations under the contract by refusing to submit to an IME, despite at least 6 requests to do so. It further concluded that the breach prejudiced defendant because defendant was unable to evaluate plaintiff's injuries at the time of the claim.

(6) *Schlegel v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 111514 (M.D. Pa. Aug. 8, 2013) (Mannion, J.)

As discussed in more detail in §10:17, plaintiff was involved in an auto accident and after setting with the tortfeasor's carrier for far less than the available limits, submitted a UIM claim to her auto carrier, State Farm. State Farm requested medical records and bills to evaluate the claim. After reviewing the records, State Farm denied the claim. This breach of contract and bad faith suit followed. State Farm filed a motion for summary judgment on the bad faith claim. Judge Mannion of the Middle District granted the motion.

Plaintiff maintained that State Farm acted in bad faith by requesting medical records it already had, thus possessing no reasonable basis for its request. The court rejected this position because State Farm believed, given plaintiff's continued treatment, the records it possessed were incomplete and thus "State Farm had a reasonable basis for requesting updated medical records."⁸¹⁴ The court also concluded that even if there had been no reasonable basis for this request, "the facts presented to the court demonstrate a level of culpability akin to negligence at best,"⁸¹⁵ and thus could not support a bad faith claim.

(7) *Treadways LLC v. Travelers Indem. Co.*, 2011 U.S. Dist. LEXIS 47708 (E.D. Pa. May 4, 2011) (Rueter, M.J.), *aff'd*, 2012 U.S. App. LEXIS 5094 (3d Cir. Mar. 12, 2012) (Ambro, J.)

Treadways was sued in the underlying complaint by a Treadways employee and his wife as a result of injuries sustained by the employee in an auto accident. The underlying complaint set forth fraud and loss of consortium counts. Treadways filed claims under both its commercial auto policy and worker's compensation policies with each Travelers entity that issued each policy. Travelers initially retained counsel to defend Treadways. Several months later, Travelers denied coverage but extended the period during which it paid counsel for over two months in order to give Treadways time to retain a new attorney and in order to have the attorney who had been handling the litigation attend a "key" deposition before a new attorney took over the file. Treadways hired the Travelers-appointed attorney to continue representation. Ultimately, the employee recovered \$1,000,000 following submission of the case to the trial judge on stipulated facts.

Treadways then filed suit against Travelers for statutory bad faith; the parties filed cross motions for summary judgment. Magistrate Judge Rueter of the Eastern District denied Treadways' motion and granted Travelers' motion as to the bad faith claim.

The court concluded that Treadways could not create a genuine issue of material fact because there was no evidence to support a finding that Travelers had acted with ill will or dishonest purpose, so that Treadways could not prove that the "insurer knew or recklessly disregarded its lack of reasonable basis." At most, the court noted, Travelers' decisions and actions had been negligent. Weighing against Treadways was the fact that Travelers had paid

⁸¹³ *Page v. Infinity Indemnity Ins. Co.*, 2014 U.S. Dist. LEXIS 13790, at *8-9 (E.D. Pa. Jan. 31, 2014).

⁸¹⁴ *Schlegel v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 111514, at *13 (M.D. Pa. Aug. 8, 2013).

⁸¹⁵ *Id.*

for over two months of defense costs after deciding that the claim was not covered, in order to protect Treadways' interests.

Treadways contended that the claim was not properly handled because the claims director, Mr. Davis, was "too busy" with other files he considered more important. The court ruled that this fact alone was insufficient to establish recklessness: ". . . [P]laintiff [Treadways] admits that defendant's agent's alleged improper conduct was caused by Mr. Davis being distracted by work load and priority issues. Plaintiff has not proven that Mr. Davis, or any of defendants' agents, acted with the requisite dishonest purpose, self-interest, or ill will to support a bad faith claim in Pennsylvania."⁸¹⁶ Because Treadways had failed to present evidence that Travelers acted with a dishonest purpose, Travelers was entitled to summary judgment on the bad faith claim: "The evidence shows that the claims handling by defendants [Travelers] may have been negligent. However, plaintiff failed to present any evidence that the actions of defendants were motivated by dishonest purpose, self-interest or ill will. As such, defendants' motion for summary judgment . . . must be granted."⁸¹⁷

After a jury trial resulted in a verdict in favor of Travelers on the remaining issues, Treadways appealed a number of issues, including the grant of summary judgment on the bad faith claim. The Third Circuit, in an opinion by Judge Ambro, affirmed, stating: "Treadways does not argue that Travelers wrongly denied coverage under the policies. Indeed, it admits that the policies precluded coverage. This alone was sufficient for the District Court to dismiss the bad faith claim. Because the claims asserted in the Gonsar Suit were not covered by the policies, Travelers had good cause to deny coverage and cease defending the litigation."⁸¹⁸

(8) *Wisinski v. Am. Commerce Grp., Inc.*, 2011 U.S. Dist. LEXIS 320 (W.D. Pa. Jan. 4, 2011), reconsideration denied, 2011 U.S. Dist. LEXIS 26846 (W.D. Pa. Mar. 16, 2011) (Cohill, S.J.)

This case is also discussed in §§9:13(a) and 9:15. Wisinski was involved in an auto accident in December 2001, following which she sought benefits for lost wages and UIM benefits from her auto insurer, ACIC. When the parties failed to resolve the various claims for benefits arising out of the accident, Wisinski filed this action for breach of contract and statutory bad faith. The parties filed cross-motions for summary judgment. As to the lost wages claim, Senior Judge Cohill of the Western District found no evidence of bad faith, and thus denied Wisinski's motion and granted the motion of ACIC.

The court concluded that the lost wages claim could not survive. The evidence showed that when Wisinski filled out her original claim form, she initially filled it out indicating that she did have lost wages, but then crossed all of that information out, checking the box stating she did not have lost wages. Nine months later, Wisinski, in filling out a subsequent form, indicated that she did have a lost wages claim. In its investigation, ACIC requested that Wisinski's physician provide a verification that the accident caused Wisinski's disability, but ACIC never received a response. Further, ACIC received information that Wisinski had not worked for her employer since well before the accident, and had been collecting Social Security Disability Benefits. The court found there was no genuine issue of material fact, based on this evidence, with respect to the bad faith claim because the information presented to ACIC made its decisions relating to wage loss benefits reasonable:

We find that it was reasonable that ACIC continued to request further documentation to verify Ms. Wisinski's claimed loss. ACIC had incomplete and unclear facts on which to base a determination on Ms. Wisinski's income loss claim. ACIC did know that Ms. Wisinski was on Social Security Disability Income and that she had not worked for the U.S. Postal Service since a year prior to the accident. Based on this information, it appears that ACIC could have reasonably denied the wage loss claim. We can discern no ill will on the part of ACIC and find that ACIC did not act in bad faith with regard to this claim. Ms. Wisinski has failed to present clear and convincing evidence that ACIC did not have a reasonable basis for denying benefits under the policy or that the insurer acted with reckless disregard in denying the claim.⁸¹⁹

(9) *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 12992 (W.D. Pa. Feb. 16, 2010) (McVerry, J.), *aff'd*, 410 F. App'x 484 (3d Cir. 2011) (Greenberg, J.)

In this case discussed in detail in §10:15, State Farm denied Lockhart's truck theft claim after a fraud investigation. Lockhart filed a suit alleging statutory bad faith and breach of contract. State Farm filed a motion for summary judgment, which Judge McVerry of the Western District granted, concluding that there was no bad faith as a matter of law.

According to the court, "an insurance company's substantial and thorough investigation of an insurance claim, which forms the basis of its refusal to make or continue making benefit payments, establishes a reasonable basis that

⁸¹⁶ *Treadways LLC v. Travelers Indem. Co.*, 2011 U.S. Dist. LEXIS 47708, at *15-16 (E.D. Pa. May 4, 2011).

⁸¹⁷ *Treadways LLC v. Travelers Indem. Co.*, 2011 U.S. Dist. LEXIS 47708, at *16 (E.D. Pa. May 4, 2011).

⁸¹⁸ *Treadways LLC v. Travelers Indem. Co.*, 2012 U.S. App. LEXIS 5094, at *8 (3d Cir. Mar. 12, 2012) (footnote omitted).

⁸¹⁹ *Wisinski v. Am. Commerce Grp., Inc.*, 2011 U.S. Dist. LEXIS 320, at *32-33 (W.D. Pa. Jan. 4, 2011).

defeats a bad faith claim.”⁸²⁰ The court concluded that State Farm conducted a thorough investigation, which included interviewing Lockhart, a site visit, obtaining police reports, discussions with the responding police officer, car dealers and employees from where the truck was allegedly stolen, obtaining a report regarding the Sentry Key security system on the truck, obtaining an examination under oath of the insured, and analyzing prior loss claims from the insured. The court concluded that “State Farm had a reasonable foundation for its decision to deny coverage.”⁸²¹ The Third Circuit affirmed, noting that “we agree with that conclusion.”⁸²²

(10) *Calestini v. Progressive Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 136815 (M.D. Pa. Dec. 28, 2010) (Caputo, J.)

This case is discussed in detail in § 10:17. Plaintiff was involved in two auto accidents; after each, he put his auto insurer, Progressive, on notice of his UIM claims. Plaintiff eventually filed a complaint, alleging Progressive breached their contract and acted in bad faith as to both accidents. Before Judge Caputo of the Middle District was Progressive’s motion for summary judgment, which he granted.

Plaintiff argued that Progressive acted in bad faith by inadequately evaluating his UIM claim and by seeking to try the UIM claims along with the underlying personal injury action. The court found no bad faith conduct in such a suggestion, which was primarily done to avoid the “trouble and expense of two separate proceedings.” The court also rejected plaintiff’s argument that defendant acted in bad faith in delaying its investigation and payment under the policy, noting that the parties had a legitimate dispute over the value of the respective UIM claims.

(11) *Costello v. Gov’t Emps. Ins. Co.*, 2010 U.S. Dist. LEXIS 28511 (M.D. Pa. Mar. 25, 2010) (Vanaskie, J.)

This case is also discussed in §§10:03(b), 10:13(a), and 10:17. Plaintiffs were insured by defendant GEICO for the car they owned. In the course of plaintiff Mr. Costello’s employment with the state, he was driving a state-owned car when he was in an accident. Defendant subsequently paid a first party benefit claim for medical and wage loss benefits. Thereafter, plaintiffs notified defendant of a possible underinsured motorist (UIM) claim. GEICO advised plaintiffs that the “regular use” exclusion might result in a denial of the claim. Following plaintiffs’ submission of the UIM claim, GEICO investigated and denied the claim.

Plaintiffs filed suit alleging, *inter alia*, bad faith. GEICO filed a motion for judgment on the pleadings, which was granted by Judge Vanaskie of the Middle District. Given that the “regular use” exclusion had been well litigated in the courts, the court ruled that defendant acted reasonably: “As the ‘regular use’ exception is applicable in this situation, has been historically enforced, and is not a violation of public policy, . . . there is no basis to find that Defendants [sic] acted in bad faith.”⁸²³ The court concluded that “no reasonable jury could find under a clear and convincing evidence standard that these actions amount to reckless disregard.”⁸²⁴

Although the time from first notice of a potential UIM claim (October 2007) until denial (April 2009) comprised 18 months, the court found that there was no bad faith as a matter of law, noting,

Shortly after the claim was filed, GEICO brought the “regular use” exception to Plaintiffs’ attention. GEICO acted reasonably in requesting and obtaining information relevant to the “regular use” exclusion.

Defendant performed a reasonable investigation into whether or not the “regular use” exception applies. . . .⁸²⁵

(12) *Hampton v. GEICO Gen. Ins. Co.*, 759 F. Supp. 2d 632 (W.D. Pa. 2010) (Lenihan, M.J.), adopted by 759 F. Supp. 2d 632 (W.D. Pa. 2010) (Ambrose, J.)

This case is discussed in more detail in §§15:02 and 15:03. Plaintiff alleged that GEICO improperly ceased first party medical benefit payments following the peer review organization (PRO) process. Magistrate Judge Lenihan of the Western District recommended that summary judgment be granted in favor of GEICO, a position adopted by Judge Ambrose. The court found that GEICO had appropriately supported its summary judgment motion with evidence tending to show that the PRO process had not been improperly used and had not been a mere sham. The evidence showed that GEICO used several PROs and that its procedure was to randomly and evenly divide reviews among them. Requests for reconsideration were to always have the same company perform the reconsideration that performed the initial review. These procedures were used in this particular case. Finally, the court reviewed the actual reports generated by the peer review process and reconsideration, and found that neither report addressed causation, as alleged by plaintiff. Summary judgment was granted in favor of GEICO.

⁸²⁰ *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 12992, at *17-18 (W.D. Pa. Feb. 16, 2010) (quoting *Wedemeyer v. U.S. Life Ins. Co. in City of New York*, 2007 U.S. Dist. LEXIS 15742 (E.D. Pa. 2007)).

⁸²¹ *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 12992, at *19 (W.D. Pa. Feb. 16, 2010).

⁸²² *Lockhart v. State Farm Mut. Auto. Ins. Co.*, 410 F. App’x 484, 486 (3d Cir. 2011).

⁸²³ *Costello v. Gov’t Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 28511, at *25-26 (M.D. Pa. Mar. 25, 2010) (citation omitted).

⁸²⁴ *Costello v. Gov’t Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 28511, at *26 (M.D. Pa. Mar. 25, 2010).

⁸²⁵ *Costello v. Gov’t Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 28511, at *26 (M.D. Pa. Mar. 25, 2010).

(13) *NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos.*, 2009 U.S. Dist. LEXIS 92991 (E.D. Pa. Oct. 1, 2009) (Baylson, J.)

Plaintiff Cruel, during the course of her employment with plaintiff NIA, was driving NIA's vehicle when she was in an auto accident with Stewart. As a consequence of that accident, a nearby pedestrian, Jones, was injured. NIA had an auto policy with defendant Empire. Stewart's auto insurer brought a subrogation claim against Empire, which Empire settled for an amount under the policy limits. Shortly thereafter, the pedestrian demanded settlement for his injuries, and Empire settled with him. The two settlements together exhausted the policy limits.

About two years after the accident, Stewart filed suit for personal injuries against Cruel and NIA and later added another defendant, Lloyd, apparently the owner of NIA. Empire notified Cruel and NIA that it would not provide a defense because it had paid the policy limits and its obligations under the policy had been fulfilled. Stewart received an arbitration award of \$20,000 against Cruel only.

Plaintiffs Cruel, Lloyd and NIA filed suit against Empire, asserting claims which included statutory bad faith and breach of contract. Plaintiffs alleged that Stewart would not have prevailed at the arbitration and obtained a judgment against Cruel if Empire had presented a defense to Cruel. As a result of Empire's conduct, it was alleged, there was a \$20,000 judgment against Cruel, and NIA and Lloyd incurred attorney's fees. Empire filed a motion for judgment on the pleadings. After allowing time for the plaintiffs to do fact discovery, Judge Baylson of the Eastern District granted the insurer's motion for judgment on the pleadings, dismissing all counts.

The court first reviewed the applicable law concerning a liability insurer's obligations when confronted with multiple claims against an insured. The court accepted the insurer's argument that under Pennsylvania law it was valid for an insurer to settle liability claims piecemeal, even though this might reduce or exhaust the policy limit; the insurer was not obligated to wait for all potential claims arising out of an accident to be filed before it could settle certain claims.⁸²⁶ Under the record, according to the court, the insurer acted reasonably, so there was no breach of contract, and no bad faith:

Plaintiffs have failed to make any showing of bad faith conduct on the part of Defendant. The claim files demonstrate that Defendant Empire conducted a reasonable and good faith investigation into the liability regarding the accident in question and that, based on the investigation's results, Defendant Empire acted in good faith when entering into the settlements that exhausted Plaintiffs' policy limits. Therefore, without any evidence of bad faith conduct by Defendant in handling these claims, this Court will find for Defendant.⁸²⁷

(14) *Ingraham v. GEICO Ins. Co.*, 2009 U.S. Dist. LEXIS 24467 (W.D. Pa. Mar. 24, 2009) (Flowers-Conti, J.)

This case, also discussed in §§8:04, 10:11 and 10:13, arose from three automobile accidents on November 14, 2001, January 3, 2002, and March 11, 2003. The plaintiff was insured by GEICO Insurance Company and made various claims for first-party medical expense benefits as well as UM benefits. GEICO eventually settled some of the claims and denied others in whole or in part. The plaintiff filed a breach of contract and statutory bad faith action, arguing that the insurer delayed settlement and evaluation and made a low offer on his claims. Judge Flowers-Conti of the Western District granted the insurer's motion for summary judgment, rejecting the plaintiff's allegations of undue delay and unfair settlement, stating, "Plaintiff did not provide evidence that would convince a reasonable jury that GEICO's settlement figures were not indicative of proper valuation and that the final offer did not include all GEICO's stated considerations and not just the value of his claim."⁸²⁸

(15) *Brown v. Great N. Ins. Co.*, 2009 U.S. Dist. LEXIS 13758 (M.D. Pa. Feb. 23, 2009) (Caputo, J.)

The facts of this UIM case are discussed in §10:13. Judge Caputo of the Middle District found that the insurer was entitled to summary judgment. In so ruling, the court agreed with the insurer that it had acted reasonably in the handling of plaintiff's UIM claim.

(16) *Aquila v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 93823 (E.D. Pa. Nov. 13, 2008) and 2008 U.S. Dist. LEXIS 101518 (E.D. Pa. Dec. 15, 2008) (Strawbridge, M.J.)

In this case also discussed in §10:15, plaintiffs reported the theft of their automobile in September 2005. Nationwide's claims investigation unearthed several "red flags" concerning the loss, but in April 2006, Nationwide decided to pay the claim. Plaintiffs sued, alleging that Nationwide's investigation was unreasonable and thus in bad faith. Magistrate Judge Strawbridge of the Eastern District rejected this claim. The court held that the investigation was justified by the existence of the numerous "red flags." The court also found that a significant cause of the delay

⁸²⁶ *NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos.*, 2009 U.S. Dist. LEXIS 92991, at *33 (E.D. Pa. Oct. 1, 2009). The court relied upon the decisions in *Maguire v. Ohio Cas. Co.*, 602 A.2d 893, 895 (Pa. Super. 1992), *appeal denied*, 615 A.2d 1312 (Pa. 1992) and *Anglo-American Ins. Co. v. Molin*, 670 A.2d 194, 197 (Pa. Commw. Ct. 1995).

⁸²⁷ *NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos.*, 2009 U.S. Dist. LEXIS 92991, at *33 (E.D. Pa. Oct. 1, 2009).

⁸²⁸ *Ingraham v. GEICO Ins. Co.*, 2009 U.S. Dist. LEXIS 24467, at *36 (W.D. Pa. Mar. 24, 2009).

was attributable to the plaintiffs and/or their counsel “through their failure to appear for routine examinations under oath and in failing to return routine theft claim document packets.”⁸²⁹

(17) *Blaylock v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 1098 (M.D. Pa. Jan. 7, 2008) (Caldwell, J.)

Blaylock was injured in an automobile accident with another driver who had no insurance. She made a claim against Allstate for UM coverage, which would have been in the amount of \$15,000. Allstate denied her claim, asserting that she had signed a form rejecting it. Blaylock disputed this, asserting that the signature on the form was not hers, thereby entitling her under Pennsylvania law to UM coverage regardless of the policy provisions. At arbitration, Plaintiff won in a split decision. Plaintiff then filed an action alleging bad faith.

Plaintiff retained a handwriting expert who stated his opinion that the signature on the form did not belong to Blaylock. Allstate retained its own handwriting expert who opined that no conclusion could be drawn about the authenticity of the rejection form signature. Plaintiff retained a longtime insurance company executive as an expert who opined that Allstate had acted in bad faith by failing to conduct a full investigation after the plaintiff informed the company that it was not her signature on the form. The expert also opined that Allstate improperly ignored case law which held that a valid signature on the rejection form is required; if there is none, the insurer must provide UM coverage, regardless of the policy provisions. Upon deposition, plaintiff’s expert admitted that Allstate did not have to accept plaintiff’s handwriting expert’s opinion and that the expert’s opinion was subject to a credibility attack, as was the testimony of the Blaylocks. She also acknowledged that the arbitrators could have used Allstate’s expert to discredit Plaintiff’s expert, based on his opinion that no conclusion could be drawn about the authenticity of the rejection form signature.

Plaintiff and Allstate filed cross-motions seeking summary judgment on the bad faith claim. Stating that “[o]ur job is not to decide whether the signature was Plaintiff’s or not, only whether Allstate acted in bad faith in resisting the claim,”⁸³⁰ Judge Caldwell of the Middle District granted the insurer’s motion for summary judgment, stating that “Plaintiff cannot show by clear and convincing evidence that any reasonable fact finder could find that Defendant acted in bad faith in contesting Plaintiff’s UM claim.”⁸³¹ The court stated several reasons for its decision.

According to the court, “[W]e agree with Defendant that Plaintiff’s claim presented issues of credibility that Defendant could rightfully insist be subject to assessment by a fact finder.”⁸³² In addition, the court relied upon the fact that the insurer relied upon the opinion of its handwriting expert.⁸³³ Moreover, the court rejected the plaintiff’s argument that its bad faith claim was supported by Allstate’s failure to investigate after the Blaylocks denied under oath in January 2004 that it was plaintiff’s signature on the rejection form. According to the court:

. . . [A] plaintiff in a bad faith claim must show that the outcome of the case would have been different if the insurer had done what the insured wanted done. *See Zappile v. AMEX Assurance Co.*, 2007 PA Super 171, 928 A.2d 251, 262 (Pa. Super. 2007). Here, the outcome of the case would not have been different because Allstate obtained a handwriting expert’s opinion that said the signature was too poor to allow an opinion as to its authenticity. This opinion also called into question the opinion of Plaintiff’s handwriting expert. Allstate would therefore have contested the claim in any event, and it is legally irrelevant here that it did not immediately investigate the signature issue after the January 2004 statements under oath. . . ⁸³⁴

(18) *DeWalt v. Ohio Cas. Ins. Co.*, 513 F. Supp. 2d 287 (Pa. 2007) (McLaughlin, J.)

This case is discussed in §§3:04 and 3:09. Guffey was driving a car insured with Ohio Casualty when she ran off the road and hit a tree, injuring three passengers, including DeWalt. Ohio Casualty was notified of the accident in July 1998 and was advised that DeWalt was paralyzed, and one passenger suffered a broken neck and another suffered facial injuries. The liability policy limits were \$50,000. In September 1998, DeWalt’s attorney demanded the \$50,000 policy limits. Ohio Casualty responded by advising of the policy limits but stating that there were two other claimants. From September 1998 through September 1999, Ohio Casualty was in the process of obtaining medical records for DeWalt and the other two claimants. Ohio Casualty offered to pay \$50,000, if the three claimants could agree on distribution. Counsel for DeWalt did not respond to the offer, and filed suit against Guffey in June 1999.

In September 1999, Ohio Casualty settled the claims of the other two passengers for \$25,000, and offered the remaining \$25,000 to DeWalt. DeWalt refused and proceeded through discovery and trial. Ohio Casualty continued to offer the policy limits and defended Guffey. In August 2003, a jury awarded DeWalt a verdict against Guffey in the amount of \$4,000,000. In May 2004, Guffey assigned DeWalt her rights to a cause of action for bad faith, in exchange for a release that essentially protected Guffey from an excess verdict. DeWalt then sued Ohio Casualty alleging breach of contract and bad faith.

⁸²⁹ *Aquila v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 101518, at *33 (E.D. Pa. Dec. 15, 2008).

⁸³⁰ *Blaylock v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 1098, at *3 (M.D. Pa. Jan. 7, 2008).

⁸³¹ *Blaylock v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 1098, at *33 (M.D. Pa. Jan. 7, 2008).

⁸³² *Blaylock v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 1098, at *33 (M.D. Pa. Jan. 7, 2008).

⁸³³ See §10:11 for further discussion of this case.

⁸³⁴ *Blaylock v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 1098, at *37-38 (M.D. Pa. Jan. 7, 2008).

The court held that there was no bad faith in declining to offer policy limits before the company had the opportunity to obtain medical information pertaining to the other claimants. The court observed that DeWalt never actually demanded the policy limits, only inquired as to what the policy limits were, and asked the company's position "regarding payment of same in order to avoid a bad faith claim." Also, the court held that the insurer did not unreasonably delay its investigation into the other claims. The court noted that if the insurer had prematurely offered settlement of the policy limits to DeWalt, it would have exposed Guffey to liability to the other claimants, which itself could be an act of bad faith.

(19) *Roche v. New Jersey Manufacturers Ins. Co.*, 78 F. App'x 183 (3d Cir. 2003) (Alito, J.)

Following an automobile accident, the plaintiff brought suit alleging that her insurer breached its policy with her stepfather by failing to pay her claim for medical costs under the policy and the Pennsylvania Motor Vehicle Financial Responsibility Law,⁸³⁵ and in doing so had breached its duty of good faith. Section 1797 of the MVFRL allows a court to award treble damages for insurer conduct that is considered "wanton."⁸³⁶ The district court refused to award exemplary damages for the alleged bad faith conduct, and, in an unpublished opinion, the Third Circuit affirmed, reasoning as follows:

We have defined bad faith as a "frivolous or unfounded refusal to pay, lack of investigation into the facts, or a failure to communicate with the insured." . . . Here we cannot conclude that such bad faith was present. [The insurer] never denied [plaintiff] Roche coverage but rather requested more information to make the necessary cost containment calculations under [the MVFRL]. It did not make frivolous refusals to pay but continued to request the proper documents so that it could fulfill its obligations under its policy with Roche's stepfather.⁸³⁷

(20) *Sheikh v. Travelers Personal Ins. Co.*, 2007 U.S. Dist. LEXIS 64590 (E.D. Pa. Aug. 31, 2007) (Schiller, J.)

Plaintiff insured was involved in an automobile accident on June 6, 2005. When a claim was presented to his insurer, he was advised that the insurance had been canceled, effective May 6, 2005, because plaintiff failed to make himself available for an underwriting interview. The insurer established via Pennsylvania's "mailbox rule" that the cancellation was in fact sent to the insured. Judge Schiller of the Eastern District agreed and dismissed a breach of contract claim. The court also dismissed the bad faith claim stating, "Plaintiffs' claim for bad faith fails because defendant was under no obligation to provide coverage to plaintiffs for their accident and, accordingly, Travelers had a reasonable basis for denying coverage."⁸³⁸

(21) *Fasanya v. Allstate Indem. Co.*, 2002 U.S. App. LEXIS 1419 (3rd Cir. Jan. 29, 2002) (Fuentes, J.)

The plaintiff was involved in an automobile accident on July 11, 1998, and on July 13, 1998, following the accident, paid the remaining \$127.18 he owed the insurer for overdue premium. The plaintiff informed the insurer of the accident on July 23, 1998, and the insurer denied coverage informing the plaintiff that his coverage had lapsed from July 2 through July 16, 1998, and therefore was not in effect on the date of the accident.

The plaintiff sued the insurer for bad faith denial of coverage pursuant to §8371. The insurer made a motion for summary judgment on the basis that it was justified in denying coverage. The district court granted the insurer's motion. The plaintiff appealed and Judge Fuentes of the Third Circuit upheld the district court's decision. In a memorandum opinion, the court held that "[s]ince the policy was not in effect on the date of the accident, we concluded that Allstate had a reasonable basis for denying coverage."⁸³⁹

(22) *Morrison v. Mountain Laurel Assur. Co.*, 748 A.2d 689 (Pa. Super. 2000) (Joyce, J.)

In this case, an automobile insurer denied a claim because the policy premium had not been timely paid. The plaintiff asserted that payment was mailed March 1, 1996 and was postmarked prior to the March 3, 1996 deadline. The insurer asserted that the postmark date was not until March 4, 1996, and the policy was properly canceled. The trial court found in favor of the plaintiffs and awarded punitive damages in the amount of \$100,000, finding that the insurer acted in bad faith by canceling the policy and denying coverage.

The Superior Court reversed the trial court on the coverage question, finding that there was sufficient trial testimony to conclude that the payment envelope was postmarked on March 4, 1996, and that the policy was properly canceled. Given the court's reversal on the coverage question, the Superior Court also reversed the trial court's bad faith, stating:

As we previously noted, we conclude Appellants properly denied coverage when the payment was not postmarked by the date due. Thus, Appellees failed to show that Appellants lacked a reasonable basis

⁸³⁵ See §15:01 for a discussion of the Pennsylvania Motor Vehicle Financial Responsibility Law.

⁸³⁶ See 75 Pa. C.S.A. §1797(b)(4).

⁸³⁷ *Roche v. N.J. Mfrs. Ins. Co.*, 78 F. App'x 183, 187 (3d Cir. 2003).

⁸³⁸ *Sheikh v. Travelers Personal Ins. Co.*, 2007 U.S. Dist. LEXIS 64590, at *13 (E.D. Pa. Aug. 31, 2007).

⁸³⁹ *Fasanya v. Allstate Indem. Co.*, 33 F. App'x 593, 595 (3rd Cir. 2002).

in denying the claim. We must therefore reverse the trial court's findings to the contrary and remand the case for judgment to be entered in favor of Appellants.⁸⁴⁰

(23) *Gibble v. Cincinnati Ins. Cos.*, 2015 U.S. Dist. LEXIS 57190 (E.D. Pa. Apr. 30, 2015) (Pratter, J.)

Plaintiff Gibble was driving home in a truck owned by his employer and was involved in an accident with an uninsured motorist. After being denied worker's compensation benefits, he sought coverage under the employer's commercial auto policy from defendant Cincinnati. That claim was denied based on an exclusion for those who do not reasonably believe that they have authority to drive the vehicle. Plaintiff Gibble then filed this bad faith suit. Cincinnati filed a motion for summary judgment. Judge Pratter of the Eastern District granted the motion as to the bad faith claim.

The court found no evidence in the record to create a genuine issue of material fact on bad faith because the testimony in the worker's compensation case indicated that Gibble knew that he was not supposed to drive the truck:

Mr. Gibble has not produced sufficient evidence from which a reasonable jury could find in his favor on a bad faith claim. Cincinnati had a reasonable basis to exclude payment, even if that basis ultimately proves incorrect. The workers' compensation judge found that Mr. Gibble was not acting in the scope of employment at the time of his motor vehicle accident. The testimony presented during the workers' compensation proceedings, as well as other evidence, provided a reasonable basis for Cincinnati to believe that unless Mr. Gibble was acting within the scope of his employment, he was not permitted to drive the truck, and that Mr. Gibble knew this. This gave Cincinnati a reasonable basis to deny coverage because Mr. Gibble appeared, arguably, to have lacked a reasonable belief that he was entitled to be driving the truck at the time of the accident. Mr. Gibble likewise does not have any evidence of the second element of a bad faith claim—that Cincinnati knew or recklessly disregarded its lack of a reasonable basis. Mr. Gibble argues that he "intends to call the adjuster as of cross examination to verify that this case was never properly investigated or evaluated," but such an intention is not evidence.

Especially in light of the "clear and convincing" standard by which a jury would have to find that evidence supports the claim of bad faith, Mr. Gibble's bad faith claim must be dismissed. There is insufficient evidence in the record from which a reasonable jury could conclude that Cincinnati acted in bad faith.⁸⁴¹

(24) *Empire Fire & Marine Ins. Co. v. Jones*, 739 F. Supp. 2d 746 (M.D. Pa. 2010) (Blewitt, M.J.), adopted by, 739 F. Supp. 2d 746 (M.D. Pa. 2010) (Jones, J.)

The facts of this case are set forth in § 10:03(a). The case concerned the application of a truckers' liability insurance policy issued by Empire to Jones. An employee of Jones who was injured while working sought coverage under the policy for his injuries. Empire sought declaratory judgment that there was no coverage and the employee counterclaimed for bad faith. On summary judgment, Magistrate Judge Blewitt of the Middle District recommended, and Judge Jones adopted, a finding in favor of Empire. Quoting *Cantor v. Equitable Life Assurance Soc'y*, the court held that that "an insurance company simply must show it conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its action."⁸⁴² Because the employee had not been adjudged liable to a third party arising out of his actions in working for Jones, the court held, he was simply not entitled to liability coverage. And because Empire demonstrated that it conducted an investigation "sufficiently thorough to yield a reasonable foundation for its action," the court found, there was no bad faith.

§10:07(b) — Cases (Property Claims)

(1) *Blackwell v. Allstate Ins. Co.*, 2015 U.S. Dist. LEXIS 115155 (E.D. Pa. Aug. 31, 2015) (Rufe, J.)

Plaintiff's home was damaged by water on March 2, 2011, following a pipe leak. Plaintiff submitted a claim to his homeowner's insurer, defendant Allstate. On the same day the claim was submitted, a remediation company hired by plaintiff began to remove walls, ceilings, carpets, fixtures and flooring. On March 8, Allstate performed an inspection of the home and provided arrangements for plaintiff to live elsewhere. Allstate began to look into whether all of the demolition performed by plaintiff's remediation company was necessary and retained an engineer. Plaintiff later submitted a claim for vandalism based on the work performed by the remediation company. In June and July 2011, Allstate issued checks for the claims that had been submitted. In November 2012, plaintiff submitted a claim to replace the furnace, which Allstate denied as untimely. On November 11, 2013, Plaintiff filed this action asserting statutory and common law bad faith claims. Decisions on the statute of limitations issues are discussed in §7:11(b) and

⁸⁴⁰ *Morrison v. Mountain Laurel Assurance Co.*, 748 A.2d 689, 692 (Pa. Super. 2000).

⁸⁴¹ *Gibble v. Cincinnati Ins. Cos.*, 2015 U.S. Dist. LEXIS 57190, at *5-6 (E.D. Pa. Apr. 30, 2015) (footnote and citation to record omitted).

⁸⁴² *Empire Fire & Marine Ins. Co. v. Jones*, 739 F. Supp. 2d 746, 767 (M.D. Pa. 2010) (quoting *Cantor v. Equitable Life Assurance Soc'y of the U.S.*, 1999 U.S. Dist. LEXIS 4805 (E.D. Pa. Apr. 12, 1999) (emphasis added by Empire)).

(c). Allstate moved for summary judgment on the statutory bad faith claim. Judge Rufe of the Eastern District granted the motion, as is also discussed in §§10:03(b) and 10:13(b).

Although the court concluded that all of the claims were time-barred, the court also explained that Allstate was entitled to summary judgment on the bad faith claim. As to the alleged bad faith investigation claim, the court found that the investigation was reasonable: “Confronted with a destructive tear-out that occurred before Allstate could conduct an inspection of the preceding water damage, Allstate interviewed Plaintiff, hired an engineer, interviewed [contractor] Laws (who was present both before and during the tear-out), and performed two inspections of the property, before assessing the damage and determining under which claim various items would be covered.”⁸⁴³

(2) *Gowton v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 29390 (W.D. Pa. Mar. 2, 2017) (Bissoon, J.)

After plaintiff Gowton’s home was damaged in a fire, he sought benefits from his homeowner’s insurer, State Farm. The parties were unable to resolve the claim, as their calculations of replacement cost were over \$100,000 apart, so Gowton filed this bad faith complaint. State Farm filed a motion to dismiss. Judge Bissoon of the Western District granted the motion, as is also discussed in §10:19.

The court reviewed the documents attached to the complaint and noted that the fact that the investigation appeared reasonable supported its conclusion that State Farm’s calculations as to the value of the claim were not bad faith. The court specifically pointed to the prompt initial inspection, the detailed estimate provided which included measurements, drawings and materials, as well as a line by line estimate of cost and depreciation.⁸⁴⁴

(3) *Long v. Farmers New Century Ins. Co.*, 2017 U.S. Dist. LEXIS 47552 (E.D. Pa. Mar. 30, 2017) (Stengel, J.)

Plaintiff’s home was damaged in a hail storm on May 22, 2014. He submitted a claim for benefits to his homeowner’s carrier, Farmers, a year later, on May 21, 2015. The following day, Farmers acknowledged receipt of the claim and stated that the suit limitations period required suit within one year of the loss. After discussions relating to the claim, plaintiff demanded appraisal in September 2015, which Farmers declined to participate in on the grounds that the claim was time-barred. Plaintiff then filed this breach of contract and bad faith suit, and Farmers filed a motion for judgment on the pleadings. Judge Stengel of the Eastern District granted the motion.

The court explained that the contract claim was time-barred by the suit limitation provision. Turning to the bad faith claim, the court determined that it was reasonable for Farmers to refuse to submit to appraisal based on the policy language and the time that lapsed before appraisal was demanded. The court explained:

Mr. Long has not provided factual information to show that Farmers lacked a reasonable basis for declining his request for an appraisal. Further, he has offered no facts to explain why Farmer’s decision was “arbitrary.” Even assuming that Farmers acted unreasonably in declining the request for an appraisal, Mr. Long has also not offered evidence of the second prong of the test for bad faith, i.e., Mr. Long has not provided facts to show that Farmers knew or disregarded its lack of a reasonable basis.⁸⁴⁵

(4) *Pecko v. Allstate Ins. Co.*, 2016 U.S. Dist. LEXIS 155355 (E.D. Pa. Nov. 9, 2016) (Pratter, J.)

After plaintiff’s home was damaged in an explosion and fire, she sought coverage from her homeowner’s carrier, defendant Allstate. In the course of handling the claim, Allstate declined to pay for replacement of plaintiff’s boiler, paying only for repair. Plaintiff then filed this bad faith action and after discovery, Allstate filed a summary judgment motion. Judge Pratter of the Eastern District granted the motion.

Plaintiff contended that Allstate acted in bad faith in refusing to pay to replace the boiler because Allstate had led her to believe it would. The court concluded that there was “no evidence, however, that Allstate ever insinuated that it would pay to replace the boiler unit or that Allstate’s decision to do so was unreasonable.”⁸⁴⁶ Instead, the court noted, Allstate had provided an estimate to plaintiff indicating that it would reimburse her for cleaning of the boiler but not for damage to the boiler, which it concluded was caused by a non-covered event.

(5) *Porter v. Safeco Ins. Co.*, 2017 U.S. Dist. LEXIS 17142 (M.D. Pa. Feb. 6, 2017) (Carlson, M.J.), *adopted by* 2017 U.S. Dist. LEXIS 43498 (M.D. Pa. Mar. 24, 2017) (Mariani, J.)

This claim, discussed in more detail in §10:13(b), related to fire damage to two adjoining townhomes, both owned by plaintiff Porter. Safeco made payments relating to one of the homes, but declined to make payments on the second after it concluded that the second property was not insured under its policy. Porter believed he was entitled to payments relating to the second property, so he filed this breach of contract and bad faith action. After discovery, Safeco filed a motion for summary judgment. Magistrate Judge Carlson of the Middle District recommended that the

⁸⁴³. *Blackwell v. Allstate Ins. Co.*, 2015 U.S. Dist. LEXIS 115155, at *13 (E.D. Pa. Aug. 31, 2015).

⁸⁴⁴. *Gowton v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 29390, at *10 (W.D. Pa. Mar. 2, 2017).

⁸⁴⁵. *Long v. Farmers New Century Ins. Co.*, 2017 U.S. Dist. LEXIS 47552 (E.D. Pa. Mar. 30, 2017) (footnote omitted).

⁸⁴⁶. *Pecko v. Allstate Ins. Co.*, 2016 U.S. Dist. LEXIS 155355, at *13 (E.D. Pa. Nov. 9, 2016).

motion be granted, and Judge Mariani subsequently adopted the recommendation, overruling plaintiff's objections as to the breach of contract count.

Porter maintained that Safeco had performed an unreasonable investigation, but the court disagreed that the evidence created a genuine issue of material fact. The court found that Safeco "routinely and appropriately responded to Porter's concerns." It further concluded that

The plaintiff has not responded with any countervailing evidence to support his assertion that Safeco's conduct of the investigation was unreasonable, overlong, unjustified, or undertaken for improper purpose. While Mr. Porter may have harbored a subjective belief that Safeco should pay claims for adjoining but uninsured properties, and may certainly regret the decision to allow coverage to lapse on 133 ½ Morris Avenue, those hopes and regrets do not meet the high bar applicable to claims of bad faith, which requires clear and convincing evidence that the insurer acted frivolously or was motivated by self-interest or ill will in denying benefits.⁸⁴⁷

(6) *Rosewood Cancer Care, Inc. v. Travelers Indem. Co.*, 2016 U.S. Dist. LEXIS 133075 (W.D. Pa. Sept. 28, 2016) (Conti, J.)

A leaking pipe caused damage to a linear accelerator, or Linac, used by plaintiffs' cancer care and radiation oncology companies to treat cancer patients. Plaintiffs had a commercial property policy with defendant Travelers, so they submitted a claim under the policy. Travelers maintained that the damage was covered under the personal property coverage, which had lower limits, and not under the building coverage. Plaintiffs filed this breach of contract and bad faith action. Defendant filed a motion for summary judgment. Judge Conti of the Western District granted the motion in part, as is also discussed in §10:05(b) and denied it in part, as discussed in §9:19.

The court concluded that plaintiffs' claim that Travelers' investigation was done in bad faith failed to create a genuine issue of material fact for trial. The court explained that the evidence of record showed that Travelers had full factual information necessary to render a decision about which coverage would apply, had inspected the property, had done research on linear accelerators, and had consulted with an engineer. Although the inspection may not have been perfect, the court concluded that it was not required to be for Travelers to avoid bad faith liability: "[T]o defeat a claim of bad faith, an insurance company need not demonstrate that 'the process by which it reached its conclusion was flawless or that the investigatory methods it employed eliminated possibilities at odds with its conclusion.'"⁸⁴⁸

The court also rejected plaintiffs' argument that Travelers' adjuster's log entries demonstrated the insurer's bad faith. The adjuster had entered in the log that he did not believe that plaintiffs could afford to sue over the coverage decision; the court noted that this comment was entered after the coverage decision and although "ill-advised, the comment fails to prove that Travelers knowingly took advantage of its insured's financially distressed condition."⁸⁴⁹ Similarly, the court concluded that a log note stating that she would re-inspect the site but that she would not do so on the weekend was not evidence of bad faith because it did not show that she did not intend to finalize the claim or that she had misled the plaintiffs.

Last, the court rejected plaintiffs' argument that Travelers had slanted the facts it provided to its expert in an attempt to manipulate the expert's analysis. However, the court found no evidence that Travelers had provided the inaccurate information contained in the expert's report and found that a subsequent report by the expert clarified that the information was based on his own observations. The court found that the insinuation of bad faith was insufficient to create a genuine issue of material fact: "When viewed in the context of the record as a whole, plaintiffs' evidence amounts to nothing more than an insinuation of wrongdoing; yet '[a]n insured must prove the insurer's bad faith by clear and convincing evidence, and a mere insinuation of bad faith will not suffice.'"⁸⁵⁰

(7) *Yatsonsky v. State Farm Fire & Cas. Co.*, 225 F. Supp. 3d 291 (M.D. Pa. 2016) (Munley, J.)

After a pipe burst at plaintiff's home, she sought coverage from State Farm, her homeowner's insurer. The estimate provided by her first contractor was more than the estimate calculated by State Farm; the parties had several meetings in an attempt to reconcile the estimates. State Farm revised its estimates several times, and made several payments over the course of time as its estimates increased; the insurer eventually paid more than the first contractor's initial estimate. Several months later, plaintiff submitted a new estimate, from a second contractor, that was substantially more and involved tearing the house down; plaintiff and State Farm were unable to resolve their differences with respect to this estimate, so Plaintiff filed this bad faith action. State Farm filed a motion for summary judgment after discovery. Judge Munley of the Middle District granted the motion. An earlier decision in this case is discussed in §9:05(b).

⁸⁴⁷ *Porter v. Safeco Ins. Co.*, 2017 U.S. Dist. LEXIS 17142, at *19 (M.D. Pa. Feb. 6, 2017).

⁸⁴⁸ *Rosewood Cancer Care, Inc. v. Travelers Indem. Co.*, 2016 U.S. Dist. LEXIS 133075, at *62-63 (W.D. Pa. Sept. 28, 2016) (quoting *Boulware v. Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 32223 (M.D. Pa. Mar. 17, 2015)).

⁸⁴⁹ *Rosewood Cancer Care, Inc. v. Travelers Indem. Co.*, 2016 U.S. Dist. LEXIS 133075, at *65 (W.D. Pa. Sept. 28, 2016).

⁸⁵⁰ *Rosewood Cancer Care, Inc. v. Travelers Indem. Co.*, 2016 U.S. Dist. LEXIS 133075, at *54-55 (W.D. Pa. Sept. 28, 2016) (quoting *Fugah v. State Farm Fire & Cas. Co.*, 2016 U.S. Dist. LEXIS 47009 (E.D. Pa. Apr. 7, 2016)).

Plaintiff contended that State Farm acted in bad faith in investigating the claim. She asserted that State Farm assigned 13 different claims representatives over the course of her claim, and such was evidence of bad faith. The court disagreed, concluding:

[P]laintiff fails to present evidence that State Farm’s claims management was anything other than what it claimed: an attempt to further investigate the water damage at plaintiff’s home to determine the value of her claim. Plaintiff has offered no expert evidence pertaining to State Farm’s investigation. Plaintiff cites no internal State Farm communication or testimony establishing that State Farm acted out of spite during its investigation. In sum, plaintiff has presented no competent evidence from which a reasonable jury could find that the number of State Farm employees assigned to her claim establishes bad faith.⁸⁵¹

Plaintiff also maintained that the increased estimates and payments over the course of seven months constituted bad faith, showing that State Farm failed to adequately investigate her claim. Again, the court disagreed. The court found the case law undermined her position, citing *Northwestern Mutual Life Insurance Co. v. Babayan*,⁸⁵² for the proposition that a low estimate of damages, if that estimate was reasonable, would not be bad faith. Further, the court found, State Farm had conducted five different property inspections, meeting with plaintiff and her contractor during each inspection in an attempt to reconcile their differing estimates. The payments sent to plaintiff during the initial phase of claims handling were approximately \$38,000, about \$5,000 less than the estimate by plaintiff’s initial contractor; payments over that amount were eventually paid.⁸⁵³

(8) *Tran v. Seneca Ins. Co., Inc.*, 2015 U.S. Dist. LEXIS 139527 (E.D. Pa. Oct. 14, 2015) (DuBois, J.)

Plaintiff owned commercial properties, and had a commercial property policy with defendant Seneca. After unsafe conditions were found at one of the properties, the fire department undertook emergency measures to begin to alleviate pressure from 2000 gallons of standing water on the roof: these measures caused substantial damage to the building. Plaintiff filed a claim under his policy. After an investigation, Seneca denied coverage. Plaintiff then filed this bad faith suit. Seneca filed a summary judgment motion. Judge DuBois of the Eastern District granted the motion as to the bad faith claim, as is also discussed in §10:13(b).

Plaintiff contended that Seneca’s investigation was a pretext only, and it had never intended to pay benefits. The court noted that Seneca had conducted a reasonable investigation, including:

having an independent adjuster and engineer each perform an investigation; reviewing the fire department investigation; reviewing plaintiff’s estimate of loss; taking plaintiff’s SUO; and requesting and reviewing additional documents pertinent to the loss. The court stated: “Based on the entire record before the Court, there is no clear and convincing evidence that Seneca or its agents were indifferent to the amount of plaintiff’s loss or conducted the investigation in a way that suggests Seneca never intended to honor the Policy.”⁸⁵⁴

(9) *Henriquez-Disla v. Allstate Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 15699 (E.D. Pa. Feb. 10, 2015) (Hey, M.J.)

Plaintiffs’ home was broken into and cash, jewelry and many other items were stolen. The following day, the home was damaged in a fire. They submitted claims to their homeowner’s insurer, defendant Allstate, how denied the claims on the grounds that plaintiffs had made material misrepresentations. Plaintiffs filed this breach of contract and bad faith action after the denial. Allstate filed a motion for summary judgment after several discovery issues, discussed throughout Chapter 14, were resolved. Magistrate Judge Hey granted the motion.

The court found that plaintiffs failed to provide sufficient evidence to create a genuine issue of material fact to support a bad faith claim. The court explained that the investigation had revealed facts in support of Allstate’s decision:

... I find that Plaintiffs have not presented evidence sufficient to establish that Allstate lacked a reasonable basis for denying their claims. As noted in the prior discussion, there are many inconsistencies in the statements provided by Plaintiffs, including information regarding Ms. Pacheco’s residency at the Stanwood property, her whereabouts at the time of the fire, and how she learned of the theft. Although there may be explanations for the inconsistencies, including a language barrier, there were sufficient contradictions in the testimony to justify Allstate’s decision.

* * *

[A]t the time Allstate denied Plaintiffs’ claims, it also relied on the mistaken belief that Mr. Disla had lied about his activities at the time he discovered the fire, based on his cellphone bill which showed

⁸⁵¹ *Yatonsky v. State Farm Fire & Cas. Co.*, 225 F. Supp. 3d 291, 296 (M.D. Pa. 2016).

⁸⁵² *Northwestern Mut. Life Ins. Co. v. Babayan*, 430 F.3d 121, 137 n.22 (3d Cir. 2005).

⁸⁵³ *Yatonsky v. State Farm Fire & Cas. Co.*, 225 F. Supp. 3d 291, 296-97 (M.D. Pa. 2016).

⁸⁵⁴ *Tran v. Seneca Ins. Co., Inc.*, 2015 U.S. Dist. LEXIS 139527, at *17-18 (E.D. Pa. Oct. 14, 2015).

outgoing text messages prior to his call to 9-1-1. It was later discovered that the text messages were logged in Pacific Time rather than Eastern Time as the phone calls had been. As previously stated, the insurance company's investigation need not be flawless and a finding of bad faith cannot be based on negligence or bad judgment.⁸⁵⁵

(10) *Honesdale Volunteer Ambulance Corp., Inc. v. Am. Alt. Ins. Co.*, 2014 U.S. Dist. LEXIS 38184 (M.D. Pa. Mar. 24, 2014) (Mannion, J.)

In 2005, plaintiff ambulance company discovered structural problems with its building and its commercial property insurer, AAIC, investigated in order to determine operations and malpractice risks, rather than the state of the property. After that, and subsequent investigation in 2008, AAIC did not recommend any changes to the property. The property was damaged in a 2010 earthquake, and plaintiff sought coverage from AAIC. AAIC hired an outside adjustment company which inspected the property the next day. The outside adjuster concluded that the earthquake had not caused the damage, but rather it pre-existed the event. Plaintiff had an engineer inspect the property, following which AAIC reconsidered the claim, but again the insurer denied coverage.

After AAIC denied coverage for the second time, plaintiff filed this breach of contract and bad faith action. The insurer filed a motion for summary judgment. Judge Mannion of the Middle District of Pennsylvania granted the motion as to the bad faith claim, as is also discussed in §§10:11 and 8:07.

Plaintiff contended that AAIC had acted in bad faith in its investigation. First, it argued that the adjuster for the outside company “acted as an advocate for non-payment, rather than as a fact-finder, when he did his investigation.”⁸⁵⁶ The court rejected this argument because that adjuster was not making the coverage decision and thus could not provide the basis for a finding of bad faith: “‘The attitude of a lower level claims representative, who lacked the authority to make final decisions on the claim’ and who handled the claim preliminarily, is not enough to show bad faith.”⁸⁵⁷ Further, being “discourteous” was also not enough to sustain such a count.

Second, plaintiff contended that the insurer acted in bad faith in using the internet to discover that plaintiff's employees had looked for new premises. Again, the court rejected the contention: “Plaintiff has not pointed to, and the court has not discovered any, case law in the Third Circuit or Pennsylvania prohibiting claims investigators from researching on the internet. . . . Here, looking into whether there was serious preexisting damage to the building was legitimate and does not evince bad faith. . . .”⁸⁵⁸

Last, plaintiff maintained that the investigation was performed in bad faith because the employees who had been at the building during the earthquake were not interviewed. The court explained that while such interviews might have helped, investigations are not required to be perfect. The court pointed to the investigation that was performed—which included responding to the claim promptly, inspecting the building twice, reconsidering its denial when asked by plaintiff, and relying on its engineer's conclusions—and concluded that plaintiff could not prove that defendant's inspection was in bad faith.⁸⁵⁹

(11) *Currie v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 190437 (E.D. Pa. Aug. 19, 2014) (Kelly, J.)

Plaintiffs owned a home and had a homeowner's policy with defendant State Farm. During Superstorm Sandy, a tree fell on the house and damaged it. During the claims process, plaintiffs asked a roofer, with which they had a maintenance contract, to provide an estimate. State Farm also had an estimate prepared. The parties could not resolve the claim, and plaintiffs filed this coverage and bad faith suit. State Farm filed a motion for summary judgment on the bad faith claim. Judge Kelly of the Eastern District of Pennsylvania granted the motion in part and denied it in part, as discussed in §9:09.

Plaintiffs contended that State Farm demanded the roofer to reduce its estimate in bad faith. However, the evidence indicated merely that State Farm and plaintiffs' roofer discussed the competing estimates, but that there was no request that the roofer change its estimate. Plaintiffs were unable to provide any evidence to contradict this, and the court granted the insurer's motion as to that theory: “Plaintiffs have failed to submit sufficient evidence indicating that State Farm acted in bad faith regarding its dealing with [the roofer] and the roofing estimate.”⁸⁶⁰

(12) *Atwood v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 121319 (M.D. Pa. Aug. 27, 2013) (Rambo, J.)

Plaintiff obtained a homeowner's policy with defendant in 2011. In 2012, after the DEA raided plaintiff's home, he fled the area. His home, unsecured after the DEA knocked down the front door, was the subject of numerous break ins and thefts. A fire occurred on March 31, 2012 and plaintiff thereafter sought coverage from State Farm. The insurer began an investigation, and discovered that in May 2012, plaintiff had been arrested in Colorado, and the home was

⁸⁵⁵ *Henriquez-Disla v. Allstate Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 15699, at *29-30, 30 n.14 (E.D. Pa. Feb. 10, 2015) (citations omitted).

⁸⁵⁶ *Honesdale Volunteer Ambulance Corp., Inc. v. Am. Alt. Ins. Co.*, 2014 U.S. Dist. LEXIS 38184, at *30 (M.D. Pa. Mar. 24, 2014).

⁸⁵⁷ *Honesdale Volunteer Ambulance Corp., Inc. v. Am. Alt. Ins. Co.*, 2014 U.S. Dist. LEXIS 38184, at *31 (M.D. Pa. Mar. 24, 2014).

⁸⁵⁸ *Honesdale Volunteer Ambulance Corp., Inc. v. Am. Alt. Ins. Co.*, 2014 U.S. Dist. LEXIS 38184, at *32 (M.D. Pa. Mar. 24, 2014).

⁸⁵⁹ *Honesdale Volunteer Ambulance Corp., Inc. v. Am. Alt. Ins. Co.*, 2014 U.S. Dist. LEXIS 38184, at *33 (M.D. Pa. Mar. 24, 2014).

⁸⁶⁰ *Currie v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 190437, at *18 (E.D. Pa. Aug. 19, 2014).

subject to a forfeiture proceeding. Plaintiff filed this bad faith action in March 2013, before the insurer rendered a coverage decision, but after it had notified plaintiff that it would not make any payments until certain motions were resolved relating to forfeiture. State Farm filed a motion to dismiss the bad faith claim. Judge Rambo of the Middle District granted the motion.

The court concluded that the complaint allegations failed: “Nor has Plaintiff properly pled that Defendant lacked good faith in conducting an investigation or failed to communicate with Plaintiff. To the contrary, Plaintiff alleges that Defendant undertook an investigation, but fails to make any specific allegations that might constitute bad faith regarding that investigation.”⁸⁶¹

Based on Plaintiff’s allegations and upon proper consideration of exhibits, the court concludes that Plaintiff has failed to make a claim for bad faith. Plaintiff has failed to plead that Defendant had no reasonable basis to deny coverage, because coverage has not been denied at this point.⁸⁶²

(13) *Dunn v. Scottsdale Ins. Co.*, 2013 U.S. Dist. LEXIS 107984 (M.D. Pa. Aug. 1, 2013) (Mannion, J.)

Plaintiffs’ business had a policy with defendant Scottsdale and filed a claim after discovering water damage inside their business location after a rain storm. The adjuster concluded, after an inspection, that the roof was poorly installed, and denied the claim. Defendant sent out an engineer to inspect, and that engineer also concluded that the water damage was caused by the poor installation of the roof. The denial was upheld. Plaintiffs then filed this coverage and bad faith suit. Defendant filed a motion for summary judgment. Judge Mannion of the Middle District granted the motion as to bad faith.

Plaintiffs asserted that it was bad faith for the insurer to deny coverage. The court concluded that there was a genuine issue of material fact on the coverage issue, and that given the two separate and independent inspections, each of which concluded that the cause of the loss was an uncovered condition, defendant could not be found to have acted in bad faith:

At the core of the parties’ dispute is whether storm conditions damaged the roof allowing water in or whether the roof was not properly sealed when the storm arrived. Although the parties present experts with differing opinions as to causation, neither side has alleged that the reports are in anyway unfounded or based on some critical misperception of the plaintiffs’ building so as to render the opinions unsound.... As such, the plaintiffs’ cannot make out the first element of a bad faith claim, that “the insurer lacked a reasonable basis for denying benefits.” The defendant’s denials were based on the reports of two independent claims adjusters whose veracity has not been challenged. Although the parties continue to dispute the actual cause of the damage, the defendant cannot be said to have had no basis for denying the plaintiffs’ claims. As such, the defendant’s motion for summary judgment will be granted with respect to the bad faith claim.⁸⁶³

(14) *Swan Caterers, Inc. v. Nationwide Mut. Fire Ins. Co.*, 2012 U.S. Dist. LEXIS 162305 (E.D. Pa. Nov. 13, 2012) (Yohn, J.)

Plaintiff filed a claim for wind and water damage with its property insurer, Nationwide. After Nationwide denied the claim, plaintiff filed this bad faith suit. Nationwide filed a motion for summary judgment. Judge Yohn of the Eastern District granted the motion.

The court concluded that there was no genuine issue of material fact that could support a jury finding of bad faith. The court noted that Nationwide performed four separate investigations of the damage, including by a roofer, its adjuster, and two engineers. Each of the investigations yielded a conclusion that the roof damage was not caused by wind. The roofer and adjuster properly reviewed photographs taken prior to emergency repairs. The court also rejected plaintiff’s argument that the investigations were inadequate because the investigators did not inspect the roof prior to emergency repairs because such a conclusion would render any investigation improper. Further, the court concluded that although one inspector failed to consider a “lifting effect” as a cause of damage, that failure was not enough to render the investigation as being completed in bad faith, because “[a] reasonable basis is all that is required to defeat a claim of bad faith.”⁸⁶⁴ Finally, the court rejected plaintiff’s argument that one of the investigators had stated that wind damage had caused the problems, but failed to note that in his report because there was no evidence presented to support this assertion: “Without some additional evidence, this contention does not rise to the level of a disputed material fact that can defeat summary judgment, and certainly not one that can satisfy a ‘clear and convincing’ burden under a claim of bad faith.”⁸⁶⁵

⁸⁶¹ *Atwood v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 121319, at *14 (M.D. Pa. Aug. 27, 2013) (citation to record omitted).

⁸⁶² *Atwood v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 121319, at *13-14 (M.D. Pa. Aug. 27, 2013) (citation to record omitted).

⁸⁶³ *Dunn v. Scottsdale Ins. Co.*, 2013 U.S. Dist. LEXIS 107984, at *20-21 (M.D. Pa. Aug. 1, 2013).

⁸⁶⁴ *Swan Caterers, Inc. v. Nationwide Mut. Fire Ins. Co.*, 2012 U.S. Dist. LEXIS 162305, at *22 (E.D. Pa. Nov. 13, 2012) (quoting *Treadways LLC v. Travelers Indem. Co.*, 467 F. App’x 143, 147 (3d Cir. 2012)).

⁸⁶⁵ *Swan Caterers, Inc. v. Nationwide Mut. Fire Ins. Co.*, 2012 U.S. Dist. LEXIS 162305, at *23 (E.D. Pa. Nov. 13, 2012).

(15) *Capriotti v. Allstate Prop. & Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 126540 (E.D. Pa. Sept. 6, 2012) (O’Neill, J.)

Plaintiff insureds filed a claim for water damage with their homeowner’s insurer, Allstate. Allstate denied the claim on the grounds that the damage was caused not by a sudden event, but by a gradual leak from a pipe under plaintiffs’ home. Following the denial, plaintiffs brought this breach of contract and bad faith suit. Allstate filed a motion for summary judgment, which was granted as to the bad faith claim by Judge O’Neill of the Eastern District .

The court denied Allstate’s motion for summary judgment as to the breach of contract claim, finding genuine issues of material fact as to whether the water damage was sudden or gradual. However, the court concluded that no reasonable jury could conclude that Allstate acted in bad faith because there was evidence that the damage was gradual, stating:

Allstate denied [plaintiffs’] claim only after conducting an in-person inspection of their home. Allstate’s inspector observed wall rot and discolored carpet tack strips, both of which suggest gradual, not sudden, damage. Allstate therefore had a reasonable basis for denying the [plaintiffs’] claim.⁸⁶⁶

(16) *Palmisano v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 116938 (W.D. Pa. Aug. 20, 2012) (Fischer, J.)

Plaintiff had a homeowner’s policy with State Farm, and filed a claim after discovering subsidence in the foundation, which was caused at least in part by a broken sewer line. State Farm denied the claim, and plaintiff filed this bad faith action. State Farm filed a motion to dismiss. Judge Fischer of the Western District granted the motion.

Plaintiff contended that State Farm acted in bad faith in relying on its engineer’s report because its conclusions were in error. The court found that it was not bad faith to rely on a report that the insured disagreed with; the parties simply disputed the conclusions of each other’s reports, which was not bad faith.⁸⁶⁷ The court also noted that plaintiffs failed to allege that they provided information to State Farm to contradict the report. The engineering report provided State Farm a reasonable basis to deny coverage: “Given [the engineer’s] findings, State Farm had a reasonable basis to deny coverage under the cited exclusion.”⁸⁶⁸

(17) *United States Fire Ins. Co. v. Kelman Bottles*, 2012 U.S. Dist. LEXIS 48684 (W.D. Pa. Apr. 5, 2012) (Schwab, J.)

U.S. Fire provided an all risks commercial property policy to defendant Kelman. Kelman filed a claim under the policy after a furnace at its glass manufacturing facility leaked and caused damage. U.S. Fire denied coverage based on several exclusions in its policy, the inherent risk exclusion, the wear and tear exclusion, and the design defect exclusion. U.S. Fire filed this declaratory judgment action seeking a declaration that it did not owe coverage under the policy. Kelman filed counterclaims, including counterclaims for breach of contract and statutory bad faith. The parties filed cross motions for summary judgment. Judge Schwab of the Western District of Pennsylvania granted the U.S. Fire’s motion, in this opinion also discussed in §§5:04(c), 10:03(b), and 10:21.

Kelman argued that the factual basis underpinning application of one of the exclusions was erroneous, so it was bad faith for U.S. Fire to deny coverage. The court disagreed, finding that there was no question that the inherent risk exclusion applied, even if one of the other claimed exclusions did not. Therefore, the denial of coverage remained appropriate and could not provide the basis for a bad faith claim: “Even if U.S. Fire denied coverage (in whole or in part) based on its erroneous belief that the furnace had not been rebuilt since 1994, this is not enough to legally support a claim for bad faith.”⁸⁶⁹

(18) *L.R. Costanzo Co. v. Ohio Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 1655 (M.D. Pa. Jan. 6, 2012) (Mariani, J.)

Plaintiff constructed a building for a police commission. The police commission sued plaintiff for property damage after construction was complete. Plaintiff sought coverage under its CGL policy with American Fire, which American Fire denied. Plaintiff then filed this breach of contract and bad faith suit. American Fire filed a motion for summary judgment at the conclusion of discovery. Judge Mariani of the Middle District granted the motion, which is also discussed in §10:03(a).

Plaintiff argued in part that American Fire conducted an investigation in bad faith, which resulted in a decision to deny a defense and indemnification. The court pointed to the fact that two claims representatives, and their managers and supervisors had examined the claim and to the fact that American Fire had obtained a coverage opinion from outside counsel supporting the declination. The court also found no bad faith surrounding the decision not to hire a building expert, given American Fire’s decision that there was simply no coverage for the faulty workmanship claim.

⁸⁶⁶ *Capriotti v. Allstate Prop. & Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 126540, at *10 (E.D. Pa. Sept. 6, 2012).

⁸⁶⁷ *Palmisano v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 116938, at *41 (W.D. Pa. Aug. 20, 2012).

⁸⁶⁸ *Palmisano v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 116938, at *43 (W.D. Pa. Aug. 20, 2012).

⁸⁶⁹ *United States Fire Ins. Co. v. Kelman Bottles*, 2012 U.S. Dist. LEXIS 48684, at *52 (W.D. Pa. Apr. 5, 2012).

The court concluded that “the record shows that Defendants [insurers] engaged in a thorough inquiry before determining there was no duty to defend.”⁸⁷⁰

(19) *Gold v. State Farm Fire & Cas. Co.*, 880 F. Supp. 2d 587 (E.D. Pa. 2012), 2012 U.S. Dist. LEXIS 102470 (McLaughlin, J.)

Following two separate instances of water damage to their home, the Golds sought coverage under their homeowner’s policy with defendant State Farm. After State Farm denied their second claim, plaintiffs brought this breach of contract and bad faith action. State Farm moved for summary judgment. Judge McLaughlin of the Eastern District granted the motion in part and denied it in part.

The Golds, plaintiffs-insureds, contended that State Farm acted in bad faith during its investigation of both the 2009 and 2010 claims. As discussed in §9:05, the court concluded that bad faith claim as to the 2009 investigation would survive summary judgment. The Court found that the claim relating to the 2010 investigation could not survive summary judgment. The court described the 2010 investigation as “thorough.”

State Farm sent [an investigator] to the house for a site visit, wherein he eliminated other potential causes of the damage, described his thought process to the plaintiff, and made clear why he had reached the conclusion that the loss was excluded under the policy. The plaintiffs have produced no evidence that this investigation was conducted in bad faith and the Court will grant the motion with respect to this part of the bad faith claim.⁸⁷¹

(20) *Enwereji v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 83417 (E.D. Pa. July 28, 2011) (Baylson, J.)

After plaintiffs’ roof was damaged by snow and ice storms, they sought coverage from their homeowner’s carrier, State Farm. State Farm paid to cover the cost of repairs, but plaintiffs insisted that the entire roof should have been replaced. Plaintiffs filed suit alleging breach of contract and bad faith. State Farm filed a motion for summary judgment. Judge Baylson of the Eastern District granted the motion.

The court found that State Farm provided evidence that it acted reasonably in its investigation, and plaintiffs had not provided evidence to meet its burden; therefore, State Farm would not be liable for bad faith. The court explained that “[c]onducting a thorough investigation of a claim demonstrates the insurer’s reasonable behavior.”⁸⁷² State Farm had sent its own investigators out to inspect the property twice, and had paid the claim commensurate with those estimates. After it retained an outside inspector for a third inspection, State Farm sent an additional check to plaintiffs reflecting that inspector’s higher estimate. The court also noted that State Farm was in regular communication with plaintiffs throughout the process.

(21) *Dawson v. Utica First Ins. Co.*, 2011 Phila. Ct. Com. Pl. LEXIS 164 (Philadelphia Apr. 4, 2011) (New, J.)

Plaintiffs ran a shop that was destroyed in a fire on Thanksgiving Day, 2008, approximately one month after obtaining a new insurance policy with Utica First that increased coverage from its prior policy. The prior policy had lapsed due to nonpayment of premiums. The day after the fire, plaintiffs, through counsel, notified Utica First of the fire. Within about a week of the fire, Utica First’s investigator had investigated and determined that the fire had been deliberately set. Shortly after notifying the parties of its conclusion, the landlord demolished the store. In January 2009, plaintiffs filed this breach of coverage and bad faith action. In August 2009, Utica First denied coverage, on the grounds that the fire was intentionally set. Several months later, in the seventh amended complaint, plaintiffs admitted that the fire was intentionally set, but alleged that the landlord and the other tenants in the strip mall had conspired to set the fire. After discovery, Utica First filed a motion for summary judgment, which Judge New of the Philadelphia County Court of Common Pleas granted.

Having concluded that Utica First did not breach its contract in denying coverage, the court turned to the bad faith claim. The court explained that Utica First provided evidence that would reasonably have led it to conclude that the fire was arson, including: plaintiffs had severe financial difficulties; plaintiffs allowed the prior property insurance policy to lapse due to nonpayment and then obtained a new policy that substantially increased coverage at a substantially increased premium; plaintiffs inquired of the insurance agent whether the policy covered fire damage the day prior to the fire; plaintiffs could not show any recent inventory orders and a few days before the fire, requested that a vendor remove its equipment; suspicious burn patterns were found during the investigation; the fire started on a day when the shop was the only one open and at a time just after plaintiff owner left; there was no sign of forced entry although plaintiff owner and her fiancé had the only keys.

The court noted that plaintiffs failed to provide evidence to dispute these facts, and thus could not meet their burden of showing clearly and convincingly that Utica First had acted in bad faith:

⁸⁷⁰ *L.R. Costanzo Co. v. Ohio Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 1655, at *19 (M.D. Pa. Jan. 6, 2012).

⁸⁷¹ *Gold v. State Farm Fire & Cas. Co.*, 880 F. Supp. 2d 587, 2012 U.S. Dist. LEXIS 102470, at *29 (E.D. Pa. 2012).

⁸⁷² *Enwereji v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 83417, at *24-25 (E.D. Pa. July 28, 2011).

Plaintiffs, who have the burden of proving bad faith, have made no genuine attempt to provide clear and convincing evidence that Utica First denied their claim with knowledge or in reckless disregard of a lack of a reasonable basis. The extent of the plaintiffs' bad faith claim is a series of unsupported conclusions of counsel in the Seventh Amended Complaint. The plaintiffs have failed to present any evidence that would begin to clearly and convincingly persuade this Court that Utica First acted with the requisite animus. Because the plaintiffs do not properly respond to the motion for summary judgment, this Court concludes the plaintiffs have not raised any triable issue regarding Utica First's alleged bad faith. Utica First's motion for summary judgment is therefore granted and plaintiff's bad faith claim in Count II of the Seventh Amended Complaint is dismissed.⁸⁷³

(22) *Portside Investors, L.P. v. N. Ins. Co. of N.Y.*, 2011 Phila. Ct. Com. Pl. LEXIS 19 (Philadelphia Jan. 5, 2011) (Bernstein, J.), *aff'd*, 41 A.3d 1 (Pa. Super. 2011) (Stevens, J.)

Portside owned a pier in the Delaware River in Philadelphia; that pier collapsed, killing three and injuring many others. Portside filed a claim with Northern, the property insurance carrier for it and its lessee, seeking \$15 million in coverage. The policy excluded coverage for "collapse" unless the pier collapse was caused by "hidden decay." Further, in the event of a covered collapse, the policy provided for payment of "replacement cost," but if the pier were not replaced, the policy would only provide coverage for "actual cash value."

Portside claimed that the collapse was caused by hidden decay. Northern indicated that certain aspects of the property claim would be covered, but because the pier was not to be rebuilt, it would pay only the actual cash value of the pier. Based on its expert's conclusions, Northern determined that although the pier was worthless just prior to collapse, it would pay \$200,000 to settle that portion of the claim. Portside rejected that settlement offer and demanded appraisal. Shortly after that demand, the two principals in the pier's lessee were indicted for involuntary manslaughter in the deaths resulting from the collapse. Northern then sought an examination under oath (EUO) from the two principals prior to appointing an appraiser.

Portside filed this suit seeking recovery for breach of contract and statutory bad faith. Judge Bernstein of the Philadelphia Court of Common Pleas bifurcated the trial, with the contract claim proceeding to a jury trial, at which the jury found that Northern breached its contract, but which the court opined should be reversed on appeal.⁸⁷⁴ The bad faith claim proceeded to a bench trial, at which Judge Bernstein found that Northern had not acted in bad faith.

In rejecting Portside's bad faith claim, the court found that Northern had properly investigated and handled the claim. Portside contended that Northern's demand for the EUO of the lessee's principals was made in bad faith as a pretext for denying the claim, much of which had already been paid, but the court disagreed. According to the court, because of the indictment, coverage became a "live issue" again, as the criminal presentation supporting the indictment showed that the principal knew about the decay, undermining the position that the collapse was caused by a hidden decay. The court found that these facts supported a conclusion that the demand for an EUO was reasonable because there were factual questions regarding the knowledge the principals had about whether the collapse was caused by hidden decay: "Portside's own expert confirmed that a factual question existed as to whether Asbell [principal] had knowledge of the hidden decay prior to the collapse. Northern's request for an examination under oath was reasonable because of the factual questions regarding Asbell's knowledge of the decay. Northern's request for an examination under oath even after an appraisal was demanded by Portside, was not made in and did not constitute bad faith."⁸⁷⁵

In finding in favor of the insurer, Northern, the court held:

Portside failed to prove at trial by clear and convincing evidence that Northern acted in bad faith.

Portside failed to prove by clear and convincing evidence that any bad faith was involved in the failure to appoint an appraiser. Portside itself failed to appoint an appraiser or seek any court assistance to compel Northern to appoint an appraiser. When Portside did nothing to compel the appointment of an appraiser, it was reasonable for Northern to conclude that Portside had abandoned its request, or at a minimum acquiesced in deferring the appraisal process until the examination under oath or at least the criminal case against its principal had been concluded.⁸⁷⁶

Portside appealed the judgment in Northern's favor on the bad faith claim, contending that Northern acted in bad faith by insisting on the EUO when it should have known that Asbell would exercise his 5th Amendment rights as the criminal case was proceeding. The Superior Court affirmed, in this opinion by Judge Stevens. The court agreed with trial court's decision that Asbell's knowledge of existing decay at the pier was critical to the coverage decision:

Under Portside's insurance policy, coverage was unavailable for Pier loss caused by "decay" unless the decay was "hidden decay." As the Presentment . . . gave reason to believe that Pier 34's

⁸⁷³ *Dawson v. Utica First Ins. Co.*, 2011 Phila. Ct. Com. Pl. LEXIS 164, at *20-21 (Philadelphia Apr. 4, 2011).

⁸⁷⁴ *Portside Investors, L.P. v. N. Ins. Co. of N.Y.*, 2011 Phila. Ct. Com. Pl. LEXIS 22 (Philadelphia Jan. 13, 2011) (opinion supporting reversal of jury verdict in favor of Portside on breach of contract claim).

⁸⁷⁵ *Portside Investors, L.P. v. N. Ins. Co. of N.Y.*, 2011 Phila. Ct. Com. Pl. LEXIS 22, at *19 (Philadelphia Jan. 13, 2011) (footnote omitted).

⁸⁷⁶ *Portside Investors, L.P. v. N. Ins. Co. of N.Y.*, 2011 Phila. Ct. Com. Pl. LEXIS 22, at *19-20 (Philadelphia Jan. 13, 2011).

collapse resulted from something other than “hidden decay,” Northern’s decision to insist on a statement from Asbell as to what he knew prior to collapse was not an exercise in statutory bad faith. Accordingly, for the reasons expressed in the trial court opinion dated January 5, 2011, we affirm the judgment entered in favor of defendant Northern Insurance and against plaintiff Portside Investors on Portside’s claim for statutory bad faith.⁸⁷⁷

(23) *Garvin v. Allstate Ins. Co.*, 2011 Phila. Ct. Com. Pl. LEXIS 9 (Phila. Jan. 19, 2011) (Di Vito, J.)

In this opinion supporting the appeal of its grant of Allstate’s motion for summary judgment on the bad faith claim, Judge Di Vito of the Philadelphia County Court of Common Pleas, noted that:

Although the facts do not warrant granting summary judgment as to breach of contract, they do not evidence the existence of bad faith on the part of Allstate.⁸⁷⁸

(24) *Mitch’s Auto Serv. Ctr., Inc. v. State Auto. Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 123199 (E.D. Pa. Oct. 24, 2011) (Robreno, J.)

Plaintiffs had a commercial policy with State Auto to cover plaintiff automotive repair shop. Following a fire at the shop, plaintiffs submitted various claims; State Auto provided coverage for most of the claims, but denied coverage for nearly \$65,000. Plaintiffs then filed this breach of contract and bad faith suit. State Auto moved for summary judgment. Judge Robreno of the Eastern District granted the motion as to the bad faith claim, in an opinion also discussed in §§5:05(a) and 10:13(b).

The court declined to enter summary judgment on the breach of contract claim, finding a genuine issue of material fact as to coverage because of ambiguity in the contract language. The court found that allegations that State Auto denied coverage in bad faith failed in light of the ambiguity: “[A]mbiguity is not bad faith. Indeed an ambiguous contract term is one that is subject to more than one reasonable interpretation. . . . Defendant’s interpretation here, . . . although unpersuasive to the Court, was reasonable and cannot be the basis for a claim of bad faith.”⁸⁷⁹

(25) *Pfister v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 81324 (W.D. Pa. July 26, 2011), later proceeding at, 2011 U.S. Dist. LEXIS 92556 (W.D. Pa. Aug. 18, 2011) (Schwab, J.)

Plaintiffs’ home was damaged when a shower drain was blocked. State Farm, their homeowner’s carrier, valued the claim at just over \$16,000, and paid the claim. Plaintiffs contended that, based on several estimates, their claim should have been valued at more than \$152,000. They filed suit, alleging a bad faith claim. A motion to dismiss the bad faith claim in the first amended complaint is discussed in §10:19; following that dismissal, plaintiffs filed a second amended complaint, which also included a bad faith claim. State Farm filed a motion to dismiss. Judge Schwab of the Western District of Pennsylvania granted the motion, in an opinion also addressed in §§7:01 and 10:03(b). Plaintiffs averred that the insurer improperly failed to respond to their demand for appraisal or mediation. The court found that State Farm did respond to the communication, although “it simply did not respond with the answer Plaintiffs sought.”⁸⁸⁰ The court found this could not state a claim for bad faith.

(26) *Schmitt v. State Farm Ins. Co.*, 2011 U.S. Dist. LEXIS 105834 (W.D. Pa. Aug. 12, 2011) (Lenihan, C.M.J.), adopted by, 2011 U.S. Dist. LEXIS 105836 (W.D. Pa. Sept. 19, 2011) (Cercone, J.)

Plaintiffs’ basement suffered water damage from a leak in a broken water pressure gauge on June 8, 2008. Plaintiffs reported the damage to their homeowner’s carrier, State Farm, on June 10, 2008. State Farm sent an adjuster to inspect the property on June 18, 2008. Serv Pro began a clean up the following day, and as part of its clean up, discarded many items. On July 25, 2008, plaintiffs submitted an inventory of damaged items, valued at over \$37,000, which plaintiffs apparently indicated was not complete. State Farm valued the damaged contents at approximately \$24,000, and advanced \$3,000. State Farm requested that plaintiffs provide receipts for a number of items, stating that their claimed purchases for 2007 and 2008 were far higher than what would have been expected, or if receipts could not be provided, documentation of income could be provided instead. On September 9, 2008, plaintiffs met with representatives from State Farm at their home and provided information relating to their income and recent satisfaction of their mortgage, but claimed that the receipts for all of their purchases had been destroyed by the water damage. At that meeting and over the next 10 days, plaintiffs also provided additional inventories of damages, totaling over \$10,000. On September 10, 2008, State Farm paid the balance of the original \$24,000 claim for personal property losses and paid over \$8,000 for structural repairs. Over the course of the claims handling process, plaintiffs twice requested that the assigned adjusters be taken off the claim, and State Farm reassigned the claims when requested.

In late September, after receiving the supplemental claims, State Farm assigned the claim to the Special Investigative Unit (“SIU”), having concerns that the late-identified damages might have been misrepresented. The SIU investigation discussed the clean up with Serv Pro representatives, who indicated that plaintiffs had instructed them to throw out items that Serv Pro believed either were not damaged or could be salvaged. The investigation also noted the

⁸⁷⁷. *Portside Investors, L.P. v. N. Ins. Co. of N.Y.*, 41 A.3d 1, 8 (Pa. Super. 2011).

⁸⁷⁸. *Garvin v. Allstate Ins. Co.*, 2011 Phila. Ct. Com. Pl. LEXIS 9, at *1 (Philadelphia Jan. 19, 2011).

⁸⁷⁹. *Mitch’s Auto Serv. Ctr., Inc. v. State Auto. Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 123199, at *24 (E.D. Pa. Oct. 24, 2011).

⁸⁸⁰. *Pfister v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 92556, at *5 (W.D. Pa. Aug. 18, 2011).

high value of recent purchases, all of which were stored in the basement and the fact that a huge amount of clothing and linens were listed as destroyed. In addition, it appeared that some of the same items appeared both on the original and supplemental inventories. In early October, State Farm requested that plaintiffs submit to an examination under oath (EUO); State Farm attempted to schedule the EUO, but was unable to do so before the plaintiffs filed this breach of contract and bad faith action in June 2009.

Defendant State Farm filed a motion for partial summary judgment on the bad faith claim. Chief Magistrate Judge Lenihan of the Western District of Pennsylvania recommended that the motion be granted. Judge Cercone adopted the recommendation without substantive discussion and granted summary judgment.

Plaintiffs contended that State Farm acted in bad faith in its investigation and that it had no reason to conduct such a lengthy investigation. State Farm countered, arguing that it had a reasonable basis to investigate the supplemental claims and had not completed its investigation at the time suit was filed. The court agreed with State Farm. The court pointed to red flags, such as an unusually high value of losses, which led State Farm to believe that there were misrepresentations in the supplemental claim forms. Because the policy permitted State Farm to void the policy where an insured makes a material misrepresentation, the court found that the decision to request an EUO and perform an investigation was appropriate and reasonable:

State Farm submits that as in *Parasco [v. Pacific Indemnity Co.]*, 920 F. Supp. 647 (E.D. Pa. 1996)], the record here contains nothing that would suggest that State Farm conducted its investigation in a biased manner, or for the improper purpose of evading its contractual duty to pay valid claims. The Court agrees with State Farm. The uncontroverted evidence here shows that State Farm paid out \$24,682.91 in property damages, and \$8,193.00 for structural repairs on Plaintiffs' claim, before it began to suspect possible material misrepresentations in Plaintiffs' supplement [sic] claim. Moreover, the handling of Plaintiffs' claim by the various State Farm representatives was, by Mrs. Schmitt's own account, professional. Nothing in Mrs. Schmitt's testimony regarding her interactions with the various State Farm representatives (or anywhere else in the record) would lead a reasonable jury to find that State Farm's conduct was motivated by ill will, or could be construed as purposefully evading its contractual duties. Finally, the Policy expressly provides for the use of EUOs by State Farm to investigate a claim, and thus, its request that Mrs. Schmitt submit to an EUO is both reasonable and proper. *Leo v. State Farm Mut. Auto. Ins. Co.*, 939 F. Supp. 1186, 1191 (E.D. Pa. 1996) ("Because State Farm's request for a statement under oath was proper under the policy's terms, State Farm had a reasonable basis for requesting the statement under oath in order to evaluate the plaintiffs UIM claim."); *Murphy v. Fed. Ins. Co.*, 206 Fed. Appx. 143, 148 (3d Cir. 2006) (the insurer had the right to take the depositions of insureds where policy unambiguously provided for same; insured's refusal to cooperate in investigation and allow depositions of family members justified granting of summary judgment in favor of insurer on plaintiff's bad faith claim).⁸⁸¹

The court rejected plaintiffs' argument that State Farm must have more than generalized suspicions of misrepresentations in order to initiate an investigation:

According to Plaintiffs, the suspicions of State Farm's claims representatives that Mrs. Schmitt has been untruthful are not a reasonable basis to deny an insurance claim. At the outset, the Court notes that State Farm has not denied Plaintiffs' claim. The investigation of their supplemental claim was ongoing when Plaintiffs instituted the present action. Moreover, nothing in *Parasco* suggests that affidavits from third parties are required to conduct an investigation of a supplemental claim, including that the insureds submit to an EUO. Plaintiffs fail to cite any authority for their position, and the Court is not aware of any such requirement. Indeed, the Policy specifically provides as a condition of coverage that Plaintiffs submit to EUOs.⁸⁸²

The court concluded that plaintiffs failed to meet their burden of proving by clear and convincing evidence that State Farm acted in bad faith: "Plaintiffs provide no evidence to suggest that State Farm's investigation was conducted in a biased fashion, or for the improper purpose of evading its contractual duty to pay valid claims."⁸⁸³ Furthermore, State Farm had not even rendered a decision on the supplemental claim, so plaintiffs could not succeed on an argument that the insurer had no reasonable basis to deny their claim. State Farm had presented sufficient evidence, detailed above, for the court to conclude that red flags warranted a thorough investigation of the supplemental claims.

(27) *Kling v. State Farm Fire & Cas.*, 2011 U.S. Dist. LEXIS 21835 (E.D. Pa. Mar. 3, 2011) (Fullam, S.J.)

In this case, also discussed in §10:13(b), plaintiff's home was damaged in a storm, and she submitted a claim to State Farm, her homeowner's carrier. Plaintiff retained a public adjuster, who valued the claim at almost \$40,000. State Farm initially valued the claim at \$3,000, and following a second inspection, revised its estimate to almost \$10,000. State Farm paid the amounts that the parties did not dispute. Plaintiff filed suit, alleging breach of contract

⁸⁸¹. *Schmitt v. State Farm Ins. Co.*, 2011 U.S. Dist. LEXIS 105834, at *31-33 (W.D. Pa. Aug. 12, 2011).

⁸⁸². *Schmitt v. State Farm Ins. Co.*, 2011 U.S. Dist. LEXIS 105834, at *33-34 (W.D. Pa. Aug. 12, 2011).

⁸⁸³. *Id.* at *35-36.

and bad faith. State Farm filed a motion for summary judgment. Senior Judge Fullam of the Eastern District granted the insurer's motion.

The court focused on State Farm's investigation, which it found reasonable, and held that there was no bad faith in that the claim presented a legitimate dispute as to the value of the claim and as to which areas of the home were damaged in the storm:

Although the plaintiff does not concede the accuracy of the defendant's activity log, it is not really disputed that the defendant conducted two inspections of the plaintiff's home, responded to the public adjuster's letters and telephone calls, and revised its initial estimate. Under these circumstances, the plaintiff cannot establish by clear and convincing evidence that the insurer acted in bad faith in denying coverage. The opinion of the public adjuster that the insurer intentionally ignored certain areas of damage is not supported by the record, which reflects a disagreement as to the cause of the damage.⁸⁸⁴

The court also rejected plaintiff's argument that one particular interaction with her insurance agent was designed to "intimidate" her, presumably into resolving the claim for less than she thought it was worth. The court found that the comment made by the agent had no effect on the outcome:

The plaintiff also argues that her insurance agent, whom she knew socially, attempted to intimidate the plaintiff by telling the plaintiff in a telephone call that the [public] adjuster "is known for stating things that are damaged that aren't." . . . Although this action by the agent may have been inappropriate, there is no evidence that it affected the handling of the claim.⁸⁸⁵

(28) 3039 B Street Assocs., Inc. v. Lexington Ins. Co., 740 F. Supp. 2d 671 (E.D. Pa. 2010) (Robreno, J.), aff'd, 444 F. App'x 610 (3d Cir. 2011) (Barry, J.)

Plaintiffs' commercial real estate and personal property were allegedly damaged when a frozen sprinkler pipe burst, flooding the building. Lexington denied the claim, after providing one advance during the investigation and after a long investigation into whether plaintiffs heated the building. Plaintiffs filed suit, alleging breach of contract and bad faith. Lexington subsequently paid the undisputed flooding damages, and pursuant to an appraisal process for the continuing damage claims, paid additional sums. Lexington filed a summary judgment motion on the remaining bad faith claims, which was granted by Judge Robreno of the Eastern District.

In its analysis, the court focused on the first prong of the two-part Terletsky bad faith test—whether Lexington lacked a reasonable basis to delay payment on plaintiffs' claim. Lexington pointed to plaintiffs' long delay in submitting proof of loss and plaintiffs' failure to timely provide documents necessary to the investigation in support of its motion. Noting that Lexington offered to pay the undisputed claims, the court observed that the bad faith claims related only to the long investigation of the disputed claims. The court concluded that Lexington did not lack a reasonable basis for denying benefits because: (a) there were frequent communications between plaintiffs and Lexington, including regular requests for information; (b) Lexington timely inspected the property, met with plaintiffs' adjuster and worked up an estimate; and (c) plaintiffs failed to provide Lexington with the information it believed necessary to its investigation. Therefore, plaintiffs had not demonstrated by clear and convincing evidence "that Defendant [Lexington] acted without a reasonable basis in continuing to investigate whether the premises were heated, which may have caused or contributed to the ruptured water pipe."⁸⁸⁶ Because the first prong of the

Terletsky test was lacking, the court ruled that it did not need to analyze the second prong (knowledge or reckless disregard of a reasonable basis).⁸⁸⁷

The Third Circuit, in an opinion authored by Judge Barry, affirmed the grant of summary judgment. The court noted that the claim "was highly questionable, and that Lexington . . . conducted a reasonable investigation."⁸⁸⁸ In particular, the Third Circuit observed that the plaintiffs had no documentation of any recent heating oil deliveries, and could not provide the name of the oil company which might have made such a delivery. Further, the building had a number of broken windows, which would have made heating difficult and that plaintiffs could not prove that they owned the damaged property.

(29) Caroselli v. Allstate Prop. & Cas. Ins. Co., 2010 U.S. Dist. LEXIS 83515 (E.D. Pa. Aug. 16, 2010) (Schiller, J.)

The facts of this case appear in §10:03(b). Following the denial of his claim under an extended limits endorsement of his homeowner's policy, Caroselli filed this putative class action suit, alleging breach of contract and bad faith. Allstate filed a motion to dismiss the complaint, which Judge Schiller of the Eastern District granted. According to the court, "Allstate properly paid to Caroselli the limits of liability pursuant to the clear language of the Policy. Therefore,

⁸⁸⁴ *Kling v. State Farm Fire & Cas.*, 2011 U.S. Dist. LEXIS 21835, at *3 (E.D. Pa. Mar. 3, 2011).

⁸⁸⁵ *Id.* at *3-4 (citation to record omitted).

⁸⁸⁶ *3039 B Street Assocs., Inc. v. Lexington Ins. Co.*, 740 F. Supp. 2d 671, 682 (E.D. Pa. 2010).

⁸⁸⁷ *Id.*

⁸⁸⁸ *3039 B Street Assocs., Inc. v. Lexington Ins. Co.*, 444 F. App'x 610, 612 (3d Cir. 2011).

Allstate had a reasonable basis for failing to pay additional monies to Caroselli and he cannot make out a bad faith claim against Allstate.⁸⁸⁹

(30) *Berko Investments, LLC v. State Nat'l Ins. Co., Inc.*, 2010 U.S. Dist. LEXIS 73144 (E.D. Pa. July 20, 2010) (DuBois, J.)

This case, discussed in §10:03(b), involved a property claim at a restaurant. Following a bench trial, Judge DuBois of the Eastern District entered a verdict for defendant State National. The parties agreed that plaintiffs did not provide timely notice of the claim, and centered their dispute around whether State National suffered any prejudice as a result. The court agreed with State National that it had been prejudiced. Plaintiffs should have left the temporary fix in place—as the contract required—until State National could inspect the roof because that fix would have sufficiently protected the property until after the inspection. The court also rejected plaintiffs' argument that State National could have "cured" any prejudice by interviewing the contractor and roofer and by examining two photographs that had been taken prior to the roof replacement. Under the contract, State National was entitled to inspect the property for itself. Because the court found that plaintiffs had breached the contract, "plaintiffs' claim of bad faith is moot."⁸⁹⁰

(31) *Colella v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 31895 (E.D. Pa. Apr. 1, 2010) (Joyner, J.), *aff'd*, 407 F. App'x 616 (3d Cir. 2011) (Barry, J.)

This case, discussed more fully in §10:03(b), involves denial of a water damage claim under a homeowner's policy. Plaintiffs filed a complaint alleging breach of contract and statutory bad faith. Defendant insurer filed a motion for summary judgment which was granted by Judge Joyner of the Eastern District. In part, the court relied on the fact that defendant's investigation and communications with plaintiffs was reasonable. Each plumber who inspected the property agreed on the cause of the damages and there was regular contact between plaintiffs and defendant. The court explained:

Other than the fact that Defendant denied Plaintiffs' insurance claim, Plaintiffs have failed to cite any other evidence of bad faith. The parties agree that several different plumbers came to evaluate the damage and that they all reached the same conclusion: a leaking pipe underneath the slab caused water to enter the ground which then leaked into the foundation of Plaintiffs' home. Finally, the parties agree that Defendant was available for and open to communication with Plaintiffs regarding their claim. Defendant's agents were in regular contact with both the Colellas and Pierson, their representative. State Farm always responded to Plaintiffs' inquiries and provided the information which Plaintiff sought. Plaintiffs have failed to show evidence of a frivolous or unfounded refusal to pay, lack of investigation into the facts, or a failure to communicate with the insured which is required to make out a claim of bad faith . . .⁸⁹¹

Accepting the reasoning of the district court, the Third Circuit, in an opinion by Judge Barry, affirmed.

(32) *Kao v. Markel Ins. Co.*, 708 F. Supp. 2d 472 (E.D. Pa. 2010) (Brody, J.)

In this case, discussed more fully in §10:05, the defendant insurer denied a property damage claim because it believed that the damage stemmed from the police execution of a valid search warrant which was thought to be excluded under the applicable policy. Judge Brody of the Eastern District closely examined the warrant and the legal requirements to sustain a warrant, and found the warrant was not valid, and thus the pertinent policy language did not act to preclude coverage. However, the court decided that the insurer was entitled to summary judgment on the bad faith count, because the insurer did not evince bad faith in its investigation:

Defendants reasonably believed, based on what Plaintiffs told them, that the damage caused was done pursuant to a facially valid warrant. At worst, Defendants were negligent in assuming that the warrant was facially valid, and in denying coverage before obtaining a copy of the warrant. Defendants' reliance on Plaintiffs' explanation of the cause of damage and on the assumption that the warrant was likely to be valid does not rise to the level of reckless disregard necessary to show bad faith.⁸⁹²

(33) *Whitmoyer Ford, Inc. v. Republic Franklin Ins. Co.*, 2010 U.S. Dist. LEXIS 32607 (E.D. Pa. Apr. 2, 2010) (Golden, J.)

In this case discussed more fully in §10:03(b), Plaintiffs submitted a claim for damage to cars on their automotive dealership lots under their commercial insurance policy with Republic Franklin. In determining the value of the loss, the insurer applied a co-insurance penalty pursuant to the policy. Judge Golden of the Eastern District granted the insurer's motion for summary judgment. The court concluded that the policy language permitted defendant to apply the co-insurance penalty if the value of the cars on plaintiffs' lots exceeded the policy limits. Having found that

⁸⁸⁹ *Caroselli v. Allstate Prop. & Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 83515, at *18-19 (E.D. Pa. Aug. 16, 2010) (citation to record omitted; citing *Kelly v. Nat'l Liab. & Fire Ins. Co.*, 2010 WL 2736953, at *3 (E.D. Pa. July 12, 2010)).

⁸⁹⁰ *Berko Investments, LLC v. State Nat'l Ins. Co., Inc.*, 2010 U.S. Dist. LEXIS 73144, at *18 (E.D. Pa. July 20, 2010).

⁸⁹¹ *Colella v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 31895, at *14-15 (E.D. Pa. Apr. 1, 2010).

⁸⁹² *Kao v. Markel Ins. Co.*, 708 F. Supp. 2d 472, 480 (E.D. Pa. 2010).

defendant correctly interpreted the contract, the court held that the bad faith claim could not stand: “Because the Court holds that the insurer had a reasonable basis for applying the policy’s co-insurance provision, it also dismisses Plaintiff’s bad faith claim.”⁸⁹³

(34) *Morrisville Pharmacy, Inc. v. Hartford Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 116607 (E.D. Pa. Oct. 29, 2010) (Rufe, J.)

In this case, discussed in more detail in §10:13(b), the plaintiff pharmacy alleged that defendant Hartford acted in bad faith in its investigation of plaintiff’s claims of loss under its all-risks policy.

Hartford had obtained the requisite police reports from August 2008, when the owner of plaintiff pharmacy had overdosed at the pharmacy and from September 2008, when the owner had attempted to remove property from the pharmacy after the landlord had changed the locks. Because those did not provide any indication of theft, which plaintiff maintained in its insurance claim, Hartford had its special investigation unit perform an additional investigation. Hartford updated plaintiff on a monthly basis advising that the claim was still under investigation.

After plaintiff filed suit, Hartford filed a motion for summary judgment, which was granted by Judge Rufe of the Eastern District. The court found that there was no bad faith:

File notes indicate that Defendant was actively conducting an investigation of the claim during this time span. The Plaintiff has not raised any genuine issue of material fact as to whether the Defendant spent an unreasonable amount of time investigating the claim or otherwise acted in bad faith. Plaintiff has also failed to point to facts suggesting that the delay in processing the claim was purposeful and motivated by self-interest or ill will. The mere fact that Plaintiff allegedly suffered an injury from the delay in processing the claim does not raise an issue of material fact as to whether bad faith misconduct was the reason for the delay.⁸⁹⁴

(35) *Collins v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 60436 (E.D. Pa. June 17, 2010) (Yohn, J.)

A storm damaged Collins’s house, including the roof and adjacent portions of the interior. Allstate, which provided the homeowner’s policy, covered the part of the claim relating to the interior damage but denied coverage for any exterior repair beyond the damaged section of the roof. Collins filed suit, claiming a breach of contract for not replacing the entire roof where the slate tiles could not be matched, and bad faith in rendering that decision. Allstate filed a motion for summary judgment. Judge Yohn of the Eastern District granted the insurer’s motion.

The court analyzed the Pennsylvania Superior Court decision in *Greene v. United Services Auto. Ass’n*,⁸⁹⁵ discussed in this section. The court noted that *Greene* held that under similar policy language, repairing the damaged portion of the roof required only “like” or “similar” shingles, not an exact match. It also noted that the “part of the building damaged” required repairing the portion of the roof that had been damaged, not the entire roof. The court determined that similar policy language and similar facts required a similar result:

Given the similarity of the facts of *Greene* to the facts of this case, Allstate had a reasonable legal basis to deny coverage for more than the damaged slopes of the Property under the Policy. Furthermore, Allstate has submitted evidence which it considered in evaluating the claim, that before the March 8, 2008 storm the roof of the Property contained mismatched slates and did not have a uniform appearance. . . . The terms of the Policy in this case (“like kind and quality” and “equivalent construction”) are similar to the “like construction” term of the policy in *Greene*, which did not require “replacement with the identical item damaged,” but only “repair of the damaged slope . . . with shingles *similar* to the damaged shingles.”⁸⁹⁶

(36) *Somerset Indus., Inc. v. Lexington Ins. Co.*, 639 F. Supp. 2d 532 (E.D. Pa. 2009) (Goldberg, J.)

Somerset owned and operated a food distribution facility. Following a July 2006 rainstorm, the facility and inventory inside suffered water damage. Somerset had an all-risks policy with Lexington that excluded damage caused by flood water, surface water and water that backed up from a sewer or drain. Somerset purchased an endorsement that provided an exception to that exclusion, so that damage caused by flood water or surface water would be covered, but water that backed up from a sewer or drain would continue to be excluded.

After Somerset made its claim, Lexington inspected the facility, hired an accounting firm to assist in assessing damages, and sent Somerset a reservation of rights letter. Lexington’s accounting firm sought information relevant to the investigation and had to wait up to several months before it received the pertinent information. In one instance, Somerset failed to respond to a request, despite several reminders. Lexington denied Somerset’s request for advance payment in January 2007. Lexington continued to ask for additional information and continued its investigation until Somerset filed suit in April 2007.

⁸⁹³ *Whitmoyer Ford, Inc. v. Republic Franklin Ins. Co.*, 2010 U.S. Dist. LEXIS 32607, at *12, n.3 (E.D. Pa. Apr. 2, 2010).

⁸⁹⁴ *Morrisville Pharmacy, Inc. v. Hartford Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 116607, at *16-17 (E.D. Pa. Oct. 29, 2010).

⁸⁹⁵ *Greene v. United Services Auto. Ass’n*, 936 A.2d 1178 (Pa. Super. 2007)

⁸⁹⁶ *Collins v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 60436, at *22 (E.D. Pa. June 17, 2010) (footnote omitted, emphasis in original) (quoting *Greene v. United Servs. Auto. Ass’n*, 936 A.2d 1178, 1186 (Pa. Super. 2007)).

Somerset's suit alleged bad faith and breach of contract. Lexington filed a motion for summary judgment as to the coverage claim and the bad faith claim. Judge Goldberg of the Eastern District denied Lexington's motion for summary judgment on the coverage issue because there existed factual questions as to the exact cause of the water damage. As for bad faith, Somerset argued that it was entitled to press its claim because Lexington had failed to respond promptly when Somerset had sought information and had failed to provide an advance payment. Lexington argued that Somerset could not meet its burden of proof on the bad faith claim because the investigation was delayed primarily because of Somerset's lack of cooperation. The court granted Lexington's motion on the bad faith claim.

Although recognizing that "bad faith may also extend to the insurer's investigative practices,"⁸⁹⁷ the court noted that bad faith claims did not follow from any investigatory delay, and "[i]t is not bad faith for an insurer to take a stand with a reasonable basis or to aggressively investigate and protect its interests."⁸⁹⁸ The court held that "Somerset has failed to present evidence that Lexington acted with a dishonest purpose or that Lexington did not have a reasonable basis for its actions."⁸⁹⁹

The court found Lexington's decision not to advance payment to Somerset reasonable in light of Somerset's lack of cooperation. Somerset claimed that because it complied with Lexington's initial request for information and allowed Lexington to inspect the property, it had fully cooperated. The court found this unconvincing and insufficient to allow the bad faith claim to continue:

Given the extent of the alleged loss, which required a thorough investigation by Lexington, and Somerset's delayed response to the requests for information, this Court finds that Somerset has not provided clear and convincing evidence that Lexington did not have a reasonable basis for its handling of the investigation.⁹⁰⁰

As for the company's decision to delay making an advance payment, the court held, "[C]onsidering Lexington's delayed and unanswered requests for information, Lexington's delay in denying the advance payment was not without a reasonable basis."⁹⁰¹

(37) *Pisano v. Nationwide Mut. Fire Ins. Co.*, 2009 U.S. Dist. LEXIS 98213 (E.D. Pa. Oct. 21, 2009) (Goldberg, J.)

This property damage case involving a flooded basement is discussed more fully in §10:03(b). In granting summary judgment in favor of Nationwide, Judge Goldberg of the Eastern District found that the insurer's investigation was reasonable as a matter of law, holding, "Pisano's bad faith claims would be dismissed because he has failed to present any evidence that Nationwide did not have a reasonable basis for partially denying coverage."⁹⁰²

In so ruling, the court noted that "Nationwide relied on the report of expert Jody DeMarco, which attributed the majority of basement damage to excluded sources."⁹⁰³ Since the court held that the insurer's coverage position was correct, the alleged low estimate of the insurer was irrelevant:

The facts cited by Pisano in his response and sur-reply briefs do not support his bad faith claim. First, he points out that Porter, Nationwide's adjuster, thought that the original damage estimate prepared by Joseph Kurtz was low. However, Pisano has not explained why this establishes bad faith on the part of Nationwide.⁹⁰⁴

The court also rejected as irrelevant to the current claim Pisano's argument that Nationwide should have considered that other storms in the area had never caused flooding in the basement before.⁹⁰⁵

(38) *Bottke v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 4203 (E.D. Pa. Jan. 22, 2009) (Schiller, J.)

State Farm issued a homeowner's insurance policy to plaintiff. Plaintiff's home furnace broke, causing pipes to freeze and burst, which resulted in water damage to his home. State Farm determined plaintiff's loss was covered. State Farm made an advance payment on the claim, and scheduled a contractor, MKA, to inspect the premises. MKA provided a damage repair estimate of \$37,687.87. The insured's public adjuster estimated the loss at \$87,728.31. State Farm paid the MKA estimate. After a re-inspection at the request of plaintiff, State Farm paid plaintiff an additional \$1,245.07, and later paid a subsequent plumbing invoice for \$5,000.

When State Farm refused to pay more, plaintiff filed suit. State Farm filed a motion for partial summary judgment on the bad faith count. Neither party disputed that the property damage was covered; rather, the parties disputed the scope and method of repairs necessary to properly restore the property. Judge Schiller of the Eastern District granted the insurer's motion. The court held that the insurer's estimate was reasonably based on an inspection of the premises

⁸⁹⁷ *Somerset Indus., Inc. v. Lexington Ins. Co.*, 639 F. Supp. 2d 532, 543 (E.D. Pa. July 7, 2009).

⁸⁹⁸ *Id.*

⁸⁹⁹ *Id.*

⁹⁰⁰ *Id.* at 544.

⁹⁰¹ *Id.* at 544 n.12.

⁹⁰² *Pisano v. Nationwide Mut. Fire Ins. Co.*, 2009 U.S. Dist. LEXIS 98213, at *17-18 (E.D. Pa. Oct. 21, 2009) (citations omitted).

⁹⁰³ *Id.* (citations omitted).

⁹⁰⁴ *Id.* (citations omitted).

⁹⁰⁵ *Id.* at *18-19.

as well as photographs and notes of conversations with the plaintiff. The court rejected plaintiff's arguments that the insurer's representative, Hoffman, improperly influenced the contractor's damage estimate:

[A] jury could not reasonably infer that Hoffman's alleged statement that the contractor should investigate "a" leak at Plaintiff's house was intended to influence an estimate intended to repair the Plaintiff's home based on the damage sustained, especially since the estimate does not suggest any foul play on its face. Indeed, Plaintiff himself cannot articulate how the estimate was affected by this alleged misrepresentation. Furthermore, State Farm acted in good faith by meeting with [public adjuster] Wagner, having MKA revise its estimate, paying additional funds to Plaintiff, and promptly paying for the plumber's repairs to fix the multiple leaks. Without clear and convincing evidence from which a jury could conclude that Hoffman manipulated the MKA estimate, State Farm can show a reasonable basis for its actions.⁹⁰⁶

(39) *Teti v. Phoenix Ins. Co.*, 2009 U.S. Dist. LEXIS 8027 (E.D. Pa. Feb. 3, 2009) (Joyner, J.)

Phoenix issued a homeowner's insurance policy to the plaintiff, Teti. In January 2007, a retaining wall on Teti's property collapsed. Teti sought coverage under her policy with Phoenix, which denied coverage because collapse was not covered under the policy. Phoenix sent an engineer to Teti's premises to inspect the property; the engineer concluded that long-term deterioration and extensive, recent rainfall caused the wall to collapse. Phoenix maintained its coverage position, and Teti filed suit alleging breach of contract and bad faith.

Judge Joyner of the Eastern District granted summary judgment in favor of Phoenix, finding that the insurer's investigation, its interpretation of its policy, and reliance upon the expert were all reasonable. According to the court, there was no bad faith:

In this case, plaintiff has argued that its interpretation of the contract and its engineering reports are, in fact, the correct ones; however, even if this is ultimately the case, plaintiff has failed to support her claim of bad faith with any evidence to suggest that the insurer acted with self interest or ill will as outlined in Pennsylvania law. Phoenix's positions were based upon an engineering report and the wording of the Policy itself; it cannot be said that the decisions were unfounded. Thus, summary judgment is granted as to plaintiff's claim of bad faith and this count is dismissed.⁹⁰⁷

(40) *Fitzmartin v. Allstate Prop. & Cas. Co.*, 2010 U.S. Dist. LEXIS 98299 (M.D. Pa. Sept. 20, 2010) (Blewitt, M.J.)

Plaintiffs' home was damaged by water when a pipe broke, and they sought coverage from their homeowner's carrier, Allstate. Allstate paid part of the damages sought by plaintiffs, but not the full amount claimed, on the ground that plaintiffs had overvalued their damages. Plaintiffs filed suit for breach of contract and bad faith in violation of §8371. Allstate filed a motion for partial summary judgment on the bad faith claim, which Magistrate Judge Blewitt of the Middle District granted.

The facts presented indicated that plaintiffs notified Allstate of the damage a day after the damage occurred. The insurer sent Service Master to the home for prompt remediation. Allstate paid over \$11,000 for remediation and a "tear out" of the damaged property. Thereafter, the insurer sent an outside adjuster to estimate the costs of repairing the damage. The outside adjuster estimated the property damage at about \$34,000. Plaintiffs initially obtained an estimate from a general contractor of \$147,000. A second contractor, however, provided an estimate for just over \$73,000. Allstate had an internal adjuster look at the estimates again, and that adjuster increased the valuation of damages by over \$22,000. In total, Allstate paid plaintiffs over \$67,000. The parties continued to dispute the value of the repairs, and Allstate continued its investigation by contacting the plumber who initially responded after the damage was discovered and the Service Master team leader who had worked on the remediation. The record showed that Allstate and plaintiffs (through their public adjuster) were in contact throughout the process.

Plaintiffs claimed that the insurer's failure to pay the \$147,000 estimate was in bad faith because it ignored important elements of damage. The court held that in order to avoid summary judgment on their bad faith claim, plaintiffs needed to provide some proof that Allstate had no reasonable basis to limit its offer to \$67,000. Quoting defendant's brief, the court found that because one of plaintiff's estimates was so close in value to what the insurer eventually paid, Allstate's "evaluation of the claim was at least reasonable."⁹⁰⁸

Based on the facts detailed above, the Court finds that Plaintiffs cannot establish a bad faith claim, as the undisputed evidence does not show that Defendant's conduct amounted to bad faith. Plaintiffs have failed to show that Defendant did not have a reasonable basis for denying Plaintiffs' full claim under the policy, and that Defendant knew of or recklessly disregarded its lack of reasonable basis for paying the amount. *See Klinger*, 115 F.3d 230, 233 (3d Cir. 1997). Plaintiffs have not presented evidence that demonstrates a genuine issue for trial concerning their bad faith claim. Further,

⁹⁰⁶ *Bottke v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 4203, at *17-19 (E.D. Pa. Jan. 22, 2009).

⁹⁰⁷ *Teti v. Phoenix Ins. Co.*, 2009 U.S. Dist. LEXIS 8027, at *7-8 (E.D. Pa. Feb. 3, 2009).

⁹⁰⁸ *Fitzmartin v. Allstate Prop. & Cas. Co.*, 2010 U.S. Dist. LEXIS 98299, at *30 (M.D. Pa. Sept. 20, 2010) (quoting defendant's brief in support of motion for summary judgment).

Plaintiffs have not provided evidence that Defendant had a dishonest motive in its dealings with their claim, or that Defendant's conduct was sufficiently egregious to be considered reckless. *See Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747, 751 (3d Cir. 1994). The undisputed facts, detailed above, show that Defendant conducted a thorough investigation regarding Plaintiffs' claim for damages due to their loss caused by the water and that it had a reasonable basis for its action.⁹⁰⁹

(41) *White v. W. Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 99034 (M.D. Pa. Dec. 8, 2008) (Blewitt, M.J.)

Plaintiffs were insured under a homeowner's policy issued by West American Insurance Company. West American denied coverage with respect to the plaintiffs' claims for damages to their trailer and personal property. At issue were two sections of the policy: (1) a Water Damages Exclusion; and (2) a Pollutant Exclusion. Magistrate Judge Blewitt of the Middle District agreed with the insurer that there was no coverage for the claims. Finding no coverage was owed under the policy, the court held that there could be no bad faith:

The claim for bad faith depends on whether the Plaintiffs' claim was covered under their insurance policy. Since there was no duty by Defendant to cover the damages to the Plaintiffs' house and personal property, there can be no bad faith claim....

In this case, the Defendant properly denied coverage of the Plaintiffs' claim under the Water Damage Exclusion of the Plaintiffs' homeowners insurance policy. Since the Plaintiffs' claim was properly denied by Defendant, there can be no showing under a clear and convincing standard that there was bad faith.⁹¹⁰

(42) *Rock-Epstein v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 76042 (E.D. Pa. Sept. 29, 2008) (Schiller, J.)

The plaintiff sought coverage under a homeowner's policy after a water-related loss. The insurer denied the claim based on certain exclusions in the policy and the plaintiff filed a breach of contract and bad faith action. On cross-motions for summary judgment, Judge Schiller of the Eastern District denied the insurer's motion on the breach of contract claim, because there were fact issues remaining for trial. However, the court granted the insurer's motion as to the bad faith claim, finding that, "[t]he parties disagreement over whether Plaintiff suffered a covered loss is not, as a matter of law, bad faith."⁹¹¹ Further, in the court's view, even "a reasonable but incorrect interpretation of an insurance policy and the law is not bad faith."⁹¹² The plaintiff also cited as a basis for bad faith the insurer's failure to obtain an expert. The court rejected this argument, holding, "At most, Allstate erred in not engaging an expert to further examine the damage, but that mistake in judgment falls far short of bad faith."⁹¹³

(43) *Allison v. Allstate Indem. Co.*, 2008 U.S. Dist. LEXIS 50684 (E.D. Pa. June 27, 2008) (Rice, M.J.)

The insured, Allison, was issued a homeowners' policy by Allstate. Allison reported an insurance claim to the insurer, stating that her down spout had clogged and caused heavy rain to back up onto the roof and then leak into all three levels of her home. Allstate denied the claim as a loss that was not covered under the policy. Allison later contacted the insurer again, and claimed the loss was caused by wind. Allison then requested an inspection of the property, and the insurer sent an adjuster who prepared an estimate for the home's interior damages. A roofing consultant hired by the insurer inspected the property and prepared a report stating that there was no wind damage. Allstate again denied Allison's claim. At the request of Allison's public adjuster, the insurer's adjuster and the same expert roofer reinspected the property. Based on the reinspection, the insurer reiterated its denial.

Allison then sued the insurer, claiming breach of contract and bad faith. Magistrate Judge Rice of the Eastern District granted the insurer's motion for summary judgment on the bad faith claim. As to Allison's initial claim that her down spouts clogged and caused the water intrusion, the court noted that the policy terms did not cover such a loss, and therefore the insurer had a reasonable basis for denying the claim on based on those facts.⁹¹⁴ When Allison contacted the insurer a second time to report that the loss was caused by wind, the court held, the insurer reasonably investigated the claim, and then reinvestigated at Allison's request before the denial.⁹¹⁵ According to the court:

Allison fails to present clear and convincing evidence so clear, direct, weighty and convincing to show Allstate did not have a reasonable basis for denying benefits under the policy, and knew of or recklessly disregarded its lack of a reasonable basis in denying the claim. . . . Allstate's substantial, thorough investigation, which included two investigations with pictures taken of the property and on-site inspections, establishes a reasonable basis to defeat a bad faith claim. . . . The fact that Allstate's conclusion might prove incorrect fails to establish Allstate had a dishonest purpose, ill will, or disregard for the truth. . . . No evidence supports Allison's conclusory assertions of bad faith based on the alleged incompetency of Allstate's expert. Moreover, such allegations would reflect mere

⁹⁰⁹ *Id.* at *30-31.

⁹¹⁰ *White v. W. Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 99034, at *41 (M.D. Pa. Dec. 8, 2008).

⁹¹¹ *Rock-Epstein v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 76042, at *20 (E.D. Pa. Sept. 29, 2008).

⁹¹² *Id.* at *20 (citing *Bostick v. ITT Hartford Grp., Inc.*, 56 F. Supp. 2d 580, 587 (E.D. Pa. 1999)).

⁹¹³ *Id.* at *21.

⁹¹⁴ *Allison v. Allstate Indem. Co.*, 2008 U.S. Dist. LEXIS 50684, at *5-12, *13-14 (E.D. Pa. 2008) (citations omitted).

⁹¹⁵ *Id.* at *14.

negligence or bad judgment, not ill will. . . . Allison does not establish a genuine issue of material fact exists regarding whether Allstate had a reasonable basis for denying the benefits under the policy or recklessly disregarded its lack of a reasonable basis. Thus, Allstate’s motion for summary judgment on Count II is granted.⁹¹⁶

(44) *Miller v. First Liberty Ins. Corp.*, 2008 U.S. Dist. LEXIS 47550 (E.D. Pa. June 17, 2008) (O’Neill, J.)

In 2006, the plaintiff decided to put a second floor on top of an existing addition to his home. The existing addition (built in 1984) experienced termite infestation in 1996 that caused structural damage to the walls of the addition that remained hidden until plaintiff’s contractors removed the roof in 2006. Determining that the structural condition of the addition walls would not support a second floor, the contractors decided to tear down the walls as a safety precaution. The plaintiff then submitted a claim to his homeowners’ insurer for damage to the insured property.

Upon receipt of the claim, the insurer designated the loss date for plaintiff’s claim as 1996, the year in which the termite infestation was discovered and treated. The insurer determined that plaintiff’s claim was not covered by the policy since it was due to termite infestation, which the policy did not cover. The plaintiff filed suit, alleging breach of contract and bad faith. The plaintiff contended that the policy provided coverage for his loss based on the “collapse” provision in the policy, which covered building damage caused by hidden insect or vermin damage. The insurer filed for summary judgment as to the breach of contract and bad faith claims. Judge O’Neill of the Eastern District granted the insurer’s motion.

The court found that the record reflected that the insurer “had multiple reasonable bases to deny the claim.”⁹¹⁷ The court concluded that the insurer “reasonably determined that the loss date of plaintiff’s claim was 1996 and reasonably used that loss date as one basis for denying coverage.”⁹¹⁸ It also found the insurer’s claims adjuster “reasonably discerned no basis for coverage” under the policy with respect to the termite damage. The court also concluded that to the extent that the insurer neglected the possibility of collapse that might have been covered under the policy, this was, “at most negligent or demonstrated bad judgment, and it is well-established that mere negligence or bad judgment is not bad faith.”⁹¹⁹ According to the court, “Because plaintiff fails to produce evidence that defendant acted with a dishonest purpose or meant to a breach of a [sic] known duty through some motive of self-interest or ill will, I conclude defendant did not act in bad faith.”⁹²⁰

(45) *Whitmore v. Liberty Mut. Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 76049 (E.D. Pa. Sept. 30, 2008) (Pratter, J.)

In this case addressed more fully in §10:05, Liberty Mutual denied the insured’s claim in reliance upon the pollution exclusion in the applicable policy. Judge Pratter of the Eastern District did not accept the insurer’s interpretation of its policy language, but granted summary judgment to the insurer on the \$8371 claim. In so holding, the court acknowledged that Liberty Mutual relied on various Pennsylvania cases that were interpreted reasonably by Liberty Mutual in denying coverage. Because Liberty Mutual’s interpretation was reasonable, the court determined Liberty Mutual did not act in bad faith and the plaintiffs failed to meet their burden of proof:

Accordingly, although this Court cannot accept Liberty Mutual’s “interpretation given the various factors discussed above, [Liberty Mutual’s] is not a wholly unreasonable or reckless interpretation.” Because there is insufficient, much less clear and convincing, evidence in the record that Liberty Mutual acted in bad faith in denying the Whitmores’ claim, the Court will grant summary judgment for the insurer on the bad faith claim.⁹²¹

(46) *Hanna v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 59650 (E.D. Pa. Aug. 14, 2007) (Baylson, J.)

State Farm denied plaintiffs’ homeowner’s claim because the damage to plaintiffs’ garage was caused by settlement and excavations by groundhogs. The policy excluded coverage for damage caused by cracking and settlement, and by vermin and rodents. Judge Baylson of the Eastern District granted the insurer’s motion for summary judgment on alleged breach of contract and bad faith. The court held that the insurer properly applied its policy, retained an engineer to assess the causes of the insureds’ damage, and otherwise acted reasonably in deciding that there was no coverage for the claim.

⁹¹⁶ *Id.* at *15-16 (citations omitted).

⁹¹⁷ *Miller v. First Liberty Ins. Corp.*, 2008 U.S. Dist. LEXIS 47550, at *14-15 (E.D. Pa. 2008).

⁹¹⁸ *Id.* at *15.

⁹¹⁹ *Id.* at *16.

⁹²⁰ *Id.* at *16.

⁹²¹ *Whitmore v. Liberty Mut. Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 76049, at *23 (E.D. Pa. Sept. 30, 2008).

(47) *McMahon v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 34137 (E.D. Pa. May 8, 2007) (Kelly, J.)

In this case, a homeowner's insurer denied a water damage claim based upon coverage exclusions. Judge Kelly of the Eastern District upheld the insurer's interpretation of its policy. The court also granted summary judgment in favor of the insurer on a \$8371 claim. The court relied on several factors in finding no bad faith, including the fact that the insurer sent an adjuster to the plaintiffs' premises within nine days after receiving notice of the claim; the insurer spoke with plumbers to learn about the problems at plaintiff's house and its resolution; the denial letter cited policy language and stated the reasons for the denial.

(48) *SRP Mgmt. Corp. v. Seneca Ins. Co.*, 2007 U.S. Dist. LEXIS 71824 (E.D. Pa. Sept. 27, 2007) (Ditter, S.J.)

The plaintiff owned a building that was insured for damage with Seneca. The policy excluded damage caused by collapse, but extended coverage to a collapse if caused by "hidden decay." Aware that there was a hole in the roof of the building, the owner, while visiting the property to consider the repair, discovered a roof collapse on the opposite side of the roof. A claim was made for coverage. An expert engineer retained by the insurer concluded that the roof collapsed because of a rotted truss, as a result of the roof leaking obviously for many years. The insurer denied the claim, finding that there was no evidence of "hidden decay." A bad faith suit followed.

Senior Judge Ditter of the Eastern District denied summary judgment on the breach of contract action, because there was a question of fact as to whether there was "hidden decay." The court held that summary judgment "is appropriate on a bad faith claim where there is no clear and convincing evidence that the insurer's conduct was unreasonable and no evidence that the insurer knew its lack of reasonable basis in denying the claim."⁹²² The court granted summary judgment to the insurer "because the plaintiffs have not produced clear and convincing evidence that Seneca's refusal to pay was unreasonable."⁹²³

(49) *Easy Sportswear, Inc. v. American Economy Ins. Co.*, 2007 U.S. Dist. LEXIS 86114 (W.D. Pa. Nov. 21, 2007) (Fischer, J.)

This case arose from damage to plaintiff's business property allegedly caused by "Hurricane Ivan" in September 2004. Four months later, the plaintiff submitted a property loss claim. The defendant insurer promptly issued a reservation of rights letter to the plaintiff. The insurer also retained an independent adjuster and a roofing consultant to investigate the claim. In February 2005, the insurer denied coverage of the damaged inventory, finding that, based upon the opinions of the insurance adjuster and the roofing inspector, the loss of the inventory was not due to storm related damage and therefore not covered under the policy. Plaintiff asserted that its claimed property constituted "covered property" as defined in the policy and that the limitations and exclusions asserted by the insurer did not apply.

Plaintiff filed an action alleging breach of contract and bad faith. The parties filed cross-motions for summary judgment. Judge Fischer of the Western District held that there existed factual issues as to the actual cause or causes of loss, and therefore denied both cross-motions on the coverage question. However, the court granted the insurer's motion for summary judgment on bad faith. According to the court:

In this case, Defendant has offered evidence that it provided Defendant with a timely reservation of rights letter. Furthermore, it has offered evidence that it investigated the claims reported by Plaintiff through the use of a claims agent and roofing specialist. Defendant contends that, as a result of this investigation, Defendant made a reasonable and good faith denial of Plaintiff's claims. Furthermore, Plaintiff has offered no evidence to rebut Defendant's evidence of a reasonable attempt to investigate and a reasonable decision based upon that investigation. Defendant has also offered evidence that it promptly communicated its denial of Plaintiff's claim and the reason for its denial to Plaintiff. Based on the evidence offered by Defendant, namely the affidavits of the claims adjuster and roofing inspector and correspondence sent to Plaintiff, Defendant had a reasonable basis for denying Plaintiff's claim. Furthermore, in consideration of the reservation of rights letter and letter to Plaintiff denying its claim, Defendant reasonably communicated with Plaintiff. Because Plaintiff has offered no evidence, let alone clear and convincing evidence that Defendant's denial was based on an unreasonable basis, Defendant's motion as to the issue of bad faith is granted.⁹²⁴

(50) *Totty v. Chubb Corp.*, 2006 U.S. Dist. LEXIS 61013 (W.D. Pa. Aug. 28, 2006) (Ambrose, J.)

The plaintiff insured sued its insurer, seeking to recover under a homeowners' insurance policy for alleged structural damage to her property caused by vibrations from construction equipment used by the city to resurface her

⁹²² *SRP Mgmt. Corp. v. Seneca Ins. Co.*, 2007 U.S. Dist. LEXIS 71824, at *7 (E.D. Pa. Sept. 27, 2007).

⁹²³ *Id.* at *8.

⁹²⁴ *Easy Sportswear, Inc. v. Am. Economy Ins. Co.*, 2007 U.S. Dist. LEXIS 86114, at *38-39 (W.D. Pa. Nov. 21, 2007).

street. She also claimed that the insurer acted in bad faith. The insurer had denied the claim based upon the earth movement and structural movement exclusions in its policy.

Judge Ambrose of the Western District held that the exclusions were ambiguous, and denied the insurer's motion for summary judgment on the breach of contract claim. However, the court granted the insurer's summary judgment on the bad faith claim, stating, "[N]o reasonable jury could conclude that Plaintiff has shown, by clear and convincing evidence that Great Northern acted in bad faith in denying her claim. To the contrary, the evidence supports Great Northern's position that it had a reasonable basis to deny the claim."⁹²⁵

After receiving the plaintiff's claim, the insurer employed an expert, which determined that the property damage was related to foundation settlement. Thereafter, when the plaintiff provided the insurer with evidence that vibrations from the road equipment densified the soil, causing the house to "settle," the insurer employed two additional experts, both of whom rejected the plaintiff's new theory of causation. The plaintiff did not argue that she was entitled to coverage under any of the theories of the insurer's experts. Thus, according to the court, the insurer continued to have a reasonable basis to deny the insured's claim. The insured also failed to produce evidence to support her argument that the insurer's investigation of her claim was inadequate. As for the insurer's coverage position, the court held, "Because the cause of the alleged damage to Plaintiff's home remains fairly debatable, it is not bad faith for Defendant to maintain its initial defenses to coverage."⁹²⁶

(51) *Pidro v. State Farm Ins. Co.*, 81 Pa. D. & C.4th 305 (Lawrence 2006) (Cox, J.)

Plaintiffs were insured under a homeowner's policy issued by State Farm. Plaintiffs filed a claim when they noticed that the right side of their home had begun to deteriorate. State Farm sent out an adjuster who denied the claim because the condition had occurred over time, and was excluded settlement under the policy. The denial letter advised plaintiffs that there was a one-year suit limitation clause in the policy. Plaintiffs filed a breach of contract and bad faith action more than one year after denial of the claim. Judge Cox of the Lawrence County Court of Common Pleas granted summary judgment to the insurer. The court held that there was no bad faith because the insurer's decision was reasonably based and there were no facts suggesting the contrary.

(52) *Toll Naval Assocs. v. Lexington Ins. Co.*, 2005 U.S. Dist. LEXIS 16393 (E.D. Pa. Aug. 10, 2005) (Yohn, J.)

The insurers issued two commercial property policies to the insured, which owned a historical property, Biddle Hall, that was damaged by fire. The policies contained a limitation on coverage for newly acquired locations or unnamed locations, stating that 120 days prior reporting was required. There was not a list of insured properties in the policies. The insurers conducted an investigation after the fire, and by letter five months thereafter, denied coverage for the fire damage. Multiple reasons were cited for the denial, including that the insured failed to include the property on the schedule of properties, and the insured failed to satisfy the 120-day reporting requirement so that the property was not covered as an "unnamed location." The insured filed suit alleging breach of contract, breach of the duty of good faith and fair dealing, and statutory bad faith.

Judge Yohn held that the provisions in the policies relied upon by the insurers were ambiguous. Interpreting the ambiguous terms in favor of the insureds, the court denied summary judgment on the breach of contract claim. However, with respect to the bad faith claim, the court granted the insurer's motion for summary judgment. According to the court:

[The insurers'] argument is a compelling one in light of what this Court has already held: that defendants and plaintiffs both proffered reasonable interpretations of ambiguous terms in the policies. Because defendants reasonably interpreted the policies to exclude coverage for fire damage to Biddle Hall, they acted reasonably — and, therefore, not in bad faith — when they denied coverage for plaintiff's claim.⁹²⁷

The plaintiff argued that the insurers acted in bad faith in the handling of the investigation of the claim. The court rejected this argument, stating:

Because liability in this case is not clear, defendants' failure to interpret the policies as plaintiff has interpreted them, or to voluntarily accept liability, or to propose a substantial settlement, does not amount to clear and convincing evidence of bad faith.⁹²⁸

The plaintiff also argued that the insurer acted in bad faith by abandoning their reliance on some of the exclusions upon which they initially relied to deny coverage. The court rejected this argument, stating that such evidence could be reasonably interpreted "to suggest nothing more sinister than a realization that some of the reasons defendants initially relied upon turned out to be inapplicable upon further investigation of the policies and the facts underlying the claim."⁹²⁹ The court noted that at the time of the fire, the policies governing the claim were undergoing revision and

⁹²⁵ *Totty v. Chubb Corp.*, 2006 U.S. Dist. LEXIS 61013, at *37 (W.D. Pa. Aug. 28, 2006).

⁹²⁶ *Id.* at *40.

⁹²⁷ *Toll Naval Assocs. v. Lexington Ins. Co.*, 2005 U.S. Dist. LEXIS 16393, at *14-15 (E.D. Pa. Aug. 10, 2005).

⁹²⁸ *Id.* at *16-17.

⁹²⁹ *Id.* at *17.

renewal and final versions had not yet been issued. “In light of the fact that the policies were in a state of flux, defendants altered rationale for denying coverage does not amount to clear and convincing evidence of their bad faith.”⁹³⁰

(53) *Roth v. Old Guard Ins. Co.*, 850 A.2d 651 (Pa. Super. 2004) (DelSole, P.J.)

In this case, plaintiff made claims through a public adjuster for losses suffered as a result of fires at two adjacent properties. Old Guard Insurance Co. paid his claims for property damage but refused to pay for lost rental income. Plaintiff signed a general release prepared by the public adjuster, which was forwarded with a letter indicating that the loss of rental value was still in dispute. When the insurer received the document, the funds were distributed to the plaintiff.

Plaintiff brought suit to recover business income and rental value. The insurer pled accord and satisfaction as an affirmative defense on the basis of general release. Plaintiff, however, claimed that the release was not intended to relinquish his remaining claims. Plaintiff asserted that his public adjuster inadvertently failed to exclude matters that were still in dispute from the release and maintained that in the cover letter to the release, he had reserved the right to make a claim for loss of rental value.

The trial court, sitting without a jury, found for the plaintiff on his claim for damages but granted JNOV in favor of the insurer on his claim for bad faith. Both parties appealed.

The Superior Court, in an opinion authored by Judge Del Sole, reversed and vacated the judgment for plaintiff on his claim for business losses and affirmed the denial of his bad faith claim. With respect to the bad faith claim, the court agreed with the lower court that there was no bad faith, stating, “The Trial Court. . . properly concluded that plaintiff failed to establish that defendant’s denial of the rental loss claim was unreasonable and that it engaged in bad faith conduct.”⁹³¹

(54) *F.P. Woll & Co. v. Valiant Ins. Co.*, 2004 U.S. Dist. LEXIS 4377 (E.D. Pa. Mar. 11, 2004) (Pollak, J.)

The plaintiff manufacturing business was insured under a commercial property policy issued by Valiant. In January 1996, a fire severely damaged one of two manufacturing buildings used by the plaintiff. By May 1998, the parties had resolved the majority of the plaintiff’s claims under the policy. In November 1998, the plaintiff submitted additional claims for extra expenses in the form of legal and negotiation fees, environmental testing costs, construction costs, and architectural fees incurred in connection with the leasing and purchase of a new facility. In response to this claim, Valiant asserted that these costs and fees were outside the scope of extra expenses as defined by the policy.

The plaintiff filed suit, alleging breach of contract and bad faith. In a motion for summary judgment, Valiant asked the court to dismiss the plaintiff’s claims for bad faith and punitive damages.

One issue in the case involved the interpretation of the policy provision that required the insured to “avoid or minimize the suspension of business . . . at replacement premises” with regard to the environmental testing. While not deciding at the summary judgment stage whether Valiant’s reading of this provision was correct, the court held that the company’s interpretation was at least reasonable:

I find neither party’s interpretation to be clearly compelled, or precluded, by the language of the policy. While I refrain at this point from deciding whose interpretation will ultimately prevail, the existence of a genuine ambiguity in the policy leads me to conclude that Valiant’s reading of [the provision] is, at a minimum, reasonable.⁹³²

Another dispute concerned the final provision addressing the extent of the period of restoration. Valiant argued that the period of restoration was the shortest of the time to repair, rebuild or replace the existing facility. The plaintiff claimed that since it elected to replace the facility, the period of restoration was the time required to replace the facility with one of a similar quality. The court concluded that “[o]nce again, [the plaintiff] has failed to establish by clear and convincing evidence that Valiant’s interpretation of the policy is unreasonable.”⁹³³

Ultimately, the court granted Valiant’s motion for summary judgment on the bad faith claim. In reaching this conclusion, the court held that since the plaintiff “failed to establish the absence of a reasonable basis for Valiant’s denial of coverage, [the plaintiff’s] claim that Valiant knowingly or recklessly disregarded its lack of reasonable basis necessarily fails as well.”⁹³⁴ Similarly, Judge Pollak dismissed the plaintiff’s claim for punitive damages based upon the fact that this claim “arises solely out of its bad faith claim.”⁹³⁵

⁹³⁰ *Id.* The court’s reasoning is further discussed in §6:02(b).

⁹³¹ *Roth*, 850 A.2d 651, 2004 Pa. Super. LEXIS 653, at *10.

⁹³² *F.P. Woll & Co.*, 2004 U.S. Dist. LEXIS 4377, at *9-10.

⁹³³ *Id.* at *13.

⁹³⁴ *Id.* at *13.

⁹³⁵ *Id.* at *13

(55) *Estate of Barbara Higgins v. Washington Mutual Fire Ins. Co.*, 838 A.2d 778 (Pa. Super. 2003) (Bender, J.)

The decedent purchased a fire insurance policy from Washington Mutual, and the decedent died during the policy period. Thereafter, the policy was renewed by the decedent's estate. Thirty-six days after the renewal policy took effect, the residence was destroyed by fire. At that time, the property had been vacant for more than sixty consecutive days. Washington Mutual denied the claim based upon the policy's vacancy provision, which provided that coverage would be suspended if the property was vacant in excess of sixty days. The plaintiff estate brought suit asserting a claim for breach of contract and bad faith.

In reviewing the vacancy provision, the court rejected the estate's argument, stating that "[n]o reasonable insured would believe . . . that the vacant premises would annually be provided coverage during the first sixty days of each renewal period."⁹³⁶ The estate contended that it was unfair for Washington Mutual to accept the premium when the insurer had no intention of providing coverage. The court rejected this argument, concluding that "[a]bsent any showing that Insurer knew, at the time of renewal, that Decedent had died, that her property had been vacant, and that her estate was renewing the policy, we can find no indicia of bad faith on the part of the Insurer in this case."⁹³⁷

(56) *Shearer v. State Farm Mut. Automobile Ins. Co.*, 56 Pa. D. & C.4th 503 (Lackawanna 2002) (Barrasse, J.)

This case is discussed in detail in §10:13. Judge Barrasse of Lackawanna County found that there was no bad faith in the insurer's handling of a theft claim where the insurer had the recovered vehicle inspected by an appraiser and a forensic specialist, contacted the police, and took a reasonable period of time in investigating other aspects of the claim.

(57) *Perschau v. USF Ins. Co.*, 1999 U.S. Dist. LEXIS 3334 (E.D. Pa. Mar. 22, 1999) (Reed, J.)

USF issued an all risk policy that contained a damage appraisal provision. The policyholder alleged that USF acted in bad faith by conditioning the appraisal and deducting depreciation from property estimates. The policyholder also argued that USF acted in bad faith by issuing a notice of non-renewal after expiration of the policy, and by failing to pay the "undisputed" minimum amount of the loss in a timely manner.

Judge Reed of the Eastern District held that the policyholder had failed to demonstrate with clear and convincing evidence that the insurer acted in bad faith. The court held that there was no evidence that the insurer's non-renewal was motivated by bad faith. The court also held that under a commercial policy it was acceptable for the insurer to allow for depreciation in its calculation of the property damage.

On the issue of partial payment, the court distinguished *Polselli v. Nationwide*⁹³⁸ stating:

Here, in contrast, there is no evidence that [the policyholder] was financially destitute or needed an advance payment to survive. The fire did not involve his home or leave him without a place to live. Moreover, there is no evidence that USF has a policy of paying in advance portions of the run-of-the-mill commercial loss claims. Nor is there evidence that USF unnecessarily delayed the appraisal process, was dilatory in processing [the policyholder's] claim or responding to his correspondence, or attempted to use [the policyholder's] misfortune or need for funds as a lever to force him to settle.⁹³⁹

The court concluded that an advance or partial payment on disputed commercial claims was not required by Pennsylvania regulations.

(58) *Focht v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 124561 (M.D. Pa. Sept. 5, 2014) (Mariani, J.)

After plaintiffs' home suffered water damage in Hurricane Irene, they sought coverage from their homeowner's carrier, State Farm, which covered the claim for damage to the home's exterior, but denied coverage for the interior damage as caused by flood, which was excluded under the policy. Plaintiffs disagreed with this conclusion, and when the parties were unable to resolve the dispute, filed this breach of contract and bad faith action. State Farm brought a motion for summary judgment on the bad faith claim. Judge Mariani of the Middle District granted the motion, in this decision also addressed in §10:25.

Plaintiffs contended that the inspection was inadequate because it was too short and the investigation was inadequate because there were discrepancies and inconsistencies between its investigation and that of plaintiffs' public adjuster. As to the time the State Farm inspector spent in the home—approximately 30 minutes—the court noted that "there is no reason to believe, on the record before us, that a longer time was necessary" because the inspector found water damage only in the basement and none on any other level, which would support a conclusion that the damage was caused by surface or subsurface flood waters.⁹⁴⁰ Any discrepancies as to whether the flooding was done by surface or subsurface waters were irrelevant to the coverage decision, and therefore could not provide the basis for a

⁹³⁶ *Higgins*, 838 A.2d at 783.

⁹³⁷ *Id.* at 784.

⁹³⁸ 1995 U.S. Dist. LEXIS 10173, 1995 WL 430571 (E.D. Pa. July 20, 1995).

⁹³⁹ 1999 U.S. Dist. LEXIS 3334, at *12-13.

⁹⁴⁰ *Focht v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 124561, at *14 (M.D. Pa. Sept. 5, 2014).

bad faith claim. Further, the court explained that there was no evidence to show that any problems with the investigation were anything other than “negligence or bad judgment,” insufficient to support a bad faith claim.⁹⁴¹

The court also addressed plaintiffs’ argument that State Farm had covered a claim for water damage from a leaking pipe years earlier, and rejected that such coverage could support a bad faith claim.

(59) *Leitner v. Allstate Ins. Co.*, 2014 U.S. Dist. LEXIS 95071 (E.D. Pa. July 11, 2014) (Tucker, C.J.)

Plaintiffs had a homeowners’ policy with defendant Allstate. After a pipe burst and caused damage to the home, they sought coverage. After Allstate denied the claim, plaintiffs brought this breach of contract and bad faith action. Allstate filed a motion for summary judgment. Chief Judge Tucker of the Eastern District granted the motion.

Plaintiffs contended that Allstate’s investigation was done in bad faith, the court concluded that plaintiffs did not meet the burden set by §8371. The evidence of record showed that the adjuster had asked for further documentation, but such had not been provided timely. The court also explained that the evidence showed that a plumber’s inspection concluded that the pipes had not burst, but rather had been leaking for some time; the adjuster correctly concluded on this basis that the policy did not provide coverage in this situation. Because plaintiffs provided no evidence to create a genuine issue of material fact, the claim was dismissed.

(60) *Kojsza v. Scottsdale Ins. Co.*, 2014 U.S. Dist. LEXIS 5286 (M.D. Pa. Jan. 15, 2014) (Mariani, J.)

Plaintiff sought coverage from her homeowner’s carrier, defendant Scottsdale, when a theft occurred at her home when she was out of town. Defendant denied the claim because there was no sign of forced entry and the policy’s coverage for theft was contingent on the existence of “visible signs of forced entry.” Plaintiff filed a breach of contract and bad faith action, and Scottsdale moved for summary judgment. Judge Mariani of the Middle District of Pennsylvania granted the motion as to bad faith.

Although the court concluded that it could not grant summary judgment on the coverage issue, it concluded that there was no genuine issue of material fact with respect to the bad faith claim. The policy language excluded coverage for thefts where there was no evidence of forced entry, and the investigation properly focused on this issue. The court explained that the police report, the officer at the scene, and the adjuster’s investigation all concluded that there were no signs of forced entry. Further, plaintiff contended that the investigator should have conducted a more thorough investigation, but the court rejected that argument:

[T]he undisputed evidence shows that he did conduct an investigation in which he was looking for signs of physical damage, such as a broken window, bent frames, and the like. As such, the Court finds that Defendant had a reasonable basis for denying coverage when it relied on both [the investigator’s] and the police report.⁹⁴²

(61) *Moran Industries, Inc. v. Netherlands Ins. Co.*, 2014 U.S. Dist. LEXIS 20081 (M.D. Pa. Feb. 19, 2014) (Brann, J.)

Plaintiff Moran owned a commercial property that was insured by defendant Netherlands. After the property was damaged in a fire, Moran submitted a claim to defendant, and the parties could not agree on the value of the repairs. Moran then filed this bad faith suit. After discovery, Netherlands filed a motion for summary judgment. Judge Brann of the Middle District granted the motion, discussed in more detail in §§10:11 and 10:13(b).

Moran contended that Netherlands failed to properly communicate during the course of investigation, but court concluded that the evidence failed to create a genuine issue of material fact because both parties failed to maintain regular communications, and the adjuster “acted with reasonable diligence following up missed communications and was conscious of the relative urgency. Moran offered no evidence demonstrating an ill-will, self-interest, or dishonest purpose on this point, and did not provide other evidence with which a reasonable jury could find bad faith by the clear and convincing standard.”⁹⁴³

The court also rejected plaintiff’s argument that Netherlands acted in bad faith in discounting the opinion of its building consultant about the extent of needed repairs because “Netherlands demonstrated other reasonable bases for its actions.”⁹⁴⁴ The court pointed to the fact that Netherlands had an assessment done by an architect and engineer supporting its decision.

(62) *Viscounte v. Liberty Mut. Grp.*, 2012 U.S. Dist. LEXIS 177228 (E.D. Pa. Dec. 14, 2012) (Sitarski, M.J.)

Plaintiffs had a homeowner’s policy with defendant First Liberty, with whom they filed a claim after a flood caused damage to their home. First Liberty concluded that the sump pump endorsement applied, and limited coverage to the \$10,000 policy limits applicable in that endorsement. Plaintiffs maintained that they were entitled to coverage under the general policy. When the parties could not resolve their dispute, Plaintiffs filed this breach of contract and bad

⁹⁴¹ *Focht v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 124561, at *15-16 (M.D. Pa. Sept. 5, 2014).

⁹⁴² *Kojsza v. Scottsdale Ins. Co.*, 2014 U.S. Dist. LEXIS 5286, at *18 (M.D. Pa. Jan. 15, 2014).

⁹⁴³ *Moran Indus., Inc. v. Netherlands Ins. Co.*, 2014 U.S. Dist. LEXIS 20081, at *26 (M.D. Pa. Feb. 19, 2014) (citation omitted).

⁹⁴⁴ *Moran Indus., Inc. v. Netherlands Ins. Co.*, 2014 U.S. Dist. LEXIS 20081, at *27.

faith action. First Liberty filed a motion for summary judgment. Magistrate Judge Sitarski of the Eastern District granted the motion.

Plaintiffs argued that First Liberty acted in bad faith in its investigation. The court disagreed, noting that an insurer does not need to show that its investigation was “flawless” but only “sufficiently thorough to yield a reasonable foundation for its actions.”⁹⁴⁵ The court pointed to the insurer’s inspection, discussions with plaintiffs’ plumber and plaintiff husband and found that plaintiffs failed to point to any evidence that there were any deficiencies in the investigation. Therefore, “this Court finds that First Liberty’s investigation was sufficiently thorough to establish a reasonable basis for concluding that the sump pump endorsement applied.”⁹⁴⁶

(63) *McGarvey v. Harleysville Mutual Ins. Co.*, PICS Case No. 06-0263 (C.P. Lancaster Dec. 12, 2005)

(Cullen, J.)

Following a fire at plaintiffs’ auto body shop, plaintiff submitted a claim to its insurer for damages to their building and personal property and for loss of business income. The insurer made payments on these claims totaling in excess of \$300,000. After the adjustment was completed, plaintiff sued the insurer alleging bad faith in the handling of the matter. The insurer filed a motion for summary judgment. Judge Cullen of the Lancaster County Court of Common Pleas granted the motion in favor of the insurer.

The plaintiff argued that the insurer did not pay in a timely fashion for electrical repair work. The court rejected this claim stating, “This evidence would support the conclusion that, if there was a delay in payment for a portion of the electrical work, defendant had a reasonable basis for its action, and at the very least, did not know of or recklessly disregarded a lack of a reasonable basis for its practice.”⁹⁴⁷

The plaintiff argued that the insured did not timely communicate in the handling of the claim. The court noted that the evidence showed a number of telephone conversations and meetings between the adjuster and the plaintiffs, and stated, “Even if the adjuster’s level of contact was less than what it could have been, there is no evidence that this was intentional on defendant’s part or that it affected defendant’s decisions regarding payment for plaintiffs’ losses.”

§10:07(c) —Cases (Life/Health/Disability Claims)

(1) *Sicherman v. Nationwide Life Ins. Co.*, 2012 U.S. Dist. LEXIS 47630 (E.D. Pa. Apr. 4, 2012)

(McLaughlin, J.)

Plaintiff’s decedent had a life insurance policy with Nationwide. In June 2010 and July 2010, Nationwide informed him by letter that the premium was increasing. The next bill he received was for the former amount, which he paid. After receiving the payment, Nationwide informed him that it had mistakenly sent a bill for the wrong amount, and that in order to keep the policy current, he needed to pay the balance within 20 days. The next bill plaintiff’s decedent received was for the correct amount, and he paid that bill. However, when Nationwide did not receive the balance due from the previous bill, it sent plaintiff a check for the lower amount he had paid.

In November 2010, Nationwide sent a letter indicating that the policy had lapsed. Plaintiff and plaintiff’s decedent did not receive the letter prior to the decedent’s death in December 2010. After her husband’s death, plaintiff requested benefits under the policy. Nationwide refused to pay benefits on the grounds that the policy had lapsed. Plaintiff, through counsel, requested that the denial be reversed and benefits issued. Nationwide then paid out the benefits. Plaintiff filed suit alleging bad faith. Nationwide filed a motion to dismiss. Judge McLaughlin of the Eastern District granted the motion, finding that plaintiff’s allegations failed to state a claim:

The plaintiff alleges that the defendant misrepresented the terms of the policy and failed to conduct a reasonable investigation into the merits of the plaintiff’s claim given all available information. She fails to allege facts that demonstrate which terms of the policy were misrepresented or what information should have been considered by the defendant in making its determination on her claim. . . . The allegations of the complaint make clear that the defendant not only premised its initial denial of claims on a lapse in the payment of policy premiums, but ultimately paid the proceeds of the policy at issue in full when that denial was challenged. Such conduct does not constitute bad faith.⁹⁴⁸

(2) *Chebatoris v. Monumental Life Ins. Co.*, 2010 U.S. Dist. LEXIS 86367 (W.D. Pa. Aug. 23, 2010)

(Lenihan, M.J.)

This case is discussed in greater detail in §10:05. Plaintiff filed suit against two life insurers. Before Magistrate Judge Lenihan was defendants’ motion for summary judgment. The court granted the motion as to the bad faith counts. The court found that it could not conclude that the investigation, based on the insurers’ erroneous, but reasonable, interpretation of the policy was in bad faith: “While Defendants’ interpretation of the effect of the policy language under the applicable law was misguided, it was not so facially unreasonable as to support an award of

⁹⁴⁵ *Viscounte v. Liberty Mut. Grp.*, 2012 U.S. Dist. LEXIS 177228, at *15 (E.D. Pa. Dec. 14, 2012) (internal quotation omitted).

⁹⁴⁶ *Viscounte v. Liberty Mut. Grp.*, 2012 U.S. Dist. LEXIS 177228, at *16.

⁹⁴⁷ *McGarvey v. Harleysville Mut. Ins. Co.*, PICS Case No. 06-0263 (C.P. Lancaster Dec. 12, 2005) (Cohen, J.).

⁹⁴⁸ *Sicherman v. Nationwide Life Ins. Co.*, 2012 U.S. Dist. LEXIS 47630, at *14 (E.D. Pa. Apr. 4, 2012) (footnote omitted).

damages for bad faith. Nor was Defendants' evaluation of this claim through their claims adjusters and medical expert . . . unreasonable under their interpretation."⁹⁴⁹

(3) *Smith v. Lincoln Benefit Life Co.*, 2009 U.S. Dist. LEXIS 24941 (W.D. Pa. Mar. 23, 2009) (Fischer, J.)

Lincoln Benefit issued a term life insurance policy in the amount of \$500,000 to the decedent. The policy named the plaintiff, who was the wife of the decedent, as the primary beneficiary on the policy. In September and October, 2007, the insurer forwarded a notice to the decedent stating that the decedent had failed to pay the required monthly premium, and the policy would lapse if not paid within the proper time. The decedent died suddenly on November 1, 2007. When the plaintiff submitted a claim, the insurer denied the claim because the policy had lapsed.

The plaintiff filed an action alleging, among other things, breach of contract and statutory bad faith. Judge Fischer of the Eastern District granted the insurer's motion to dismiss. The court ruled that the policy had lapsed prior to the alleged bad faith conduct, and therefore no bad faith claim would lie:

Plaintiff's bad faith claims are premised on conduct which occurred subsequent to decedent's death, when the policy was no longer in force. Because no contract existed at the time the alleged bad faith denial occurred, plaintiff has failed to state a plausible claim for relief for bad faith. Furthermore, defendant had a reasonable basis to deny plaintiff's claims, as the policy was not in effect at the time of decedent's death. As such, plaintiff's complaint does not properly plead a claim for bad faith.⁹⁵⁰

(4) *Kidd v. Prudential Ins. Co. of Am.*, 2008 U.S. Dist. LEXIS 2934 (M.D. Pa. Jan. 15, 2008) (Blewitt, M.J.)

The plaintiff filed a complaint against defendant Prudential asserting a breach of contract and bad faith claim with respect to defendant's denial of plaintiff's demand for a death benefit under her late husband's Prudential term life insurance policy. The company denied the claim because the decedent had allowed the policy to lapse and had not reinstated the policy as allowed under the policy terms. Magistrate Judge Blewitt of the Middle District granted summary judgment in favor of Prudential, finding that the insurer had properly concluded that death benefits were not payable because the policy had lapsed. There was no bad faith, according to the court, "since decedent was not insured at the time of his May 20, 2003 death and Defendant Prudential was not contractually obligated to pay Plaintiff's death benefit claim. . . . Thus, the present case presents no factual disputes on the issues of whether Plaintiff had a reasonable belief that the policy was reinstated and of entitlement to payment of her death benefit claim."⁹⁵¹

(5) *Levin v. Transamerica Occidental Life Ins. Co.*, 2008 U.S. Dist. LEXIS 66243 (E.D. Pa. Aug. 20, 2008) (Joyner, J.)

The plaintiff, claiming entitlement to a 50 percent share of a life insurance policy issued to his parents, sued the insurer, Transamerica, alleging bad faith. The plaintiff had been included as a beneficiary on the policy back in 1990-91, but in 2001 a change of beneficiary form was issued that removed plaintiff as a co-beneficiary. Amid allegations of forgery, the plaintiff argued that Transamerica's investigation into the proper owner and beneficiary of the insurance policy was reckless, and its decision to pay the full policy limits to the designated beneficiary, plaintiff's sister, lacked a reasonable basis.

The insurer filed a motion for summary judgment, which was granted by Judge Joyner of the Eastern District. Citing *Mann v. UNUM Life Insurance Company*,⁹⁵² the court held that an insurance company's investigation process need not be "flawless" and to defeat a bad faith claim "an insurance company simply must show that it conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its action."⁹⁵³ The court held that Transamerica set forth sufficient evidence demonstrating that it took reasonable steps to determine the proper beneficiary of the policy. In addition, according to the court, there was no evidence to suggest that Transamerica acted in its own self-interest, particularly since the company had paid the entire \$1 million policy benefit to the designated beneficiary.

(6) *Robbins v. Metropolitan Life Ins. Co.*, 2008 U.S. Dist. LEXIS 104902 (E.D. Pa. Dec. 29, 2008) (Baylson, J.)

In this case discussed in §10:13, Judge Baylson of the Eastern District held that a life insurer had not acted in bad faith in its four-month investigation of a claim, stating that a "four month delay is not, by itself, so unusual or unreasonable to in-dicate bad faith."⁹⁵⁴

⁹⁴⁹ *Chebatoris v. Monumental Life Ins. Co.*, 2010 U.S. Dist. LEXIS 86367, at *19 (W.D. Pa. Aug. 23, 2010).

⁹⁵⁰ *Smith v. Lincoln Benefit Life Co.*, 2009 U.S. Dist. LEXIS 24941, at *58-59 (W.D. Pa. Mar. 23, 2009).

⁹⁵¹ *Kidd v. Prudential Ins. Co. of Am.*, 2008 U.S. Dist. LEXIS 2934, at *48 (M.D. Pa. Jan. 15, 2008).

⁹⁵² 2003 U.S. Dist. LEXIS 23993 (E.D. Pa. 2003), discussed in this section.

⁹⁵³ *Levin v. Transamerica Occidental Life Ins. Co.*, 2008 U.S. Dist. LEXIS 66243, at *17 (E.D. Pa. Aug. 20, 2008).

⁹⁵⁴ *Robbins v. Metro. Life Ins. Co.*, 2008 U.S. Dist. LEXIS 104902, at *21 (E.D. Pa. Dec. 29, 2008) (citing *Wiener v. Banner Life Ins. Co.*, 2003 U.S. Dist. LEXIS 4957, at *22 (E.D. Pa. Feb. 28, 2003)).

(7) Schaeffer v. Allianz Life Ins. Co. of North Am., 2008 U.S. Dist. LEXIS 44939 (E.D. Pa. 2008) (Fullam, J.)

The insured claimed that he was disabled and entitled to disability benefits under two policies issued by his insurer. Under both policies, the insured had to establish that he was unable to perform the activities of daily living for at least 90 days continuously. The claim was disputed by the insurer, and the insured filed suit, seeking payment of benefits and alleging bad faith. The insurer filed a counterclaim, seeking rescission of one or both of the policies on the basis of alleged misrepresentations in the application. It also later filed a motion for summary judgment as to all counts of the complaint.

Judge Fullam of the Eastern District concluded that fact and credibility issues remained as to the plaintiff's contract claim and the insurer's counterclaim. However, the court concluded that the insurer's motion should be granted as to the bad faith claim, stating, "On the basis of the extensive evidentiary record now provided, no rational jury could conclude that the defendant acted in bad faith in its investigation and denial of plaintiff's claim. The record establishes, without any dispute, that the defendant merely conducted a reasonable and permissible investigation, and had a reasonable basis for denying plaintiff's claims in their entirety."⁹⁵⁵

(8) Oehlmann v. Metro. Life Ins. Co., 644 F. Supp. 2d 521 (M.D. Pa. 2007) (Kosik, J.)

MetLife issued a \$100,000 life insurance policy to Smirman on the life of his minor daughter (the insured), listing as beneficiaries Smirman and the plaintiff (the insured's mother), to whom he was married at the time. Each beneficiary was to share fifty percent of the policy proceeds. Smirman and plaintiff divorced sometime thereafter. The insured died in a house fire in April 2005, while she was living with her mother. In July 2005, both Smirman and the plaintiff individually submitted claims forms to MetLife. After processing, MetLife settled the claim and established equal money market accounts for both Smirman and plaintiff.

Five days later, counsel for Smirman notified MetLife that (1) Smirman disputed the plaintiff's right to the proceeds, and (2) an investigation of the circumstances surrounding the fire was ongoing, insinuating that the fire may not have been an accident. In response to the claims of the policyholder, MetLife issued a letter to plaintiff's attorney that advised of Smirman's allegations and designated a time period during which Smirman's counsel could investigate the allegations. MetLife requested the fire marshal's report from Plaintiff, and MetLife received the report from plaintiff's attorney.

Plaintiff instituted litigation against MetLife. In September 2005, MetLife ruled the fire not suspicious, and notified plaintiff and Smirman regarding same, but explained that plaintiff and Smirman were still considered rival claimants given Smirman's belief that he was the sole beneficiary of the proceeds. As the proceeds had already been disbursed to the money-market accounts, MetLife told the parties that it would distribute the accounts once each side had executed a settlement agreement and release.

Plaintiff's attorney continued with the litigation because MetLife would not distribute the accounts without a release. MetLife insisted on the releases because it considered plaintiff and Smirman to be rival claimants. In February-March 2006, the attorneys for plaintiff and Smirman notified MetLife that they had agreed to split the proceeds, however the parties failed to execute the releases provided by MetLife. Plaintiff's attorney informed MetLife that the release could not be executed as written, and that he was referring the matter to new counsel. In May 2006, plaintiff's new counsel filed a new complaint alleging, *inter alia*, (1) bad faith; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; and (4) breach of fiduciary duty.

MetLife included in its responsive pleading a counterclaim and third party complaint of interpleader against plaintiff and Smirman. While this litigation was pending, Smirman orally agreed to waive any dispute to the payment of the proceeds, and executed the release for MetLife in November 2006. A week later, MetLife sent plaintiff her share of the policy proceeds, without requiring a signed release from plaintiff.

The court held that MetLife acted reasonably in its handling of the disputed claim:

[T]he evidence establishes that MetLife's investigation into the fire and beneficiary arrangement was reasonable. After receiving the claims forms from both beneficiaries, MetLife processed the claim, and transferred the funds owed into accounts for Plaintiff and Smirman. A claims processing period of a few weeks is entirely reasonable. When Smirman, the policyholder, questioned the beneficiary arrangement and whether the cause of the house fire was accidental, MetLife acted appropriately by allowing the policyholder a period in which to investigate the arrangement, requesting the fire marshal's report, and promptly notifying the other beneficiary, Plaintiff. We find that delaying the distribution of the proceeds—which MetLife had already transferred into interest bearing accounts for each of the beneficiaries—pending the resolution of the disputed issues was reasonable.⁹⁵⁶

⁹⁵⁵ *Schaeffer v. Allianz Life Ins. Co. of North Am.*, 2008 U.S. Dist. LEXIS 44939, at *2 (E.D. Pa. 2008).

⁹⁵⁶ *Oehlmann v. Metro. Life Ins. Co.*, 644 F. Supp. 2d 521, 531-32 (M.D. Pa. 2007).

(9) *Tate v. U.S. Financial Life Ins. Co.*, 2006 U.S. Dist. LEXIS 62603 (W.D. Pa. Sept. 1, 2006) (McVerry, J.)

The plaintiff widow alleged that the insurer acted in bad faith by denying that the life insurance policy at issue was in force and by failing to pay death benefits. Citing *Wise v. American General Life Insurance Company*,⁹⁵⁷ Judge McVerry of the Western District held there was no bad faith:

[L]ike the plaintiff in *Wise*, Plaintiff in this case cannot present any evidence of USFL denying benefits under a policy without any reasonable basis to do so. . . . [T]here was no policy in force and no contract of insurance existed between the parties. Thus, the Court finds and rules that USFL is entitled to summary judgment on Plaintiff's claim for bad faith.⁹⁵⁸

(10) *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440 (E.D. Pa. Nov. 13, 2006) (Joyner, J.)

ReliaStar insured the plaintiff for long-term disability. The LTD policy provided an offset for other income benefits, such as receipt of Social Security disability income payments. When the plaintiff presented a claim of emotional distress disability, ReliaStar paid the claim. The plaintiff executed a Reimbursement Agreement with ReliaStar, providing that if the company paid benefits that were later offset by Social Security, the insured would reimburse ReliaStar. The subject litigation arose when ReliaStar attempted to obtain reimbursement from the plaintiff for overpayment, and plaintiff filed an action alleging, inter alia, breach of contract and bad faith.

Judge Joyner of the Eastern District granted summary judgment in favor of ReliaStar as to all counts. The court rejected the plaintiff insured's arguments that ReliaStar's efforts to collect the overpayments – which included phone calls, surveillance, and ultimately filing suit – constituted bad faith:

Defendants' efforts to enforce the Reimbursement Agreement did not breach their duty (if any) of good faith and fair dealing. Given Dr. Connolly's refusal to reimburse defendants in accordance with the Reimbursement Agreement, the only reasonable expectation (and outcome) was that defendants would eventually file suit to collect back the excess payments. This was absolutely their right.⁹⁵⁹

The court also rejected plaintiff's §8371 claim because the claim was based upon the Reimbursement Agreement, and not an insurance policy. "Because the Reimbursement Agreement was not an insurance policy, Dr. Connolly cannot state a §8371 claim based on defendant's conduct to enforce it."⁹⁶⁰ The court further noted that the plaintiff "has introduced no evidence that defendants acted in bad faith in investigating, processing and satisfying her disability claim."⁹⁶¹

(11) *American Home Assurance Co. v. Church of Bible Understanding*, 2006 U.S. Dist. LEXIS 63859 (E.D. Pa. Sept. 6, 2006) (Kauffman, J.)

Where the court found in favor of the insurer on its claim to rescind a worker's compensation insurance policy, the court also ruled that because the plaintiff "cannot demonstrate by clear and convincing evidence that American Home did not have a reasonable basis for bringing that claim," the plaintiff's "motion for summary judgment on the Counterclaim will be denied, and American Home's motion for summary judgment will be granted."⁹⁶²

(12) *Wise v. American General Life Ins. Co.*, 2005 U.S. Dist. LEXIS 4540 (E.D. Pa. Mar. 22, 2005) (Kauffman, J.), *aff'd*, 2006 U.S. App. LEXIS 21315 (3rd Cir. Aug. 21, 2006) (Fuentes, J.)

The decedent sent an application to the defendant life insurance company for a \$500,000 life insurance policy. The insurer issued and mailed a policy; however, the insurer's documents stated that no insurance would be in effect until the policy had been delivered and accepted and the first premium payment had been paid. The policy was received on the same day that the decedent passed away. The insurer rejected the Administratrix's attempt to pay the premium after the decedent's death. The insurer denied her claim for benefits. The Administratrix of the decedent's estate filed suit, alleging breach of contract and bad faith. Judge Kauffman of the Eastern District held that there was no breach of contract claim cognizable, because no insurance contract was formed. The Third Circuit agreed, stating, "Because there was no insurance policy in effect at the time of Wise's death, Plaintiff cannot establish a prima facie case under the bad faith statute."⁹⁶³

(13) *Northwestern Mutual Life Ins. Co. v. Stein*, 2005 U.S. Dist. LEXIS 590 (E.D. Pa. Jan. 13, 2005) (Stengel, J.)

Northwestern issued a long-term disability policy to its insured providing coverage for partial disability, total disability and presumptive disability. Under the policy, the presumptive disability benefit was payable when the

⁹⁵⁷ 2006 U.S. App. LEXIS 21315 (3d Cir. Aug. 21, 2006).

⁹⁵⁸ *Tate v. U.S. Fin. Life Ins. Co.*, 2006 U.S. Dist. LEXIS 62603 (W.D. Pa. 2006).

⁹⁵⁹ *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440, at *25 (E.D. Pa. Nov. 13, 2006).

⁹⁶⁰ *Connolly v. Reliastar Life Ins. Co.*, 2006 U.S. Dist. LEXIS 83440, at *44 (E.D. Pa. Nov. 13, 2006).

⁹⁶¹ *Id.* at *46.

⁹⁶² *American Home Assurance Co. v. Church of Bible Understanding*, 2006 U.S. Dist. LEXIS 63859, at *19-20 (E.D. Pa. 2006).

⁹⁶³ *Wise v. Am. Gen. Life Ins. Co.*, 2006 U.S. App. LEXIS 21315, at *24 (3d Cir. 2006).

insured experienced a “total and irrevocable loss of use of both hands.” In 1995, the insured began experiencing pain and numbness in his shoulder, arms and hands, and he submitted a claim. The insurance company paid him partial disability benefits, finding that he was still able to perform certain aspects of his occupation, and later paid total disability benefits for a portion of time, but refused to pay the presumptive disability benefit because it did not agree that the insured had suffered a “total and irrecoverable loss” of the use of both hands. Northwestern sought to continue its investigation by requesting tax returns and medical and employment records, and consent to an independent medical examination, which the insured refused. Northwestern filed a declaratory judgment action to compel the insured to provide information and cooperation. The insured responded by filing a counterclaim for breach of contract and bad faith.

Judge Stengel of the Eastern District granted the insurer’s motion for summary judgment. The court found that the presumptive disability provision in the policy was clear and unambiguous, and he held that Northwestern properly and reasonably denied the insured’s claim. The court also found that while Northwestern was contemporaneously administering the claim for total disability, there was a reasonable basis for its request for information and subsequent benefit decisions. Finally, finding no genuine issue of material fact, the court entered summary judgment in favor of the insurer on the bad faith claim, and dismissed the counterclaim against it with prejudice.

With respect to the insurer’s not conducting an independent medical exam, the court noted that under Pennsylvania law, “‘Section 8371 is not restricted to an insurer’s bad faith in denying a claim,’ but ‘may also extend to the insurer’s investigative processes.’”⁹⁶⁴ However, the court also noted that “‘an insurance company. . . is not required to show the process by which it reached its conclusion was flawless or that the investigatory methods it employed eliminated possibilities at odds with its conclusion.’”⁹⁶⁵ Given that Northwestern reviewed the insured’s medical records and had them analyzed by a physician consultant, and the fact that there was evidence that the insured refused to submit to medical examination unless the insurer agreed to his conditions, the court held as a matter of law that there was no evidence that the insurer acted in bad faith.

The court also held that the insurer’s request for financial and medical information, and its reduction of the monthly benefit payment, was also reasonable. The court noted that in order to recover partial disability benefits the insured had to establish a loss of income, which, “requirements necessitate an inquiry into an insured’s medical and financial status.”⁹⁶⁶

(14) *McCrink v. People’s Benefit Life Ins. Co.*, 2005 U.S. Dist. LEXIS 5072 (E.D. Pa. Mar. 29, 2005) (Davis, J.)

The facts of this case are discussed in §10:05. The insurer issued a group policy that provided \$100,000 in benefits due to accidental death, but excluded coverage if the insured died as a result of operating a motorcycle. A key issue concerned whether the insured was operating a motorcycle at the time of his death. As part of its investigation, the company reviewed the police report and the hospital records pertaining to the insured. The police report designated the insured as the “operator” and “driver” of the motorcycle, and summarized some eyewitness accounts. The insurer hired an investigator to interview witnesses listed in the police report; the investigator interviewed one witness but did not interview two others. The claim was denied. After the insured’s counsel sent a letter asking the company to reopen the claim, the insurer hired a second investigative firm and interviewed the other two eyewitnesses. After completing the supplemental investigation, the insurer again concluded that there was no coverage owed.

In a bad faith action, plaintiff argued that the defendant failed to conduct a fair and complete investigation. The defendant filed a motion for summary judgment on the bad faith count, which was granted by Judge Davis of the Eastern District, who observed:

Defendant’s investigation — the interviews of Mr. McElroy and the officers at the scene of the accident, reading of the description of the accident provided by [the second two witnesses] in the police report, and an assessment of the medical reports — was sufficiently thorough to yield an appropriate foundation to confirm the defendant’s belief that the insured was “operating” the motorcycle in accordance with the defendant’s reasonable construction of this term.⁹⁶⁷

(15) *Alexander v. Provident Life & Accident Ins. Co.*, 2003 U.S. Dist. LEXIS 4498 (M.D. Pa. Jan. 2, 2003) (McClure, J.)

The plaintiff Alexander submitted a claim to his disability insurer, Provident, stating that he was totally disabled from his occupation as a result of myopathy, muscle tremor and dizziness. As a result of its investigation, the company denied the claim. The plaintiff instituted a breach of contract action and a claim for bad faith. The insurer filed a motion for summary judgment on the bad faith claim, which was granted by Judge McClure of the Middle District.

⁹⁶⁴ *Northwestern Mutual Life Ins. Co. v. Stein*, 2005 U.S. Dist. LEXIS 590, at *25 (E.D. Pa. Jan. 13, 2005) (citing *O’Donnell v. Allstate Ins. Co.*, 734 A.2d 901, 906 (Pa. Super. 1999)).

⁹⁶⁵ *Id.* (citing *Cantor v. Equitable Life Assurance Society*, 1999 U.S. Dist. LEXIS 4805 (E.D. Pa. April 12, 1999)).

⁹⁶⁶ *Id.* at *30.

⁹⁶⁷ *McCrink v. People’s Benefit Life Ins. Co.*, 2005 U.S. Dist. LEXIS 5072 at *43, *44, and *47 (E.D. Pa. Mar. 29, 2005).

According to the court, “in order to survive bad faith claims, an insurance company’s procedures must be reasonable, but they need not be perfect.”⁹⁶⁸ The court ruled that the insurer’s investigation was reasonable, in that it relied on an IME report and surveillance evidence which showed the insured actively engaged in physical activity and performing functions of his occupation. The court rejected the plaintiff’s argument that the insurer’s investigation was not thorough, stating, “The bottom line is that while Provident’s methods may have been lacking, its conclusion did not lack a reasonable basis.”⁹⁶⁹

(16) *Barrer v. Metro. Life Ins. Co.*, 151 F. Supp. 2d 617 (E.D. Pa. July 17, 2001) (Joyner, J.)

A life insurer denied plaintiff’s claim on the grounds that the coverage had expired prior to the time of the named insured’s death. The plaintiff-beneficiary filed a breach of contract and bad faith action, alleging that the life insurer followed improper procedures leading to the termination of the policy. Judge Joyner of the Eastern District held that the undisputed facts established that there “clearly was no coverage at the time and no reasonable expectation of coverage.”⁹⁷⁰

The court granted summary judgment in favor of the insurer as to both the breach of contract and bad faith claim.

(17) *Cantor v. Equitable Life Assurance Society of the U.S.*, 1999 U.S. Dist. LEXIS 4805 (E.D. Pa. Apr. 12, 1999) (McGirr Kelly, J.)

The plaintiff was an options trader who claimed total disability as a result of depression. Equitable paid benefits for a period of time but, after conducting an IME and several in-house medical reviews, terminated benefits, concluding that the plaintiff’s condition did not prevent him from engaging in his occupational duties. On motion for summary judgment, the court dismissed the plaintiff’s bad faith claim, stating:

For an insurance company to show it had a reasonable basis, an insurance company is not required to demonstrate its investigation yielded the correct conclusion or even that its conclusion more likely than not was accurate. The insurance company also is not required to show the process by which it reached its conclusion was flawless or that the investigatory methods it employed eliminated possibilities at odds with its conclusion. Rather, an insurance company simply must show it conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its action.⁹⁷¹

Applying that standard, the court found that Equitable’s investigation was reasonable.⁹⁷²

(18) *Grayboyes v. General American Life Ins. Co.*, 1995 U.S. Dist. LEXIS 4233 (E.D. Pa. Mar. 31, 1995) (Waldman, J.)

In a claim under a disability insurance policy, the policy-holder alleged that he was disabled from his occupation as an orthodontist after his license was revoked for “improperly touching” young female patients. The policyholder alleged that he suffered from “frotteurism,” a disabling sickness that caused him to fondle his young female patients. The insurer denied the claim, asserting that, even if the plaintiff had an illness, it was controllable and not disabling, as evidenced by (1) the policyholder’s practice for 20 years while afflicted, (2) information reflecting the claimant’s ability to control the behavior, and (3) the claimant’s unquestionable ability to perform orthodontic services without risk to approximately half of the potential patient pool (i.e., males). The insurer did not conduct an independent medical examination.

The late Judge Waldman of the Eastern District held that there was no bad faith. The court found that the insurer fairly considered what was submitted by the claimant and made a reasoned assessment based upon an adequate record. Interestingly, the claims representative, in a letter to plaintiff’s counsel, made reference to the fact that he did not feel that the claimant would be particularly sympathetic to a jury. The court held that for an insurer to deny a claim perceived to be valid because of a belief that a factfinder might be repulsed by a claimant’s conduct, background or character would be inappropriate; in this case, however, the court found that the claim had already been denied at the time the letter was written.

(19) *Krisa v. Equitable Life Assurance Society*, 113 F. Supp. 2d 694 (M.D. Pa. 2000) (Vanaskie, J.)

Krisa, a litigation attorney, obtained two disability policies from Equitable. In December 1996, the plaintiff was hospitalized with a primary diagnosis of “labile hypertension,” and claimed that he was totally disabled under the policy definitions. As part of its claims investigation, Equitable requested pertinent information pertaining to the plaintiff’s occupation, including a list of the courts in which he had tried a case, information pertaining to non-jury and jury trials, a case list, etc. The plaintiff, through counsel, refused to provide the requested information, and filed suit.

The insurer filed a motion for summary judgment with respect to all the claims. Although refusing to grant summary judgment on the breach of contract and other claims, Judge Vanaskie of the Middle District granted the

⁹⁶⁸ *Alexander v. Provident Life & Accident Ins. Co.*, 2003 U.S. Dist. LEXIS 4498 at *12.

⁹⁶⁹ *Id.* at *14.

⁹⁷⁰ *Barrer v. Metro. Life*, 151 F. Supp. 2d 617.

⁹⁷¹ 1999 U.S. Dist. LEXIS 4805, at *7.

⁹⁷² *Cantor* is further discussed in §10:11.

insurer's motion for summary judgment with respect to the claim for bad faith. According to the court, the insurer's investigation was reasonable and based upon applicable policy language and existing case law. The court ruled that the requested occupational information "was plainly pertinent to a determination of the substantial and material duties being performed by Krisa, at the time he allegedly became disabled."⁹⁷³ The court also held that the fact that the plaintiff had obtained the report of a "bad faith expert" opining that the company had acted in bad faith did not alter its view. The court concluded that the opinions of the expert were immaterial, in that he ignored the policy language and relied upon incorrect assertions of law.

Citing Judge Kelly's opinion in *Cantor v. Equitable Life Assurance Society of the U.S.*,⁹⁷⁴ above, the district court concluded that the company "had sought to engage in a thorough investigation, with the parameters of that investigation established by its reasonable view of the policies' coverage provisions," and therefore a bad faith claim could not survive.⁹⁷⁵

(20) *Burrell v. United HealthCare Ins. Co.*, 2001 U.S. Dist. LEXIS 10856 (E.D. Pa. July 27, 2001) (Robreno, J.)

The defendant health insurer denied the plaintiff's claim for medical coverage of his inpatient stay at a VA hospital. The insurer denied plaintiff's claim alleging that (1) the VA's trauma unit was not an eligible facility under the plaintiff's policy, and (2) plaintiff's stay at that facility was not "medically necessary" as required under the policy. The Eastern District, by Judge Robreno, granted the insurer's motion for summary judgment as to the bad faith claim, ruling that "plaintiff's allegations of bad faith do not constitute clear and convincing evidence upon which a reasonable jury could determine that defendant knew or recklessly disregarded its lack of a reasonable basis."⁹⁷⁶

The plaintiff offered evidence that the insurer had paid similar claims of three other policyholders who submitted claims for stays at the same VA hospital unit. The court held that the fact that the insurer did not raise the question of facility eligibility with respect to the other claimants, and eventually paid all three claims, was not clear and convincing evidence of intentional or reckless conduct. The court stated that the company's business decision to pay the other claims, rather than incurring the risk of litigation, did not rise to the level of bad faith. According to the court, "The fact that defendant chose to raise a reasonable defense in response to plaintiff's claim in this case, rather than enter into a quick settlement as it did in settling the other claims, does not give rise to bad faith on the part of the defendant."⁹⁷⁷

Finally, the plaintiff alleged that the company acted in bad faith because the insurer initially relied solely on the facility ineligibility rationale, and not the "medically necessary" rationale. The court rejected this argument, stating, "The mere fact...that defendant did not set forth all of the potential grounds for denying a claim in the first instance does not constitute bad faith."⁹⁷⁸

According to the court, the plaintiff could not establish bad faith in the absence of evidence suggesting that the defendant intentionally withheld stating the full medical necessity rationale to delay resolution of the plaintiff's claim or to otherwise unfairly prejudice the plaintiff's prosecution of his claim or that it intentionally attempted to disguise the real reason for denying the claim.⁹⁷⁹

§10:07(d) — Cases (Liability and Other Claims)

(1) *U.S. Bank, N.A. v. First American Title Ins. Co.*, 2013 U.S. Dist. LEXIS 65751 (E.D. Pa. May 8, 2013) (Yohn, J.)

Plaintiff U.S. Bank was the trustee of a securitized mortgage with respect to which defendant First American provided title insurance. When a claim arose out of a mortgage and title problem, the parties could not resolve the claim. U.S. Bank then filed this bad faith suit. The parties filed cross motions for summary judgment. Judge Yohn of the Eastern District granted the insurer's motion, which is also discussed in §10:25.

U.S. Bank's servicer notified First American of a title defect in December 2003. First American responded a week later and advised U.S. Bank to foreclose on the property. U.S. Bank's servicer did not communicate with First American again until January 2006, informing the title insurer of the sheriff's sale 9 months prior. First American promptly began an investigation, within a month. In March 2007, First American filed a declaratory judgment action against JP Morgan Chase. The court concluded that the argument that First American acted in bad faith in its investigation, in light of these facts, "unpersuasive."⁹⁸⁰

⁹⁷³ *Krisa v. Equitable Life Assurance Society*, 113 F. Supp. 2d 694, 703.

⁹⁷⁴ 1999 U.S. Dist. LEXIS 4805 (E.D. Pa. Apr. 12, 1999).

⁹⁷⁵ *Krisa v. Equitable Life Assurance Society*, 113 F. Supp. 2d 694, 705.

⁹⁷⁶ *Burrell v. United HealthCare Ins. Co.*, 2001 U.S. Dist. LEXIS 10856, at *13-14.

⁹⁷⁷ *Burrell v. United HealthCare Ins. Co.*, 2001 U.S. Dist. LEXIS 10856, at *10.

⁹⁷⁸ *Burrell v. United HealthCare Ins. Co.*, 2001 U.S. Dist. LEXIS 10856, at *11.

⁹⁷⁹ *Burrell v. United HealthCare Ins. Co.*, 2001 U.S. Dist. LEXIS 10856, at *11.

⁹⁸⁰ *U.S. Bank, N.A. v. First American Title Ins. Co.*, 2013 U.S. Dist. LEXIS 65751, at *44 (E.D. Pa. May 8, 2013).

(2) *Bomgardner v. State Farm Fire & Cas.*, 2010 U.S. Dist. LEXIS 96379 (E.D. Pa. Sept. 15, 2010) (McLaughlin, J.)

This facts of this case are discussed in §10:03(b). Bomgardner filed suit after State Farm denied liability coverage for costs associated with a floor Bomgardner improperly installed seeking recovery for breach of contract and bad faith. State Farm filed a motion to dismiss, which Judge McLaughlin of the Eastern District granted.

Applying the *Terletsky* Superior Court decision, the court concluded that even assuming the allegations to be true, “they do not amount to bad faith conduct on the part of [State Farm].”⁹⁸¹ Specifically, the court rejected the allegations to the extent that they averred State Farm’s investigation, and its failure to turn over an expert report, was in bad faith:

[A]s Bomgardner alleges in his complaint, [State Farm] investigated his claim, retained Astrotech [a petrographic testing expert] to perform tests on the concrete, and provided Bomgardner with an answer to his request and explanation of the denial. Bomgardner’s complaint fails to make out a claim that [State Farm] acted unreasonably, let alone “with dishonest purpose.”⁹⁸²

(3) *Western World Ins. Co. v. Delta Prop. Mgmt. Inc.*, 2010 U.S. Dist. LEXIS 125296 (W.D. Pa. Nov. 29, 2010) (Schwab, J.)

This case is discussed in greater detail in §10:03(a). Delta owned and managed an apartment building; Western World provided general liability insurance for the property. Delta sought coverage in 2008 after one tenant killed another tenant at the building. Western World filed this declaratory judgment action seeking a declaration that it owed no coverage to Delta in the underlying suit. Delta filed several counterclaims, including one for bad faith. The parties filed cross-motions for summary judgment. Judge Schwab of the Western District granted Western World’s motion for summary judgment on the bad faith counterclaim. The court concluded that Western World did not waive the right to raise the assault and battery exclusion by failing to raise it after the initial reservation of rights letter, and that Western World did not act in bad faith in subsequently denying coverage on that ground.

(4) *Smith v. Continental Cas. Co.*, 2008 U.S. Dist. LEXIS 76818 (M.D. Pa. Sept. 30, 2008) (Jones, J.), *aff’d*, 347 F. App’x 812 (3d Cir. 2009) (Barry, J.)

This case arose from a third party liability suit filed by the Smiths against Continental Casualty Insurance Company’s insured, Sprecher, over failed financial planning and allegations of professional misconduct. Continental denied coverage for the claims asserted in the lawsuit on grounds that they did not fall under the policy’s definition of covered professional services. Sprecher later settled the case with the Smiths and assigned to the Smiths his rights against Continental for the alleged bad faith denial of coverage.

The Smiths filed an action against Continental for alleged breach of contract and bad faith. Continental filed a motion for summary judgment on both claims. On the breach of contract claim, the court granted summary judgment to the insurer, finding that the Smiths’ claims against Sprecher did not fall within the scope of the Continental policy, and that the insurer therefore had no duty to defend or indemnify Sprecher. As to the bad faith claim, the court held, “As the Court has determined that Sprecher’s activities upon which the Smiths’ claims are premised do not fall within the definition of covered ‘professional services,’ Continental clearly had a reasonable basis for denying coverage.”⁹⁸³

Plaintiffs appealed to the Third Circuit, which affirmed the district court. The court first analyzed the breach of contract claim and found that the policy language supported Continental’s decision to withhold defense and indemnification. As to the bad faith claim, the Third Circuit set forth the two-prong *Terletsky* test and affirmed the district court’s decision granting Continental summary judgment:

Continental clearly did have a reasonable basis for the denial of coverage . . . and there is no evidence whatsoever to support the second prong. While perhaps Continental should have spoken with Sprecher before it made a final coverage decision, a failure to follow best practices does not give rise to a bad faith claim.⁹⁸⁴

(5) *Philadelphia Indemnity Ins. Co. v. Federal Ins. Co.*, 2004 U.S. Dist. LEXIS 9686 (E.D. Pa. Mar. 26, 2004) (McGirr Kelly, J.)

Philadelphia Indemnity filed a lawsuit against its liability insurers, alleging breach of contract and bad faith. The insurers filed a motion for summary judgment. The late Judge James McGirr Kelly of the Eastern District granted the insurer’s motion for summary judgment. The court ruled first that Philadelphia Indemnity’s notice to the insured was untimely, and therefore did not fulfill the condition precedent to coverage under the policy. With respect to the bad faith claim, the court ruled that there was no bad faith because the insurers “reasonably believed that Philadelphia Indemnity had forfeited coverage under the policy by failing to timely comply with the notice provision.”⁹⁸⁵

⁹⁸¹. *Bomgardner v. State Farm Fire & Cas.*, 2010 U.S. Dist. LEXIS 96379, at *15 (E.D. Pa. Sept. 15, 2010).

⁹⁸². *Id.* at *15.

⁹⁸³. *Smith v. Cont’l Cas. Co.*, 2008 U.S. Dist. LEXIS 76818, at *44-45 (M.D. Pa. Sept. 30, 2008).

⁹⁸⁴. *Smith v. Cont’l Cas. Co.*, 347 F. App’x 812, 815 (3d Cir. 2009).

⁹⁸⁵. *Philadelphia Indemn. Ins. Co.*, 2004 U.S. Dist. LEXIS 9686, at *30.

(6) *Interbay Funding LLC v. Lawyers Title Ins. Corp.*, 2003 U.S. Dist. LEXIS 23731 (E.D. Pa. Dec. 9, 2003) (Dalzell, J.)

In this case a mortgage company sued a title insurance company alleging breach of contract and bad faith under §8371. The title insurance company maintained that its policy did not obligate it to pay the claim because Interbay prejudiced its rights to subrogation. Judge Dalzell of the Eastern District concluded that, based on the evidence presented, “Interbay has not yet established a right to recover a precise amount under the policy.”⁹⁸⁶ Accordingly, the court concluded that the title company had a reasonable basis for denying benefits under the policy, and that the denial was not in bad faith. Summary judgment was granted in favor of the title insurance company.

(7) *United States Fire Ins. Co. v. Kelman Bottles*, 2014 U.S. Dist. LEXIS 71220 (W.D. Pa. May 23, 2014) (Schwab, J.), reconsideration denied, 2014 U.S. Dist. LEXIS 88256 (W.D. Pa. June 27, 2014) (Fisher, J.)

Defendant Kelman was a company that manufactured glass, and as part of the business, had a glass melting furnace that leaked, causing damage. Kelman sought coverage under two policies: an all risk policy with plaintiff US Fire; and an equipment breakdown policy with third-party defendant CNA. In the course of its investigation, CNA sent an engineer to inspect the furnace the day after the leak. When the claims were denied, US Fire brought this declaratory judgment action and Kelman filed a bad faith counterclaim. The court granted summary judgment to US Fire on the bad faith claim, and the Third Circuit affirmed, as discussed in §10:04(b). After remand, Kelman was granted leave to amend to include a bad faith claim against CNA, and CNA brought a motion for summary judgment on the issue. Judge Schwab of the Western District of Pennsylvania granted the motion, and reconsideration was later denied by Judge Fisher, as is also discussed in §§10:11 and 10:25.

Kelman claimed that CNA performed a bad faith investigation insofar as it adjusted the claim based on a misinterpretation of policy language. The court noted that the adjuster and his supervisor each testified that the misquoted definition was a mistake, which was later corrected, so could not provide the basis for a bad faith claim. Kelman also contended that CNA told Kelman that it was investigating the claim when it was not, but the court disagreed because CNA had told Kelman that it intended to deny coverage, and monitored US Fire’s investigation for a period of time before doing so in writing and there was no evidence of ill will: “This Court does not find that CNA’s oral notification to Kelman that a denial of coverage was imminent, nor CNA’s delay in issuing its written denial of coverage, all the while monitoring the investigation of another insurance company, constitutes ‘bad faith’ as defined by Pennsylvania law.”⁹⁸⁷ Further, Kelman could produce no evidence of ill will in the delay between the oral and written denials.

Finally, Kelman contended that CNA acted in bad faith when it refused to provide additional information that Kelman sought after denial. The court noted that CNA did not refuse to provide information, but rather, directed Kelman to review the denial letter, which contained answers to its questions:

Here, here is no evidence that CNA’s alleged refusal to provide Kelman with additional information outside of what was contained in the denial letter was done with a dishonest purpose. Again, it appears to this Court that Kelman and CNA simply disagree whether Kelman was entitled to coverage under the CNA policy—an appropriate dispute for a breach of contract claim...not a bad faith claim.⁹⁸⁸

The court denied Kelman’s motion for reconsideration, as simply reiterating arguments it had already made.

(8) *Miller v. Continental Cas. Co.*, February Term 2001, No. 3592 (C.P. Phila. Mar. 23, 2005), (Tereshko, J.) rev’d in part, Memorandum Opinion No. 2542 EDA 2005 (Pa. Super. Oct. 5, 2007)

Discussed in detail in §§3:04 and 3:09, this bad faith and legal malpractice action arose from a defense attorney’s handling of a defamation action against insureds of Continental Casualty Company (CNA). The insureds filed a common law breach of contract/bad faith action and a §8371 action against CNA, alleging, among other things, that CNA failed to attempt to settle the defamation action in good faith. The insureds also asserted that the defense attorney hired by CNA acted improperly during discovery and failed to properly assess the potential for exposure against them.

The §8371 bad faith case was tried non-jury before Judge Tereshko of the Philadelphia County Court of Common Pleas, who held that CNA did not act in bad faith and was not liable for §8371 damages. According to the court, “CNA’s behavior, through its claims adjusters, claims supervisors and legal representative during the underlying defamation action was reasonable, informed, professional and in good faith under its contract of insurance and under its implied duty of good faith.”⁹⁸⁹

The §8371 verdict was not the subject of the Superior Court appeal.⁹⁹⁰

⁹⁸⁶ *Interbay Funding LLC*, 2003 U.S. Dist. LEXIS 23731, at *26.

⁹⁸⁷ *United States Fire Ins. Co. v. Kelman Bottles*, 2014 U.S. Dist. LEXIS 71220, at *34 (W.D. Pa. May 23, 2014).

⁹⁸⁸ *United States Fire Ins. Co. v. Kelman Bottles*, 2014 U.S. Dist. LEXIS 71220, at *35.

⁹⁸⁹ *Miller v. Cont’l Cas. Co.*, 2004 Phila. Ct. Com. Pl. LEXIS 142, at *136-37, at *204-05 (2004).

⁹⁹⁰ See §§3:04 and 3:09.

§10:08 Insurer Reasonably Interprets Applicable Legal Precedent

§10:09 — Cases

(1) *Colella v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 31895 (E.D. Pa. Apr. 1, 2010) (Joyner, J.), *aff'd*, 2011 407 F. App'x 616 (3d Cir. 2011) (Barry, J.)

In this case, discussed more fully in §10:03(b), the insurer denied plaintiff's property loss claim in reliance upon its policy language excluding losses caused by "water below the surface of the ground." The insurer did no research on the enforceability of the exclusion before its claim denial. Judge Joyner of the Eastern District nonetheless granted summary judgment in favor of the insurer, finding that there was no controlling case law interpreting the exclusion at issue, and adding, "Nor is it persuasive that Defendant failed to conduct a legal search for precedent before denying Plaintiffs' claim. This omission is at most negligent, which is not sufficient to prove bad faith on the part of Defendant. Additionally, Plaintiffs have not presented any evidence of an industry wide standard that Defendant deviated from."⁹⁹¹ Accepting the reasoning of the district court, the Third Circuit, in an opinion by Judge Barry, affirmed.

(2) *Amato v. Rockingham Casualty Co.*, 2006 U.S. Dist. LEXIS 24761 (W.D. Pa. Apr. 11, 2006) (Cercone, J.)

The plaintiff was operating his vehicle when he came upon a vehicle stranded due to poor weather and road conditions. The plaintiff stopped and left his vehicle to assist the operator of the stranded vehicle. The plaintiff alleged that an oncoming car approached, causing the plaintiff to move out of the way, at which time he injured his back. The plaintiff filed a claim for first party benefits for medical and wage loss under his automobile policy.

The key coverage issue was whether the plaintiff suffered an injury "arising out of the maintenance or use of a motor vehicle." After interviewing the plaintiff on two occasions, the insurer's claims adjuster opined that his injuries arose while he was outside his vehicle, so that coverage would be denied. The plaintiff requested to speak with a supervisor, who later spoke with the plaintiff. The supervisor conducted a second review of the claim, and confirmed the denial. The supervisor did not review case law prior to issuing the denial, but the testimony suggested that the claims manager from the insurer did so.

The plaintiff filed a suit for breach of contract and bad faith. The plaintiff moved for summary judgment on both counts. The insurer cross-moved for summary judgment. The court held that the issue as to whether the injury arose from the maintenance or use of a motor vehicle was unclear, and it denied both parties' summary judgment on the breach of contract. With respect to bad faith, however, the court granted the insurer's motion for summary judgment, finding that there was a reasonable basis for the insurer's coverage opinion, in light of the uncertain legal question. According to the court, "[A]n incorrect analysis of the applicable law is insufficient to sustain bad faith liability."⁹⁹² In this case, "The matter presented to the defendant in this court was/is a less than straightforward situation and there remains uncertainty as to the application of the law to the facts."⁹⁹³

(3) *Lieberson v. Chubb Life Ins. Co. of America*, 1998 U.S. Dist. LEXIS 10357 (E.D. Pa. July 14, 1998)

The plaintiff was insured under a policy of disability insurance that provided for residual disability benefits if the insured's "monthly earned income" declined by more than 20 percent due to disability. The policy further provided that earned income "does not include amounts deducted from gross income as business expenses for federal income tax."⁹⁹⁴ Chubb asserted that the plaintiff's monthly-earned income should include losses from Dumont Carpet, Inc., a corporation for which the plaintiff was the president and 90 percent owner. If such losses were included, the plaintiff's monthly earned income in the period prior to the disability claim would have been zero. The court held that Chubb's position was only tenable if the court pierced the corporate veil of Dumont Carpet, and such construction would be against Pennsylvania law. Notwithstanding the court's finding against Chubb on the contract claim, it granted summary judgment with respect to the plaintiff's bad faith claim. The court stated that there was a "proffer of credible evidence that defendant believed its view of the applicable law was consistent with insurance company standards. . . . Given the circumstances, what was proved was a negligent, albeit self-serving first-time mistake."⁹⁹⁵ While wrong, the court held that Chubb's position did not constitute bad faith.

⁹⁹¹ *Colella v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 31895, at *14 (E.D. Pa. Apr. 1, 2010).

⁹⁹² *Amato v. Rockingham Cas. Co.*, 2006 U.S. Dist. LEXIS 24761, at *15-16.

⁹⁹³ *Id.* at *17.

⁹⁹⁴ *Lieberson*, 1998 U.S. Dist. LEXIS 10357, at *1.

⁹⁹⁵ *Id.* at *7.

§10:10 Insurer's Reasonable Reliance Upon Independent Experts

§10:11 — Cases

(1) *Militello v. Allstate Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 155576 (M.D. Pa. Nov. 18, 2015)

(Rambo, J.) (property estimator)

Plaintiff owned property that contained an equestrian aquatics pool barn; the property was insured with defendant Allstate. After the barn was damaged by a horse hitting a support column, plaintiff submitted a claim. After plaintiff and defendant obtained estimates, defendant issued payment in the amount of its own estimate, which was considerably less than plaintiff's. Plaintiff filed this bad faith suit, and after discovery,⁹⁹⁶ defendant filed a summary judgment motion. Judge Rambo of the Middle District granted the motion as to the bad faith count, as is discussed in greater detail in §10:07(b).

Plaintiff contended that the investigation had been done in bad faith. As part of its decision finding that plaintiff failed to meet the bad faith standard, the court noted that the fact that defendant had obtained an expert to prepare an estimate was a point that undermined plaintiff's argument:

When Plaintiff's counsel continued to dispute the amount of the loss, Defendant requested that the parties enter an appraisal, continued in negotiations even after Plaintiff terminated the appraisal, retained an independent contractor to prepare an estimate for the damages to the property, and issued an additional check to Plaintiff in the amount of \$7,506.33. . . .

As such, the court concludes that Defendant had a reasonable basis for its claims decisions and that Plaintiff has failed to show that Defendant acted in bad faith by clear and convincing evidence.⁹⁹⁷

(2) *Insetta v. First Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 34798 (E.D. Pa. Mar. 20, 2015) (Kelly, J.)

(medical reviewer)

Plaintiff husband was injured in an auto accident, and after settlement with the tortfeasor, submitted a UIM claim to his defendant auto insurer. When the parties could not resolve the claim, plaintiffs filed this bad faith suit. Defendant filed a motion for partial summary judgment. Judge Kelly of the Eastern District granted the motion, as is discussed in more detail in §10:17.

Plaintiffs contended that defendant's reliance on its medical reviewer, retained after litigation commenced, was done in bad faith and showed that defendant was improperly acting "in a self-interested fashion." Noting that the parties' experts had very different opinions, the court concluded that plaintiffs failed to meet its burden in a bad faith case: "Plaintiffs' argument attempts to eliminate Dr. Bennett's conclusions while filling the void with medical opinions favorable to their cause. However, Defendant is 'under no obligation to accept [the determinations of plaintiff's treating physicians] at face value to evaluate [plaintiff's] claim in good faith.'"⁹⁹⁸

(3) *Neal v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 61770 (M.D. Pa. May 12, 2015) (Kane, J.)

(IME physician)

Plaintiff was in an auto accident in which she was rear-ended when she was stopped at a traffic light. She sought coverage from her auto carrier, defendant State Farm. State Farm had an IME performed that concluded that plaintiff had reached her pre-accident status, and that further treatment would not be reasonable or necessary and had reached maximum medical improvement. State Farm then began rejecting bills from that date. Several months later, plaintiff's counsel contacted the adjuster to indicate that the IME physician had formerly been a partner of plaintiff's treating physician and that the partnership had ended on poor terms. State Farm continued to rely on the IME report. Plaintiff then filed this bad faith action, an earlier decision in which is discussed in §9:07. Defendant moved for partial summary judgment. Judge Kane of the Middle District of Pennsylvania granted the motion as to the bad faith claim.

Plaintiff contended that defendant acted in bad faith in relying on the IME report, knowing that the physician had a conflict of interest with plaintiff's treating physician and that the resulting report was biased. The court rejected these arguments, finding no evidence of record to support a conclusion that defendant should have known at the time it set up the IME of any possible conflict and no evidence that the resulting report was biased against plaintiff:

[T]he Court finds that no reasonable fact finder could conclude from Plaintiff's evidence that Dr. Peppelman was in fact biased against Plaintiff or, more importantly, that Defendant knew or should have known Dr. Peppelman was biased at the time, thus evincing bad faith in adopting his findings. Indeed, Plaintiff does not endeavor to explain precisely how this former association between the doctors, and Dr. Peppelman's termination of that partnership, should have reasonably resulted in Defendant assuming Dr. Peppelman was biased concerning Plaintiff's IME or how it in fact did prejudice Dr. Peppelman's examination of Plaintiff. . . . Considering the lack of evidence before the Court clearly establishing a

⁹⁹⁶ Decision on an earlier motion to dismiss is discussed in §§8:04(b) and 9:21.

⁹⁹⁷ *Militello v. Allstate Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 155576, at *28-29 (M.D. Pa. Nov. 18, 2015).

⁹⁹⁸ *Insetta v. First Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 34798, at *12-13 (E.D. Pa. Mar. 20, 2015) (quoting *Richardson v. United Fin. Cas. Co.*, 2013 WL 2357519, at *9 (E.D. Pa. May 30, 2013)).

conflict of interest as to Plaintiff's IME—indeed, as Defendant points out, Plaintiff did not conduct any discovery into the alleged conflict, nor depose either doctor during discovery about any possible conflict—the Court identifies no material disputes of fact on this issue that preclude granting summary judgment to Defendant.⁹⁹⁹

The court also noted that as a general matter, “an insurer is entitled to rely on the findings of an IME, as Defendant did here, even in the face of contrary medical opinions.”¹⁰⁰⁰ Finally, the court rejected plaintiff's argument that the brevity of the IME itself pointed to bad faith: “Plaintiff points to no authority setting forth that any greater evaluation was required, or that any failure to do so went beyond mere negligence and constituted bad faith conduct by Defendant.”¹⁰⁰¹

(4) *United States Fire Ins. Co. v. Kelman Bottles*, 2014 U.S. Dist. LEXIS 71220 (W.D. Pa. May 23, 2014) (Schwab, J.), reconsideration denied, 2014 U.S. Dist. LEXIS 88256 (W.D. Pa. June 27, 2014) (Fisher, J.)

Defendant Kelman was a company that manufactured glass, and as part of the business, had a glass melting furnace that leaked, causing damage. Kelman sought coverage under two policies: an all risk policy with plaintiff US Fire; and an equipment breakdown policy with third-party defendant CNA. In the course of its investigation, CNA sent an engineer to inspect the furnace the day after the leak. When the claims were denied, US Fire brought this declaratory judgment action and Kelman filed a bad faith counterclaim. The court granted summary judgment to US Fire on the bad faith claim, and the Third Circuit affirmed, as discussed in §10:04(b). After remand, Kelman was granted leave to amend to include a bad faith claim against CNA, and CNA brought a motion for summary judgment on the issue. Judge Schwab of the Western District of Pennsylvania granted the motion, and reconsideration was later denied by Judge Fisher, as is also discussed in §§10:07(d) and 10:25.

The court explained that CNA's reliance on the engineer's report, which concluded that the leak was not sudden and accidental was reasonable, noting that the “report provides a basis upon which CNA could reasonably disclaim coverage. The [engineer's] report is a written document prepared by the engineering expert who was on-site to investigate the loss one day after the occurrence and thus, is a more reliable document upon which a carrier may base a decision to provide or disclaim coverage....”¹⁰⁰² The court denied Kelman's motion for reconsideration, as simply reiterating arguments it had already made.

(5) *Moran Industries, Inc. v. Netherlands Ins. Co.*, 2014 U.S. Dist. LEXIS 20081 (M.D. Pa. Feb. 19, 2014) (Brann, J.)

Plaintiff Moran owned a commercial property that was insured by defendant Netherlands. After the property was damaged in a fire, Moran submitted a claim to defendant, and the parties could not agree on the value of the repairs. Moran then filed this bad faith suit. After discovery, Netherlands filed a motion for summary judgment. Judge Brann of the Middle District of Pennsylvania granted the motion, in an opinion discussed in more detail in §§10:07(b) and 10:13(b).

During the course of the investigation, Netherlands had two assessments done, one by a building consultant and one by an architect and engineer, who disagreed about the scope of needed repairs. The court concluded that Netherlands did not act in bad faith in rendering a decision based on the architect and engineer's conclusions: “[T]his assessment provided a reasonable basis for Netherlands' position on the extent of the claim and necessary repairs, even if [the building consultant's] assessment differed.”¹⁰⁰³

(6) *Dunn v. Scottsdale Ins. Co.*, 2013 U.S. Dist. LEXIS 107984 (M.D. Pa. Aug. 1, 2013) (Mannion, J.)

The facts of this case are discussed in §10:07(b). Plaintiffs' business had a policy with defendant Scottsdale and filed a claim after discovering water damage inside their business location after a rain storm. The insurer sent out an engineer to inspect, who concluded that the water damage was caused by the poor installation of the roof. In reliance on the engineer, the insurer denied the claim. Judge Mannion of the Middle District granted the insurer's motion for summary judgment, relying in part on the fact that the insurer reasonably relied on its expert engineer:

Although the parties present experts with differing opinions as to causation, neither side has alleged that the reports are in anyway unfounded or based on some critical misperception of the plaintiffs' building so as to render the opinions unsound.... As such, the plaintiffs' cannot make out the first element of a bad faith claim, that “the insurer lacked a reasonable basis for denying benefits.” The defendant's denials were based on the reports of two independent claims adjusters whose veracity has not been challenged.¹⁰⁰⁴

⁹⁹⁹ *Neal v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 61770, at *11-12 (M.D. Pa. May 12, 2015) (citation to record omitted).

¹⁰⁰⁰ *Neal v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 61770, at *13 (M.D. Pa. May 12, 2015).

¹⁰⁰¹ *Neal v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 61770, at *14 (M.D. Pa. May 12, 2015).

¹⁰⁰² *United States Fire Ins. Co. v. Kelman Bottles*, 2014 U.S. Dist. LEXIS 71220, at *31 (W.D. Pa. May 23, 2014).

¹⁰⁰³ *Moran Industries, Inc. v. Netherlands Ins. Co.*, 2014 U.S. Dist. LEXIS 20081, at *27 (M.D. Pa. Feb. 19, 2014).

¹⁰⁰⁴ *Dunn v. Scottsdale Ins. Co.*, 2013 U.S. Dist. LEXIS 107984, at *20-21 (M.D. Pa. Aug. 1, 2013).

(7) ***Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762 (W.D. Pa. Jan. 24, 2013) (Conti, J.)**

In this bad faith claim arising out of UM claim, the court was presented with defendant insurer's motion for summary judgment on these bad faith claims. Judge Conti of the Western District granted the motion in part, as discussed at length in §10:17, and denied the motion in part as to the common law bad faith claim, as discussed in §5:03. Plaintiff claimed that defendant improperly relied on the results of the IME to support its offer, despite the fact that the offer was made before the IME. The court rejected the argument, finding that defendant reasonably performed an IME as part of its investigation and reasonably used the results of the IME to support its decision to "continue[]" to assert its initial offer¹⁰⁰⁵

(8) ***Hamm v. Allstate Prop. & Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 159348 (W.D. Pa. Nov. 7, 2012) (Hornak, J.)**

In this case, discussed in greater detail in §§10:03(b) and 10:07(b), plaintiffs filed suit against Allstate, their homeowner's insurer, following a dispute over whether the collapse of a wall was covered. After Allstate's claim denial, it retained an engineering inspector to perform an additional inspection, following which it maintained its denial. Plaintiff filed this bad faith suit, and after discovery, Allstate filed a motion for summary judgment. Judge Hornak of the Western District granted the motion.

Plaintiffs maintained that it was bad faith for defendant Allstate to hire an expert to provide support for its claim denial after the decision to deny coverage had already been made. The court explained:

While Plaintiffs disagree with Paulick's conclusions, they do not suggest that his inspection was inadequate or that it was unreasonable for Defendant to rely on his report to deny the claim. Plaintiffs also do not cite to any record evidence which attacks Paulick's methodology or conclusions, or that his determinations were biased or a mere façade. On the other hand, courts have recognized that an insurer's reasonable reliance on an engineering expert's report for a coverage decision does not constitute bad faith. *See El Bor Corp. v. Fireman's Fund Ins. Co.*, 787 F.Supp.2d 341, 349 (E.D. Pa. 2011) (insurance company's reliance on engineer report's findings as a basis for denial of coverage "provide[d] reasonable grounds to deny benefits"). "Moreover, 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." *Totty v. Chubb Corp.*, 455 F. Supp. 2d 376, 390 (W.D. Pa. Aug. 28, 2006) (citing *Pirino v. Allstate Ins. Co.*, No. 3:04CV698, 2005 U.S. Dist. LEXIS 27519, 2005 WL 2709014, at *5 (M.D. Pa. Oct. 21, 2005)). As such, Plaintiffs [sic] claim of bad faith with respect to Allstate's use of an expert after denying the claim must fail.¹⁰⁰⁶

(9) ***Garvin v. Allstate Ins. Co.*, 2011 Phila. Ct. Com. Pl. LEXIS 9 (Phila. Jan. 19, 2011) (Di Vito, J.)**

In this opinion supporting the appeal of its grant of Allstate's motion for summary judgment on a homeowner's bad faith claim, Judge Di Vito of the Philadelphia County Court of Common Pleas noted that:

Although the facts do not warrant granting summary judgment as to breach of contract, they do not evidence the existence of bad faith on the part of Allstate. Allstate relied on its own inspections, as well as those of outside inspectors, in construing and applying the exclusions within the insurance policy.¹⁰⁰⁷

(10) ***Calestini v. Progressive Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 136815 (M.D. Pa. Dec. 28, 2010) (Caputo, J.)**

This case, also discussed in §§10:07(a), 10:13(a) and 10:17, involves UIM claims raised by the plaintiff for injuries arising in two separate accidents. Judge Caputo of the Middle District granted the defendant insurer's motion for summary judgment, relying in part upon the fact that the insurer had appropriately relied on the medical opinion of its expert that the accidents in question did not cause the claimed injuries:

. . . [T]he fact that the doctor who performed the Independent Medical Examination, Dr. Kim, holds the view that the 2005 and 2006 accidents only aggravated *pre-existing* injuries, rather than create new ones, speaks to the reasonableness of Defendant's actions in not having yet settled the claim and to the fact that the value of the claim is still very much in dispute.¹⁰⁰⁸

(11) ***Bottke v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 4203 (E.D. Pa. Jan. 22, 2009) (Schiller, J.)**

In this case discussed in §10:07(b), the plaintiff submitted a property damage claim arising from a frozen pipe that burst. The insured's public adjuster estimated the plaintiff's loss at \$87,728.31. State Farm, relying upon an estimate prepared by a qualified building contractor, MKA, paid approximately \$44,000. Judge Schiller of the Eastern District granted summary judgment in favor of the insurer, finding that State Farm had reasonably relied upon the contractor's estimate of loss. The court held that the insurer's estimate was reasonably based on an inspection of the premises as

¹⁰⁰⁵ *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *31 (W.D. Pa. Jan. 24, 2013).

¹⁰⁰⁶ *Hamm v. Allstate Prop. & Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 159348, at *41-42 (W.D. Pa. Nov. 7, 2012).

¹⁰⁰⁷ *Garvin v. Allstate Ins. Co.*, 2011 Phila. Ct. Com. Pl. LEXIS 9, at *1-2 (Philadelphia Jan. 19, 2011).

¹⁰⁰⁸ *Calestini v. Progressive Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 136815, at *12 (M.D. Pa. Dec. 28, 2010).

well as photographs and notes of conversations with the plaintiff. The court distinguished the holding in *Atiyeh v. Liberty Mut. Fire Ins. Co.*,¹⁰⁰⁹ and rejected plaintiff's argument that the insurer's representative, Hoffman, had improperly influenced the contractor's damage estimate:

The evidence in this case falls far short of the evidence of bad faith in *Atiyeh*. Whereas the *Atiyeh* plaintiff could point to a smoking gun, Plaintiff here relies on unwarranted conjecture. In *Atiyeh* there was a rational basis for concluding that the letter indicating that the insured sustained minimal damage, insinuating that her disability was questionable, and requesting that the doctor "address return to work issues" suggested to the doctor that he should opine that the insured was not, in fact, disabled. In contrast, a jury could not reasonably infer that Hoffman's alleged statement that the contractor should investigate "a" leak at Plaintiff's house was intended to influence an estimate intended to repair the Plaintiff's home based on the damage sustained, especially since the estimate does not suggest any foul play on its face. Indeed, Plaintiff himself cannot articulate how the estimate was affected by this alleged misrepresentation. Furthermore, State Farm acted in good faith by meeting with [the insured's public adjuster] Wagner, having MKA revise its estimate, paying additional funds to Plaintiff, and promptly paying for the plumber's repairs to fix the multiple leaks. Without clear and convincing evidence from which a jury could conclude that Hoffman manipulated the MKA estimate, State Farm can show a reasonable basis for its actions.¹⁰¹⁰

(12) *Ingraham v. GEICO Ins. Co.*, 2009 U.S. Dist. LEXIS 24467 (W.D. Pa. Mar. 24, 2009) (Flowers-Conti, J.)

In this UIM and first party medical claim discussed in §§8:04, 10:13 and 10:18, the court addressed the plaintiff's allegations that the IME physician relied upon by the insurer to make a claim valuation was either not qualified or too biased to render the opinion that he did based upon plaintiff's injuries. After reviewing the facts, the court found no evidence to support such an argument, and held that the insurer's reliance upon the expert was reasonable.¹⁰¹¹

(13) *Teti v. Phoenix Ins. Co.*, 2009 U.S. Dist. LEXIS 8027 (E.D. Pa. Feb. 3, 2009) (Joyner, J.)

In this case, discussed in §10:07(b), Judge Joyner of the Eastern District found no bad faith where the insurer reasonably relied on an engineering report in denying plaintiff's claim: "Phoenix's positions were based upon an engineering report and the wording of the Policy itself; it cannot be said that the decisions were unfounded. Thus, summary judgment is granted as to plaintiff's claim of bad faith and this count is dismissed."¹⁰¹²

(14) *Pisano v. Nationwide Mut. Fire Ins. Co.*, 2009 U.S. Dist. LEXIS 98213 (E.D. Pa. Oct. 21, 2009) (Goldberg, J.)

In this property damage case involving a flooded basement, discussed more fully in §§10:03(b) and 10:07(b), Judge Goldberg of the Eastern District granted summary judgment in favor of Nationwide where, in denying coverage, "Nationwide relied on the report of [engineering] expert Jody DeMarco, which attributed the majority of basement damage to excluded sources."¹⁰¹³

(15) *Grammenos v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 36155 (E.D. Pa. Apr. 28, 2009) (Rueter, M.J.)

In this case discussed in §10:15, Allstate retained a master plumber and two forensic engineers to examine water pipes that allegedly caused damage to plaintiff's property. Allstate denied the claim. In granting Allstate's motion for summary judgment on the plaintiff's bad faith claim, Magistrate Judge Rueter of the Eastern District held, "[T]he two experts' opinions directly contradict the sworn statement of plaintiff, thus providing strong evidence to Allstate that plaintiff made material misrepresentations as to the cause of the discharge of the water, thus justifying the denial of the claim because of misrepresentations."¹⁰¹⁴

(16) *Allison v. Allstate Indemnity Co.*, 2008 U.S. Dist. LEXIS 50684 (E.D. Pa. June 27, 2008) (Rice, M.J.)

In this property damage case discussed in §10:07(b), Magistrate Judge Rice of the Eastern District entered summary judgment in favor of the insurer. The court held that the insurer reasonably relied on an expert roofer who found the wind did not cause the loss, finding instead that the clogged downspouts were responsible, which was not a covered loss under the policy. The court stated, "Although Allison may contest the expert's opinion on causation, no reasonable jury could find sufficient evidence that Allstate's reliance on the expert opinion resulted in a frivolous or unfounded refusal to pay under the policy."¹⁰¹⁵

¹⁰⁰⁹ 185 F. Supp. 2d 436 (E.D. Pa. 2002), discussed in §9:07.

¹⁰¹⁰ *Bottke v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 4203, at *17-19 (E.D. Pa. Jan. 22, 2009).

¹⁰¹¹ *Ingraham v. GEICO Ins. Co.*, 2009 U.S. Dist. LEXIS 24467, at *43-48 (W.D. Pa. Mar. 24, 2009).

¹⁰¹² *Teti v. Phoenix Ins. Co.*, 2009 U.S. Dist. LEXIS 8027, at *7-8 (E.D. Pa. Feb. 3, 2009).

¹⁰¹³ *Pisano v. Nationwide Mut. Fire Ins. Co.*, 2009 U.S. Dist. LEXIS 98213, at *17-18 (E.D. Pa. Oct. 21, 2009) (citations omitted).

¹⁰¹⁴ *Grammenos v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 36155, at *11 (E.D. Pa. Apr. 28, 2009).

¹⁰¹⁵ *Allison v. Allstate Indem. Co.*, 2008 U.S. Dist. LEXIS 50684, at *14 (E.D. Pa. 2008) (citations omitted).

(17) *Johnson v. Progressive Ins. Co.*, 2008 Phila. Ct. Com. Pl. LEXIS 295 (CCP Phila. Nov. 21, 2008) (DiVito, J.), *aff'd*, 987 A.2d 781 (Pa. Super. 2009) (Bowes, J.)

In this case arising out of a UIM claim, discussed in §§10:13(a), 10:17, and 10:19, the Superior Court affirmed the grant of summary judgment in favor of the insurer which had relied in part on an independent medical examination of the insured. According to the court, “The request for a physical examination from Dr. Duda was reasonable because [plaintiff’s physician’s] report was contradicted by notations in medical records indicating that the surgery was successful and [plaintiff] was improving.”¹⁰¹⁶

(18) *Wedemeyer v. United States Life Ins. Co.*, 2007 U.S. Dist. LEXIS 15742 (E.D. Pa. Mar. 6, 2007) (Dalzell, J.)

This disability insurance case is discussed in detail in §10:07(c). The insurance adjustment company had several doctors review the claimant’s medical records, and had two IMEs conducted – one by a board-certified neurologist and the other by a board-certified neuropsychologist. Judge Dalzell granted U.S. Life’s motion for summary judgment on the bad faith claim, relying in significant part upon the fact that three physicians performed medical record reviews, and the adjuster requested the two outside IMEs, both of which were sent to plaintiff’s treating physicians for comment.

(19) *Hanna v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 59650 (E.D. Pa. Aug. 14, 2007) (Baylson, J.)

State Farm denied plaintiffs’ homeowner’s claim because the damage to plaintiffs’ garage was caused by settlement and excavations by groundhogs. The policy excluded coverage for damage caused by cracking and settlement, and by vermin and rodents. Judge Baylson of the Eastern District granted the insurer’s motion for summary judgment on alleged breach of contract and bad faith. The court held that the insurer properly applied its policy, retained an engineer to assess the causes of the insureds’ damage, and otherwise acted reasonably in deciding that there was no coverage for the claim.

(20) *Easy Sportswear, Inc. v. American Economy Ins. Co.*, 2007 U.S. Dist. LEXIS 86114 (W.D. Pa. Nov. 21, 2007) (Fischer, J.)

In this property loss case, discussed in §10:07(b), the defendant insurer denied coverage of the damaged inventory based in part upon an opinion from a roofing consultant. Judge Fischer of the Western District granted the insurer’s motion for summary judgment on bad faith, stating, “Based on the evidence offered by Defendant, namely the affidavits of the claims adjuster and roofing inspector and correspondence sent to Plaintiff, Defendant had a reasonable basis for denying Plaintiff’s claim.”¹⁰¹⁷

(21) *Mann v. UNUM Life Ins. Co. of America*, 2003 U.S. Dist. LEXIS 23993 (E.D. Pa. Nov. 25, 2003) (McLaughlin, J.)

In this case arising out of the denial of a disability insurance claim,¹⁰¹⁸ the district court upheld the claim denial of the insurer which was based in part upon two separate IMEs by a psychiatrist and a psychologist:

UNUM invoked a thorough process in evaluating Mann’s claim and reasonably relied on the opinions of its qualified health professionals. UNUM conducted a reasonable review of Mann’s additional records when they became available. Substantively, UNUM has offered ample evidence demonstrating a reasonable basis for its conclusion that Mann is not disabled under his insurance policies.¹⁰¹⁹

(22) *Sanders v. State Farm Ins. Co.*, 47 Pa. D. & C.4th 129 (Delaware 2000) (Bradley, J.), *aff'd without opinion*, 777 A.2d 516 (Pa. Super. 2001)

In an investigation of an automobile theft claim, the insurer, State Farm, utilized several independent experts to inspect the stolen vehicle. The experts concluded that the alleged transmission damage was unrelated to the theft. In his bad faith action, the plaintiff-insured alleged that the company acted in bad faith in its reliance on these experts.¹⁰²⁰ Citing *Bostick v. ITT Hartford* above, Judge Bradley of the Delaware County Court of Common Pleas ruled that the insurer did not act in bad faith in utilizing the experts and in relying upon their reports at trial. According to the court, “State Farm relied on its experts in denying coverage on the transmission claim. Plaintiff has not presented clear and convincing evidence that State Farm acted unreasonably in their [sic] reliance.”¹⁰²¹

¹⁰¹⁶ *Johnson v. Progressive Ins. Co.*, 987 A.2d 781, 784 (Pa. Super. 2009).

¹⁰¹⁷ *Easy Sportswear, Inc. v. Am. Economy Ins. Co.*, 2007 U.S. Dist. LEXIS 86114, at *38-39 (W.D. Pa. Nov. 21, 2007).

¹⁰¹⁸ This case is discussed in detail in §10:07.

¹⁰¹⁹ *Mann*, 2003 U.S. Dist. LEXIS 23993, at *30.

¹⁰²⁰ *Sanders v. State Farm* is discussed in greater detail in Section 10:13.

¹⁰²¹ *Sanders v. State Farm*, 47 Pa. D. & C.4th at 143.

(23) *Cantor v. Equitable Life Assurance Society of the U.S.*, 1999 U.S. Dist. LEXIS 4805 (E.D. Pa. Apr. 12, 1999) (McGirr Kelly, J.)

The plaintiff was an options trader who claimed total disability as a result of depression. Equitable paid benefits for a period of time but terminated benefits after concluding that the plaintiff's condition did not prevent him from engaging in his occupational duties. The plaintiff sued Equitable to recover benefits and also alleged that its termination decision was made in bad faith. On motion for summary judgment, the court dismissed the plaintiff's bad faith claim. Equitable had referred the matter to two physicians and a psychological consultant who performed their own investigation. These individuals agreed that the plaintiff's depression was sufficiently manageable so that he could continue working as an options trader. As such, the court held that the insurer justifiably relied upon the expert opinions of the two physicians and the psychological consultant. According to the court, no reasonable juror could find that Equitable lacked a reasonable basis in making its claim decision.

(24) *Schifino v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 174574 (W.D. Pa. Dec. 13, 2013) (McVerry, J.)

Plaintiff was injured in an auto accident. Following settlement of his personal injury claim with the tortfeasor, plaintiff sought UIM benefits from his auto insurer, GEICO. The parties were unable to agree on the value of the claim, so plaintiff filed this breach of contract and bad faith suit. Earlier decisions in this case are discussed at §§5:05(c), 8:07 and 9:05(a). The matter proceeded to a bench trial. Judge McVerry of the Western District of Pennsylvania entered a verdict on the bad faith count in favor of GEICO. This decision is also discussed in §§10:07(a), 10:19, 10:25, and in great detail at §10:17.

The court concluded that GEICO reasonably relied on its medical expert, who performed an IME. That expert had concluded that one of the post-accident surgeries was not related to the accident, a conclusion the court rejected in its decision on the UIM claim. However, it was not bad faith for GEICO to rely on this expert: "GEICO properly gave credence to and relied upon the IME report of Dr. Bookwalter in excluding the cervical procedure from its valuation."¹⁰²²

(25) *Palmisano v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 116938 (W.D. Pa. Aug. 20, 2012) (Fischer, J.)

Plaintiff had a homeowner's policy with State Farm, and filed a claim after discovering subsidence in the foundation, which was caused at least in part by a broken sewer line. State Farm denied the claim, and plaintiff filed this bad faith action. State Farm filed a motion to dismiss. Judge Fischer of the Western District granted the motion.

Plaintiff contended that State Farm acted in bad faith in relying on its engineer's report because its conclusions were in error. The court found that it was not bad faith to rely on a report that the insured disagreed with; the parties simply disputed the conclusions of each other's reports, which was not bad faith.¹⁰²³ The court also noted that plaintiffs failed to allege that they provided information to State Farm to contradict the report. The engineering report provided State Farm a reasonable basis to deny coverage: "Given [the engineer's] findings, State Farm had a reasonable basis to deny coverage under the cited exclusion."¹⁰²⁴

(26) *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200 (E.D. Pa. Sept. 1, 2009) (Buckwalter, J.)

In this case discussed in greater detail in §10:17, the court rejected the insured's argument that Allstate was unfair in its selection of the IME doctor. Crawford contended that Allstate often used the same physician, which was evidence of bad faith because Allstate knew it would not receive "a genuine impartial understanding as to the severity of the condition or an accurate prognosis of its insureds."¹⁰²⁵ The court found Crawford's argument in this regard "conjecture" and without evidentiary basis. According to the court, the physician's IME addressed points both favorable (Crawford would continue to suffer pain) and unfavorable (Crawford had no objective findings of continued knee problems) to Crawford's position.¹⁰²⁶ The court concluded:

The Report's conclusions were appropriately confined to the evidence before him and qualified as his own opinion. Given the lack of evidence—and coupled with her silence about Allstate's selection of Doctor Zimmerman to conduct the other IME—it appears that Crawford's objection to Doctor Bonner centers on his medical findings rather than on any actual evidence of bad faith.¹⁰²⁷

¹⁰²² *Schifino v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 174574, at *66 (W.D. Pa. Dec. 13, 2013).

¹⁰²³ *Palmisano v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 116938, at *41 (W.D. Pa. Aug. 20, 2012).

¹⁰²⁴ *Palmisano v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 116938, at *43.

¹⁰²⁵ *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200, at *50 (E.D. Pa. Sept. 1, 2009) (quoting response brief; citation to brief omitted).

¹⁰²⁶ *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200, at *50-52.

¹⁰²⁷ *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200, at *51.

(27) Hampton v. GEICO Gen. Ins. Co., 759 F. Supp. 2d 632 (W.D. Pa. 2010) (Lenihan, M.J.), adopted by 759 F. Supp. 2d 632 (W.D. Pa. 2010) (Ambrose, J.)

This case is discussed in more detail in §§15:02 and 15:03. Plaintiff alleged that GEICO improperly ceased first party medical benefit payments following the peer review organization (PRO) process. Magistrate Judge Lenihan of the Western District recommended that summary judgment be granted in favor of GEICO, a position adopted by Judge Ambrose. The court found that GEICO had appropriately supported its summary judgment motion with evidence tending to show that the PRO process had been properly used. The evidence showed that GEICO used several PROs and that its procedure was to randomly and evenly divide reviews among them, that its procedure for requests for reconsideration was to always have the same company perform the reconsideration as that which performed the initial review, and that its procedures were used in this particular case. Further, the court reviewed the actual reports generated by the peer review process and reconsideration, and found that neither report addressed causation, as alleged by plaintiff. Summary judgment was granted in favor of GEICO.

§10:12 Claim Handled in a Reasonably Timely Manner

§10:13 — Cases

§10:13(a) — Cases (Auto Claims)

(1) Hardy v. Erie Ins. Exch., No. 2012-2058 (Centre Co. Mar. 7, 2017) (Ruest, J.)

Plaintiffs were injured in an auto accident, for which the other driver, insured with State Farm, was responsible. They submitted a collision claim to their defendant auto insurer, Erie. State Farm accepted liability for the accident and plaintiffs negotiated with that insurer to resolve the collision claim. When they could not resolve the claim with State Farm, plaintiffs turned again to Erie on January 12, 2012. Erie's initial offer was made within 30 days. When they could not resolve the claim, plaintiffs filed this breach of contract and bad faith suit. Erie filed a motion for summary judgment. Judge Ruest of the Centre County Court of Common Pleas granted the motion as to the bad faith count, as is discussed in greater detail in §10:19. The court found that the offer was made timely, within the time period set forth in UIPA, and was in regular contact with plaintiffs thereafter.¹⁰²⁸

(2) Ridolfi v. State Farm Mut. Auto. Ins. Co., 2017 U.S. Dist. LEXIS 54267 (M.D. Pa. Apr. 10, 2017) (Carlson, M.J.)

Ridolfi was injured in an auto accident in 2008, and she subsequently sought UIM benefits in 2013 after resolving her claim with the tortfeasor. When the parties were unable to resolve the claim, Ridolfi filed this contract and bad faith action in 2015. State Farm filed a motion for summary judgment on the bad faith count. Magistrate Judge Carlson of the Middle District of Pennsylvania granted the motion, as is discussed in greater detail in § 10:17.

Ridolfi claimed that State Farm acted in bad faith by delaying resolution of her claim. The court found that such claim did not create an issue of fact under the facts presented in this case. Noting that the process of resolving factual and legal issues in litigation with the tortfeasor “can create some delay in claims adjustment, delays that are not evidence of bad faith but simply reflect the process of careful claims evaluation.”¹⁰²⁹ The court noted the four-year litigation with the tortfeasor, which resulted in a settlement for an amount less than the liability policy limits, a fact the court explained was significant for State Farm's claims evaluation. Given the significance of the underlying litigation to the UIM claims handling, the court found that it would measure any alleged bad faith delay not from the time State Farm was first aware of the accident (2009), but from the time when Ridolfi's counsel first placed State Farm on notice of a possible UIM claim (2013).¹⁰³⁰ The court explained that although 2-years of investigation and attempts to resolve the UIM claim were “unsuccessful[,] but that lack of success, standing alone, does not demonstrate clear and convincing evidence of bad faith.”¹⁰³¹ Rather, the court noted, the significant demands “dictated a careful review of this claim, and it appears that State Farm undertook such a review.”¹⁰³²

(3) Schlegel v. State Farm Mut. Auto. Ins. Co., 2013 U.S. Dist. LEXIS 111514 (M.D. Pa. Aug. 8, 2013) (Mannion, J.)

Plaintiff was involved in an accident in December 2007, in which his car was hit by a negligent tortfeasor. Plaintiff subsequently settled with the tortfeasor's carrier for \$25,000 of the available \$100,000 limits and then presented her auto insurance carrier, defendant State Farm, with a UIM claim. State Farm requested medical records and bills to evaluate the claim in November 2009. State Farm continued to request documents, but did not receive any until October 2010. Two weeks later, State Farm concluded that the value of plaintiff's injuries did not exceed \$100,000,

¹⁰²⁸ *Hardy v. Erie Ins. Exch.*, No. 2012-2058, slip. op. at 6 (Centre Co. Mar. 7, 2017).

¹⁰²⁹ *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *19 (M.D. Pa. Apr. 10, 2017).

¹⁰³⁰ *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *22 (M.D. Pa. Apr. 10, 2017) (citing *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 149095 (M.D. Pa. Oct. 20, 2014), *aff'd*, 643 F. App'x 201 (3d Cir. 2016)).

¹⁰³¹ *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *23 (M.D. Pa. Apr. 10, 2017).

¹⁰³² *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *23 (M.D. Pa. Apr. 10, 2017).

and denied the claim. Plaintiff provided additional medical records in March 2011, but State Farm continued to value the claim at less than \$100,000. This breach of contract and bad faith suit followed. State Farm filed a motion for summary judgment on the bad faith claim. Judge Mannion of the Middle District granted the motion, as discussed in more detail in §10:17.

The court found that this 11-month delay was not unreasonable because State Farm properly required plaintiff to submit the records, and plaintiff did not do so during this time period.¹⁰³³

Plaintiff also argued that State Farm acted in bad faith in requiring verification of plaintiff's policy coverage. The court noted that the affidavit was sent to State Farm well before the medical records, so this "requirement" could not support a claim of unreasonable delay by the insurer.

(4) *Chemij v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 80688 (E.D. Pa. June 11, 2012) (Schiller, J.)

Plaintiff was involved in an automobile accident in December 2005. After settling with the tortfeasor, she filed a claim for UIM benefits with her auto insurer, Allstate, in January 2007. The parties were able to settle the UIM claim following a February 2011 arbitration; plaintiff then filed this bad faith suit. The parties filed cross motions for summary judgment. Judge Schiller of the Eastern District granted Allstate's motion and denied plaintiff's.

Plaintiff argued that Allstate acted in bad faith by failing to investigate her claim in a timely fashion, instead delaying for four years. The court rejected this argument because the evidence showed that much of the delay in resolving her UIM claim was due to plaintiff's counsel's delays in providing records and information in support of her claim. Specifically, plaintiff's counsel failed to provide any records for 10 months after making the UIM claim, and then failed to provide all of the available records until July 2009. Plaintiff's counsel also delayed presenting plaintiff for a statement under oath for approximately 18 months. Finally, the court explained that plaintiff's counsel was responsible in part for the delay in arbitration, because he refused for 2 years to approve an arbitrator who ultimately was part of the panel.

Plaintiff also contended that the use of the "Colossus" computerized claim evaluation system by Allstate's adjuster was part of the insurer's intent to delay paying UIM benefits. The court also rejected this argument, finding that there was "no evidence that the use of Collosus actually delayed her claim."¹⁰³⁴ The court concluded, "Under the circumstances, the length of time Allstate took to investigate and evaluate the claim before making an offer does not constitute bad faith."¹⁰³⁵

(5) *Platt v. Fireman's Fund Ins. Co.*, 2012 U.S. Dist. LEXIS 71000 (E.D. Pa. May 22, 2012) (Buckwalter, J.)

On December 23, 2008, Plaintiff, who was uninsured, was hit by an automobile, whose driver was insured with defendant Fireman's Fund. The following day, Fireman's Fund opened a third-party bodily injury file. In mid-February 2010, Fireman's Fund opened a PIP file. In mid-March 2010, the insurer received plaintiff's PIP application and eventually paid out over \$53,000 in medical benefits. Plaintiff also sought wage loss benefits; following an investigation that included medical reports indicating that plaintiff was able to work, in June 2011, the insurer paid over \$34,000 for these benefits for time following the accident and surgeries. Plaintiff, disputing the amount she was owed, refused the check. Upon receipt of additional information in August 2011, Fireman's Fund concluded that plaintiff was unable to work, and ultimately paid the entire policy limits for PIP benefits, partially in a lump sum, and partially in monthly payments through December 2011.

Plaintiff instituted suit for breach of contract and bad faith. Fireman's Fund filed a motion for summary judgment, which Judge Buckwalter of the Eastern District of Pennsylvania denied in part as to the payment of PIP benefits (discussed in §9:03) and granted in part as to the wage loss benefits.

The insurer argued that once it was notified that plaintiff was pressing a wage loss claim, it acted appropriately in investigating the claim. The court agreed:

After reviewing Plaintiff's opposition brief, the Court is unable to locate any substantive response to Defendant's argument. Rather, with respect to her claim of bad faith stemming from delay, Plaintiff focuses almost exclusively on the time it took Defendant to investigate whether she was entitled to PIP benefits, not on Defendant's conduct once it learned Plaintiff was making a wage loss claim. Furthermore, the documents submitted to the Court suggest that, to the extent there was any delay at all in Defendant's handling of the wage loss claim, it was due to Defendant's need for additional information regarding Plaintiff's ability to work. In such circumstances, delay is not indicative of bad faith. See *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 589 (E.D. Pa. 1999) ("if delay is attributable to the need to investigate further . . . no bad faith has occurred"). Therefore, the Court grants Defendant's Motion for Summary Judgment on Plaintiff's claim that Defendant acted in bad faith in processing her wage loss claim.

¹⁰³³. *Schlegel v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 111514, at *12-13 (M.D. Pa. Aug. 8, 2013).

¹⁰³⁴. *Chemij v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 80688, at *18 (E.D. Pa. June 11, 2012).

¹⁰³⁵. *Chemij v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 80688, at *18 (E.D. Pa. June 11, 2012).

More importantly, Defendant has demonstrated—and Plaintiff has not refuted—that the time it took to pay out the entire proceeds of the claim was due to Defendant’s need for Plaintiff’s doctors to verify that the accident rendered her unable to work.¹⁰³⁶

The court also rejected the plaintiff’s argument that the fact that the first check the insurer sent was for the wrong amount indicated bad faith because “[p]laintiff’s refusal to cash the June 2011 check because she disagreed with the amount does not negate the fact that it was sent.”¹⁰³⁷

(6) *Aumen v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 31360 (M.D. Pa. Mar. 8, 2011) (Prince, M.J.), adopted by 2011 U.S. Dist. LEXIS 31166 (M.D. Pa. Mar. 24, 2011) (Jones, J.)

This UIM claim is discussed in §§ 10:07(a), 10:05, and 10:23. The plaintiff insureds claimed that “the delay of the Defendant in making and/or communicating the coverage decision”¹⁰³⁸ was in bad faith. Plaintiffs focused on the year-long delay from plaintiffs’ arbitration demand to when the insurer notified plaintiffs of the acceptance of the claim. The insurer argued that the year-long delay was not unreasonable, and that part of that year stemmed from delays in scheduling the plaintiff-husband’s examination under oath and from time needed for plaintiffs to provide follow-up documentation of issues that came up in the examination.

The court opined that certain delays could provide the basis for a bad faith claim, although there was no bright line rule that applied, stating that “courts have looked to the degree to which a defendant insurer knew that it had no basis to deny the claimant; if delay is attributable to the need to investigate further or even to simple negligence, no bad faith has occurred.”¹⁰³⁹ The court accepted the insurer’s position, and recommended granting summary judgment because there was no genuine issue of material fact. The court ruled that delays stemming from difficulties in scheduling the examination and the necessity of obtaining additional documentation after the examination “lack sufficient evidence to establish bad faith. . . .”¹⁰⁴⁰ At most, the court noted, this might “amount to mere negligence.”¹⁰⁴¹ Furthermore, the court found notable that plaintiffs’ counsel never objected to the delay: “Nor does the record contain correspondence on Plaintiffs’ behalf during this time indicating that the processing of their claim was taking too long or that they believed Defendant was engaging in dilatory tactics to avoid resolution of the claim.”¹⁰⁴²

(7) *Rossi v. Progressive Ins.*, 813 F. Supp. 2d 643 (M.D. Pa. 2011) (Caputo, J.)

The facts of this case are set forth in §10:07(a). Rossi was in an auto accident in January 2007. In February 2008, he made a claim with Progressive for the entire amount of UIM benefits, \$30,000. When the parties were unable to resolve the claim, Rossi and his wife brought this bad faith and breach of contract suit against Progressive in April 2009. The claim was ultimately settled in February 2010. Progressive filed a motion for summary judgment. Judge Caputo of the Middle District granted the motion.

Plaintiffs argued that in delaying settling the claim, Progressive was acting in bad faith. The court found that Progressive’s investigation was “objectively reasonable” and no evidence showed “dilatory conduct, dishonesty, obfuscation, or malice.”¹⁰⁴³ According to the court, “[C]onsidering the lack of evidence that Rossi’s injuries would exceed the amount covered by [the tortfeasor’s] policy, the pace and scope of Progressive’s investigation does not suggest bad faith.”¹⁰⁴⁴

(8) *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360 (E.D. Pa. 2011) (Kelly, S.J.)

Thomer was in an auto accident in April 2002, following which she sought first party medical benefits from her insurer, Allstate. Allstate paid those benefits until April 2003, when it sought a PRO to determine whether further treatment was reasonable and necessary. The PRO concluded that treatment after May 24, 2002 was not reasonable or necessary, and Allstate stopped paying benefits. After receiving additional medical bills reflecting new diagnoses, Allstate sought an IME. Thomer filed suit in June 2004 and successfully opposed a motion to compel an IME. Thomer and Allstate then settled the first party medical benefits claim and Allstate paid all such benefits until the policy limit was exhausted.

Thomer also settled with Nationwide, the other driver’s insurer, for \$50,000. In July 2005, Thomer sought payment from Allstate of her UIM policy limits. Thomer submitted an actuarial-economic report showing her damages to be above the combined Nationwide and Allstate policy limits. Allstate’s claims examiner, after reviewing the medical

¹⁰³⁶ *Platt v. Fireman’s Fund Ins. Co.*, 2012 U.S. Dist. LEXIS 71000, at *22, *23 n.6 (E.D. Pa. May 22, 2012).

¹⁰³⁷ *Platt v. Fireman’s Fund Ins. Co.*, 2012 U.S. Dist. LEXIS 71000, at *23 n.6 (E.D. Pa. May 22, 2012).

¹⁰³⁸ *Aumen v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 31360, at *18 (M.D. Pa. Mar. 8, 2011).

¹⁰³⁹ *Aumen v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 31360, at *18 (M.D. Pa. Mar. 8, 2011) (quoting *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 589 (E.D. Pa. 1999)).

¹⁰⁴⁰ *Aumen v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 31360, at *21 (M.D. Pa. Mar. 8, 2011).

¹⁰⁴¹ *Aumen v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 31360, at *21 (M.D. Pa. Mar. 8, 2011).

¹⁰⁴² *Aumen v. Nationwide Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 31360, at *22 (M.D. Pa. Mar. 8, 2011).

¹⁰⁴³ *Rossi v. Progressive Ins.*, 813 F. Supp. 2d 643, 653 (M.D. Pa. 2011).

¹⁰⁴⁴ *Rossi v. Progressive Ins.*, 813 F. Supp. 2d 643, 653 (M.D. Pa. 2011).

records, calculated the claim to be worth \$35,000-\$45,000, and, in late October 2005, offered to settle for \$30,000. Seven months later, in July 2006, Thomer responded to that offer by submitting more medical records and demanding the \$100,000 policy limits.

The claims adjuster requested further medical records, and after review, requested an IME and authorizations for additional records. The authorizations were returned five months later. The IME was performed in August 2007, and it concluded that while some small number of symptoms might have been explained by a concussion caused by the accident, most of the symptoms were psychological. After another evaluation of the claim by the adjuster, the adjuster valued the upper limit of the claim to be \$65,000, and increased Allstate's offer to \$50,000. Then, believing Thomer had reduced her demand to \$90,000, Allstate raised its offer to \$65,000. Thomer rejected both offers, continuing to demand the full policy limits.

The claim arbitration, originally scheduled for early October 2008, was postponed at Thomer's request. In late September 2008, it offered \$75,000 and then in early October, \$85,000 and \$90,000. The offers were rejected. In late November 2008, Thomer issued a subpoena for the first party medical benefits file and the UIM file. Before the deadline for responding to the subpoena, Allstate offered the \$100,000 policy limit and forwarded a proposed release, indicating that Thomer should notify it of proposed changes to the release. At the end of the year, not having received any proposed changes or a signed release, Allstate decided to issue the settlement check. This bad faith suit followed.

Senior Judge Kelly of the Eastern District of Pennsylvania granted Allstate's motion for summary judgment on the bad faith claim. Noting that one of Thomer's bad faith theories was that Allstate acted in bad faith in delaying resolution of her claim, the court stated that "[i]n order for an insured to recover for bad faith stemming from delay, an insured must demonstrate that 'the delay is attributable to the defendant, that the defendant had no reasonable basis for the actions it undertook which resulted in the delay, and that the defendant knew or recklessly disregarded the fact that it had no reasonable basis to deny payment.'"¹⁰⁴⁵

Thomer argued that Allstate delayed in bad faith resolution of her UIM claim for either 3 or 6 years. Because the court found that Allstate could not be held responsible for a delay in handling a claim prior to that claim being asserted, it considered the 42 month period after Thomer first asserted her UIM claim, not the 6 year period since the accident. In looking at that 42 month period, the court concluded that Thomer and her attorney were responsible for a significant amount of the delay. After first being presented with the claim, Allstate reviewed the relevant records and submitted an offer approximately 3 months later. For seven months, Thomer and her attorney failed to respond, and "when Thomer did respond, she did so by providing new medical records, and was, therefore, not resuming negotiations but effectively bringing her claim back to square one,"¹⁰⁴⁶ so Allstate was not responsible for any "delay" caused by having to review the new records. Further, after discovering that it needed to obtain yet more records, in considering the injury claims Allstate found questionable, Thomer took five months to return signed authorizations. In addition, the court would not charge Allstate with bad faith when the parties could not agree on a neutral arbitrator or find one who would accept the appointment and when Thomer sought postponement of the arbitration so she could subpoena "arguably irrelevant documents," including the first party medical benefits and UIM files from Allstate. For the portion of the 42 months for which Allstate was responsible, the court concluded that the evidence showed that "it was actively engaged in investigation, valuations and negotiations."¹⁰⁴⁷

Thomer also argued that Allstate improperly delayed requesting her IME after the accident. The court rejected this argument because Allstate had sought the IME much earlier, but Thomer had filed suit and successfully blocked it. Once Thomer sought UIM benefits, she and her attorney were fully or partially responsible for failing to respond to the initial settlement offer, and then also for failing to move forward on the claim when Thomer changed attorneys, resulting in a nearly 5 month halt to any further investigation.

The court likewise rejected Thomer's argument that Allstate delayed her EUO in bad faith. Thomer's new attorney, who notified Allstate that he was representing her in February 2007, requested it in March 2007. Allstate agreed to perform one. As with the other claims of delay, the court concluded that any delay did not amount to bad faith on Allstate's part: "We further find that the periods of delay not attributable to Thomer may fairly be attributed to the need for further investigation, as Thomer submitted additional medical records, which Allstate submitted for review. Accordingly, we find that Thomer has not proven by clear and convincing evidence that there was no reasonable basis for the delay in seeking a statement under oath."¹⁰⁴⁸

(9) *Calestini v. Progressive Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 136815 (M.D. Pa. Dec. 28, 2010) (Caputo, J.)

This case, also discussed in §§10:07(a), 10:11 and 10:17, involves UIM claims arising out of two separate accidents. Plaintiff was involved in one car accident in August 2005, and another in April 2006. Plaintiff settled the

¹⁰⁴⁵ *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360, 370 (E.D. Pa. 2011) (quoting *Wiedinmyer v. Harleysville Mut. Ins. Co.*, 42 Pa. D. & C. 4th 204 (Montgomery 1999)).

¹⁰⁴⁶ *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360, 371 (E.D. Pa. 2011).

¹⁰⁴⁷ *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360, 371 (E.D. Pa. 2011).

¹⁰⁴⁸ *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360, 373 (E.D. Pa. 2011).

claim against the other driver in the August 2005 accident in December 2007 for \$15,000. In late July 2008, Progressive offered to settle the UIM claims from the accidents for \$4,000 (allocating \$2,000 per accident). Eleven months later, in June 2009, plaintiff's counsel sent an expert report to Progressive indicating what injuries were attributed to which accident. Ten days later, while the personal injury action relating to the April 2006 accident was still pending, plaintiff filed this bad faith and breach of contract suit.

Judge Caputo of the Middle District granted the defendant insurer's motion for summary judgment. The court rejected plaintiff's argument that Progressive's alleged delay in paying the UIM claim was in bad faith. The court noted that the parties had real disputes about what injuries might be attributable to the respective accidents, as well as several work-related accidents in which he suffered injuries. The court further noted that plaintiff did not provide Progressive with an expert report detailing the injuries attributable to the 2005 and 2006 accidents until more than three years after the 2006 accident, which personal injury action was still pending. In finding no bad faith, the court held:

"Bad faith" essentially requires a clear and convincing showing that the insurer acted unreasonably and had no basis for refusing to pay a legitimate claim. Here, there is significant dispute between the two sides as to cause, nature, and extent of Plaintiff's injuries. Although Plaintiff did eventually provide Defendant with an expert report setting forth the Plaintiff's injuries and the bases of his claims, this was not until . . . over three years after Plaintiff's accident and only several days before Plaintiff filed his suit against the Defendant. Furthermore, Plaintiff's claim against the driver in the second accident was still pending, and given the uncertainty over the damages that would be awarded in the trial, Defendant reasonably did not rush to settle the Plaintiff's UIM claim. Given the number of accidents Plaintiff has been involved in over the past six years and the extensive injuries he allegedly suffered, it is reasonable that Defendant would want to conduct a thorough investigation of the injuries and have all of the requisite documents and records before it before settling Plaintiff's claim. Although this evaluation has taken quite a bit of time, blame for this cannot be placed solely on Defendant. Finally, the fact that the doctor who performed the Independent Medical Examination, Dr. Kim, holds the view that the 2005 and 2006 accidents only aggravated *pre-existing* injuries, rather than create new ones, speaks to the reasonableness of Defendant's actions in not having yet settled the claim and to the fact that the value of the claim is still very much in dispute.¹⁰⁴⁹

(10) Costello v. Gov't Emps. Ins. Co., 2010 U.S. Dist. LEXIS 28511 (M.D. Pa. Mar. 25, 2010) (Vanaskie, J.)

This case is also discussed in §§10:03(b), 10:07(a), and 10:17. Plaintiff Mr. Costello was driving an automobile owned by the Commonwealth of Pennsylvania, his employer, and was in an accident on February 22, 2007. On October 17, 2007, plaintiffs, through their attorney, notified their personal automobile insurance carrier, GEICO, of the accident. GEICO began paying first party medical and wage loss benefits. Plaintiffs' attorney also notified GEICO on October 17, 2007 of a possible underinsured motorist (UIM) claim. On November 12, 2007, GEICO sent plaintiffs' attorney a copy of the policy, and at that time raised the possibility that the "regular use" exclusion might bar coverage. At the end of November, plaintiffs' counsel asked GEICO to point to the "regular use" language excluding coverage. GEICO sent another copy of the policy, but did not specifically highlight the pertinent language. Further correspondence ensued, and GEICO in March 2008 provided a highlighted version. In March 2008, plaintiffs provided GEICO with the investigative file on the accident and the medical records. Plaintiffs supplemented these materials as requested by GEICO several times over the following months. In April 2009, GEICO denied the UIM claim based on the regular use exclusionary language in the policy.

Plaintiffs filed suit alleging, *inter alia*, bad faith. GEICO filed a motion for judgment on the pleadings, which was granted by Judge Vanaskie of the Middle District. Given that the "regular use" exclusion had been well litigated in the courts, the court ruled that defendant acted reasonably, and concluded that "no reasonable jury could find under a clear and convincing evidence standard that these actions amount to reckless disregard."¹⁰⁵⁰ Although the time from first notice of a potential UIM claim (October 2007) until denial (April 2009) comprised 18 months, the court found that there was no bad faith as a matter of law, noting,

Shortly after the claim was filed, GEICO brought the "regular use" exception to Plaintiffs' attention.

GEICO acted reasonably in requesting and obtaining information relevant to the "regular use" exclusion.

Defendant performed a reasonable investigation into whether or not the "regular use" exception applies. . . .¹⁰⁵¹

¹⁰⁴⁹. *Calestini v. Progressive Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 136815, at *11-12 (M.D. Pa. Dec. 28, 2010).

¹⁰⁵⁰. *Costello v. Gov't Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 28511, at *26 (M.D. Pa. Mar. 25, 2010).

¹⁰⁵¹. *Costello v. Gov't Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 28511, at *25-26 (M.D. Pa. Mar. 25, 2010).

(11) Crawford v. Allstate Ins. Co., 2009 U.S. Dist. LEXIS 79200 (E.D. Pa. Sept. 1, 2009) (Buckwalter, J.)

Crawford alleged that Allstate failed to timely address her claim for uninsured motorist and wage loss benefits and that such was grounds for a finding of bad faith. Allstate filed a motion for summary judgment, which was granted by Judge Buckwalter of the Eastern District.

Crawford was injured on September 8, 2005, but did not settle with Allstate until nearly two years later, in August 2007. Despite the length of time, the court pointed out that Crawford's lengthy delay in submitting medical authorizations and other records to defendant accounted for a majority of that time, throughout which Allstate repeatedly sought access. Further, a legitimate question arose in the course of the investigation about whether some of her injuries might have been attributable to a prior auto accident, so Allstate reasonably needed earlier records to analyze the claim, and Crawford continued to delay providing access to those. The court found that Allstate was permitted to make a reasonable and good faith examination of the records, and in fact, its investigation redounded to Crawford's benefit, as it increased the settlement amount. Allstate would not be found to act in bad faith where Crawford failed to cooperate.¹⁰⁵²

(12) Spinelli v. State Farm Mut. Auto. Ins. Co., 2009 U.S. Dist. LEXIS 22191 (E.D. Pa. Mar. 18, 2009)

(Schiller, J.)

This case, also discussed in §§10:11 and 10:17, arose from an October 19, 2004 automobile accident and a UIM benefits claim by the plaintiff, Spinelli. On September 11, 1998, Spinelli's attorney notified the insurer, State Farm, of her demand for UIM arbitration. State Farm responded on October 5, 1998 assigning counsel, and requesting information such as the tortfeasor's policy limits, any settlement offer, and medical documentation of Spinelli's injuries. State Farm also identified its arbitrator. From that point, the claim spanned *nearly eight years*, during which time there were a number of delays attributable to events such as the deposition of Spinelli, obtaining medical records, an IME, and eventual surgery by the plaintiff. The arbitration was continued a number of times for a myriad of reasons such as the neutral arbitrator having to attend a funeral; the selection of a new neutral arbitrator; Spinelli's health unrelated to the accident; and the schedules and personal health issues of counsel. The arbitration finally took place on December 13, 2006. Spinelli received a net award of \$57,312 on the UIM claim after a large credit based on Spinelli's prior recovery from the tortfeasor. State Farm paid that sum to Spinelli on January 15, 2007.

Judge Schiller of the Eastern District held that State Farm was entitled to summary judgment because Spinelli could not establish her claims that the insurer acted unreasonably with respect to any delayed resolution of the UIM claim. According to the court, "Given the overwhelming evidence in the record, and Plaintiff's failure to cite any actual evidence of deliberate delay, the Court finds no reasonable basis to conclude that State Farm acted in bad faith and sought to deliberately delay the resolution of Plaintiff's claim."¹⁰⁵³

(13) DeWalt v. Ohio Cas. Ins. Co., 513 F. Supp. 2d 287 (E.D. Pa. 2007) (McLaughlin, J.)

In this case discussed in §§3:04 and 10:07(a), involving multiple claimants, the court held that the insurer did not unreasonably delay its investigation into the other claims. The court noted that if the insurer had prematurely offered settlement of the policy limits to claimant DeWalt, it would have exposed its insured, Guffey, to liability to the other claimants, which itself could be an act of bad faith. The court found no evidence of deliberate or knowing delay in settling any of the three claims against Guffey. The court found that the 11-month delay between the accident and the settlement offer was reasonable under the circumstances, and noted that part of the delay was caused by the claimants in failing to provide timely records.

The plaintiff also argued that Ohio Casualty acted in bad faith in not complying with the UIPA regulations by failing to communicate with Guffey every 45 days with respect to updates as to the status of its investigation.¹⁰⁵⁴ Although the insurer did not dispute that it did not provide such updates, the insurer argued that the alleged deficiencies could not support a bad faith claim because they did not cause the excess verdict. The court agreed with the insurer.

(14) Aquila v. Nationwide Mut. Ins. Co., 2008 U.S. Dist. LEXIS 93823 (E.D. Pa. Nov. 13, 2008) and 2008 U.S. Dist. LEXIS 101518 (E.D. Pa. Dec. 15, 2008) (Strawbridge, M.J.)

In this case also discussed in §10:15, plaintiffs reported the theft of their automobile in September 2005. Nationwide's claims investigation unearthed several "red flags" concerning the loss, but in April 2006, Nationwide decided to pay the claim. Plaintiffs sued, alleging that Nationwide's seven-month investigation was not timely and thus in bad faith. Magistrate Judge Strawbridge of the Eastern District rejected this claim. The court held that the investigation was justified by the existence of the numerous "red flags." The court also found that a significant cause of the delay was attributable to the plaintiffs and/or their counsel "through their failure to appear for routine examinations under oath and in failing to return routine theft claim document packets."¹⁰⁵⁵ The court noted that the

¹⁰⁵² *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200, at *24-25 (E.D. Pa. Sept. 1, 2009).

¹⁰⁵³ *Spinelli v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 22191, at *21-22 (E.D. Pa. Mar. 18, 2009).

¹⁰⁵⁴ See generally Section 8:04.

¹⁰⁵⁵ *Aquila v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 101518, at *33 (E.D. Pa. Dec. 15, 2008).

plaintiff had failed to provide documentation for a period of more than five months, despite Nationwide's sending 10 letters requesting submission of the documents.

(15) *Silverman v. Rutgers Cas. Ins. Co.*, 2005 Phila. Ct. Com. Pl. LEXIS 130 (Phila. Mar. 31, 2005) (Jones, J.)

In this case, Judge Jones of the Philadelphia Court of Common Pleas held that the plaintiff medical providers were not entitled to class certification to bring a bad faith action against the defendant insurer.¹⁰⁵⁶ The court denied this request in part because the only allegations being made were that the insurer failed to timely process claims, and, "the claim for 'bad faith' requires more than the failure to pay in a timely manner," and "[i]n fact the testimony establishes that the reason for the delay was understaffing, rather than improper motive."¹⁰⁵⁷

(16) *Kubrick v. Allstate Ins. Co.*, 2004 U.S. Dist. LEXIS 358 (E.D. Pa. Jan. 7, 2004) (Rufe, J.), *aff'd*, 121 F. App'x 447 (3d Cir. 2005) (Fisher, J.)

This case stemmed from a fatal automobile accident that occurred in October 1985, for which numerous insurance policies were applicable. The plaintiff initiated a UIM claim with Allstate in July 1989. At that time, Pennsylvania law required that applicable third party coverages be exhausted prior to a UIM claim being instituted. In 1995, that law changed,¹⁰⁵⁸ leading plaintiff to reinitiate the UIM claim. As part of its investigation, Allstate investigated issues of the decedent's residency, whether the insured was the driver of the subject vehicle, and questions concerning a UIM sign-down form required under the law. In September 2000, the UIM claim settled for \$600,000, but plaintiff instituted a bad faith action arguing, among other theories, that Allstate unduly delayed its investigation and payment of the claim.

Judge Rufe of the Eastern District rejected plaintiff's argument and granted summary judgment in favor of Allstate. Although acknowledging that there was "a lengthy delay" in handling the case, the court found no evidence of bad faith:

[I]t appears that this time was consumed by a period of inactivity by both parties and/or by investigation of Allstate's liability on the UIM claim. In fact, Allstate was still investigating its liability on the UIM claim when it admitted that the sign-down waiver was lost.¹⁰⁵⁹

The plaintiff argued that Allstate should have settled the case or completed its investigation back in 1989. However, the court agreed that the insurer's investigation was reasonable, given the state of law at the time, and the fact that there remained "a great deal of investigation to be completed on both sides."¹⁰⁶⁰ Citing *Jung v. Nationwide*, the court reaffirmed that the "law of bad faith does not 'interfere with an insurance company's right to investigate and litigate' legitimate defenses."¹⁰⁶¹

In an opinion by Judge Fisher, the Third Circuit affirmed the district court, holding, "The delay between assertion of the claim and its eventual settlement was extraordinarily lengthy, but must be viewed in light of the various and unique junctures that arose during the handling of this claim," including the fact that delay was attributable to both the insurer and the claimant.¹⁰⁶²

(17) *Shearer v. State Farm Mut. Auto. Ins. Co.*, 56 Pa. D. & C.4th 503 (Lackawanna 2002) (Barrasse, J.)

On June 22, 1995, two months after the report of an automobile theft claim, State Farm contacted the plaintiff's attorney to settle the claim. The plaintiff rejected the offer because it did not include damages for bad faith. Thereafter, he filed a bad faith action, asserting that State Farm's failure to obtain the police report for two months demonstrated bad faith.

Judge Barasse of Lackawanna County disagreed, determining that in light of the various red flags raised during the investigation, "[n]o reasonable trier of facts could conclude that the report would provide information sufficient to end the investigation of the claim[.]" Moreover, the court observed that State Farm did not await the police report before pursuing its investigation. Rather, it was "actively involved in investigating the claim while, at the same time, awaiting the police report." Concluding that State Farm had reasonable cause to investigate the plaintiff's claim and that the two-month delay in paying the claim was by no means excessive, especially in light of the red flags that arose during the investigation, the court granted summary judgment for State Farm.

(18) *Berks Mut. Leasing Corp. v. Travelers Prop. & Cas.*, 2002 U.S. Dist. LEXIS 23749 (E.D. Pa. Dec. 9, 2002) (Yohn, J.)

In this case dismissing a claim under §8371, Judge Yohn of the Eastern District, citing numerous cases, held, Courts interpreting the meaning of bad faith under Section 8371 have repeatedly said that the statute does not protect

¹⁰⁵⁶. See §4:04.

¹⁰⁵⁷. *Silverman v. Rutgers Cas. Ins. Co.*, 2005 Phila. Ct. Com. Pl. LEXIS 130, at *15 n.7 (Phila. Mar. 31, 2005) (citing *Ter-letsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. 1994)).

¹⁰⁵⁸. See *Chambers v. Aetna Cas. & Sur. Co.*, 658 A.2d 1346 (Pa. Super. 1995).

¹⁰⁵⁹. *Kubrick v. Allstate Ins. Co.*, 2004 U.S. Dist. LEXIS 358, at *37 (E.D. Pa. Jan. 7, 2004)

¹⁰⁶⁰. *Kubrick v. Allstate Ins. Co.*, 2004 U.S. Dist. LEXIS 358, at *37 (E.D. Pa. Jan. 7, 2004).

¹⁰⁶¹. *Kubrick v. Allstate Ins. Co.*, 2004 U.S. Dist. LEXIS 358, at *36 (E.D. Pa. Jan. 7, 2004).

¹⁰⁶². *Kubrick v. Allstate Ins. Co.*, 121 F. App'x 447, 449 (3d Cir. 2005).

against mere negligence or bad decision making. . . . Furthermore, courts have held that mere delay alone is not enough to establish bad faith.”¹⁰⁶³

(19) *Sanders v. State Farm Ins. Co.*, 47 Pa. D. & C.4th 129 (Delaware 2000) (Bradley, J.), *aff’d without opinion*, 777 A.2d 516 (Pa. Super. 2001)

The plaintiff insured submitted a property claim to his insurer, State Farm, relating to the theft of his automobile. During the course of the insurer’s investigation, several red flags arose concerning the whereabouts of the original keys, a lack of forced entry into the vehicle and the garage where it was stored, inconsistent reports when the vehicle was recovered out of state, and others. The company’s investigation took approximately eight months to complete, although the company ultimately paid the insured for the exterior and engine damage resulting from the theft, as well as towing costs for the car’s return.

In the bad faith action, Judge Bradley of the Delaware County Court of Common Pleas granted the insurer’s motion for summary judgment, holding that “the eight-month delay alone is not clear and convincing evidence of bad faith.”¹⁰⁶⁴ The court held that State Farm was permitted to exercise its right under the policy to request supporting documentation for the loss and require the insured to submit to an examination under oath:

An insurance company has a right under its policy to conduct a thorough investigation of a claim. Any reasonable delay caused by such an investigation does not give rise to a claim for bad faith.¹⁰⁶⁵

(20) *Brown v. Liberty Mut. Ins. Grp.*, 2001 U.S. Dist. LEXIS 781 (E.D. Pa. Jan. 20, 2001) (Buckwalter, J.)

The plaintiff submitted a first party claim stemming from the theft of her leased automobile and the contents inside. The car was recovered but an examination revealed that the ignition had not been disturbed and the steering wheel column still locked, a “red flag” that led the insurer to refer the claim to its Special Investigative Unit for a more thorough analysis. Ultimately, approximately 11 months after the loss, the company decided to pay the claim. The plaintiff instituted a bad faith action, claiming that the company improperly relied upon just one red flag – the uncompromised ignition and steering column – in delaying the resolution of the claim. Judge Buckwalter of the Eastern District disagreed and granted the defendant’s motion for summary judgment on the bad faith count. On the subject of red flags, the court wrote:

[T]he number of flags does not necessarily render Defendant’s decision to investigate her claim any less reasonable. The initial “red flag” in Plaintiff’s case, an uncompromised ignition, is significant and related enough to the theft as to reasonably require further investigation.¹⁰⁶⁶

As to the length of the investigation, the court stated that it recognized “that 11 months is a protracted period of time for payment of the small claim.”¹⁰⁶⁷ However, according to the court, “the length of the investigation fell within parameters that have been deemed acceptable by this circuit.”¹⁰⁶⁸

(21) *Segall v. Liberty Mut. Ins. Co.*, 2000 U.S. Dist. LEXIS 16382 (E.D. Pa. Nov. 9, 2000) (Buckwalter, J.)

In November 1993, the plaintiff was injured in an automobile accident, and notified the insurer, Liberty Mutual, of a potential underinsured motorist claim. In November 1996, the plaintiff settled with the tortfeasor’s insurer. Upon receiving notice of the settlement of that claim, Liberty commenced its investigation in January 1997. It took approximately six months to obtain the plaintiff’s medical file. In November 1997, the insurer expanded its investigation, obtaining a review of employment records, an economist’s assessment, and surveillance.

The insurer’s claims handler requested authorization for a \$250,000 reserve and made a \$50,000 settlement offer five days before a December 1997 UIM arbitration date. The plaintiff never responded to the settlement offer, nor made a competing demand. The case proceeded to arbitration and the plaintiff received a net award of \$187,500, which was paid by the insurer. Plaintiff filed a bad faith suit, alleging excessive delay in the handling of his claim.

Judge Buckwalter of the Eastern District rejected plaintiff’s claim, holding:

[T]he six-month delay caused by the failure to obtain the medical records most likely resulted from negligence or miscommunication but not bad faith. Additionally, only 11 months passed from the time of the settlement with the underlying tortfeasor and the arbitration date, a length of time well within the permissible period.¹⁰⁶⁹

(22) *Kantra v. Allstate Ins. Co.*, U.S.D.C. W. Dist. of Pa., No. CV-99-92 PICS No. 99-2488-03-00 (W.D. Pa. Dec. 22, 1999) (Ziegler, J.)

A delay of 20 months was held not to be bad faith in this case in which Chief Judge Ziegler of the Western District entered summary judgment in favor of Allstate. Although the plaintiffs provided 20 authorizations for release of

¹⁰⁶³. *Berks Mut. Leasing Corp. v. Travelers Prop. & Cas.*, 2002 U.S. Dist. LEXIS 23749, at *20 n.9 (E.D. Pa. Dec. 9, 2002).

¹⁰⁶⁴. *Sanders v. State Farm Ins. Co.*, 47 Pa. D. & C.4th 129, 139 (Del. 2000).

¹⁰⁶⁵. *Sanders v. State Farm Ins. Co.*, 47 Pa. D. & C.4th 129, 142 (Del. 2000).

¹⁰⁶⁶. *Brown v. Liberty Mut. Ins. Grp.*, 2001 U.S. Dist. LEXIS 781, at *8-9 (E.D. Pa. Jan. 20, 2001).

¹⁰⁶⁷. *Brown v. Liberty Mut. Ins. Grp.*, 2001 U.S. Dist. LEXIS 781, at *10 (E.D. Pa. Jan. 20, 2001).

¹⁰⁶⁸. *Brown v. Liberty Mut. Ins. Grp.*, 2001 U.S. Dist. LEXIS 781, at *10 (E.D. Pa. Jan. 20, 2001).

¹⁰⁶⁹. *Segall v. Liberty Mut. Ins. Co.*, 2000 U.S. Dist. LEXIS 16382, at *6-7 (E.D. Pa. Nov. 9, 2000).

medical records as late as August of 1998, Allstate had not received complete responses from the various medical providers. This, coupled with Allstate's attorney's busy trial schedule, caused the delay. The court also noted that the delay was not entirely the fault of Allstate. Rather than execute the requested authorization forms in October of 1997, the plaintiffs did not include complete addresses. Stating that the "[v]igorous investigation of claims does not constitute bad faith,"¹⁰⁷⁰ the court held that without receiving and reviewing all of the relevant documents, Allstate could not complete its investigation and make a decision. The court went on to state that even if all delays were attributable to Allstate, this, in and of itself, would not be sufficient to establish bad faith.

(23) *McCabe v. State Farm Mut. Auto. Ins. Co.*, 36 F. Supp. 2d 666 (E.D. Pa. 1999) (Brody, J.)

The plaintiff was injured in an automobile accident and sought UIM benefits from State Farm. She demanded the \$100,000 policy limits, but State Farm offered only \$3,000. The plaintiff rejected State Farm's offer and demanded arbitration pursuant to the terms of the policy. Following the demand for arbitration, State Farm requested additional medical authorizations, a statement under oath, and an independent medical examination. State Farm later made two additional offers to settle, the highest of which was \$30,000. The plaintiff continued to demand the policy limits of \$100,000. A unanimous arbitration panel later awarded the plaintiff \$52,744, which State Farm paid. Thereafter, the plaintiff brought an action for bad faith, alleging, *inter alia*, that State Farm delayed unreasonably in processing her claim. The court rejected this allegation, stating that the two and one-half month "time delay alone does not create bad faith."¹⁰⁷¹

(24) *Quaciari v. Allstate Ins. Co.*, 998 F. Supp. 578 (E.D. Pa. 1998) (Brody, J.), *aff'd without opinion*, 172 F.3d 860 (3d. Cir. 1998)

In this UIM case, a period of approximately 13 months passed between the initiation of the plaintiff-insured's claim and the ultimate settlement of that claim by the company after arbitration. The plaintiff's statement under oath was not taken until approximately nine months after notice of the claim was first given. An IME was not performed until approximately 11 months after notice of the claim. Nonetheless, the Eastern District held that, given the absence of aggravating factors, this delay did not constitute bad faith because, under the circumstances, the claim had required the further investigation by the insurer.¹⁰⁷²

(25) *Wiedinmyer v. Harleysville Mut. Ins. Co.*, 42 Pa. D. & C.4th 204 (Montgomery 1999) (Nicholas, J.)

In this UIM claim, the Montgomery County Court of Common Pleas held that a ten and a half month delay was not unreasonable, particularly where the policyholder herself was responsible for some of the delay, and where the matter was complicated by claims made by two separate estates. The motion for summary judgment filed by defendant Harleysville on the bad faith claim was granted.

(26) *Deibler v. Nationwide Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 119723 (W.D. Pa. Aug. 23, 2013) (Bissoon, J.)

This UM case is discussed in more detail in §10:17. After plaintiff was injured in an auto accident in 2007, the other driver sought bodily injury damages from plaintiff's auto insurer, Nationwide, which concluded that plaintiff was 100 percent at fault for the accident. Following settlement with the other driver in February 2008, plaintiff sought UM benefits from the insurer in November 2008. During the course of its investigation, the insurer took plaintiff's Examination Under Oath (EUO) in March 2009, and then the other driver's EUO in December 2009. The parties agreed to arbitrate the matter, and the insurer eventually resolved the UM claim with plaintiff for the policy limits on an unspecified date prior to arbitration. Plaintiff then filed this bad faith action. Nationwide filed a motion for summary judgment. Judge Bissoon of the Western District of Pennsylvania granted the motion.

The court concluded that any alleged delays were due at least in part to plaintiff's counsel, and some alleged delays were due to third parties. Accordingly, the court concluded that the alleged delays could not provide the basis for bad faith liability: "Given the scope of the investigation, this period of time—30 months—was neither unreasonable nor evidence of bad faith. Furthermore, all delays were reasonably related to the need for further investigation."¹⁰⁷³

(27) *Stanford v. Nat'l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323 (E.D. Pa. Nov. 3, 2014) (Tucker, C.J.)

This factually complicated UM/UIM case spanned a period of 17 years, and the facts are discussed in detail in §10:17. Following arbitration, plaintiff filed a complaint against NGM among others and alleged bad faith. NGM filed a motion for summary judgment after discovery concluded. Judge Tucker of the Eastern District granted the insurer's motion.

Plaintiff's arguments that NGM acted in bad faith included allegations that NGM delayed in handling plaintiff's UIM claim by requesting that Stanford submit to an examination under oath (EUO) and medical examination. The court disagreed, concluding that the policy required the insured to submit to such procedures:

¹⁰⁷⁰. *Kantra v. Allstate Ins. Co.*, PICS No. 99-2488-03-00, C.V. 99-92 slip op. at 10.

¹⁰⁷¹. *McCabe v. State Farm Mut. Auto. Ins. Co.*, 36 F. Supp. 2d 666, 670 (E.D. Pa. 1999).

¹⁰⁷². This case is discussed in greater detail in Section 10:17.

¹⁰⁷³. *Deibler v. Nationwide Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 119723 (W.D. Pa. Aug. 23, 2013).

Here, the insurance policy required Stanford to submit to EUOs and medical examinations. Stanford repeatedly refused to submit to EUOs and medical examinations. In 2002, when Stanford finally submitted to an EUO, he refused to answer questions that were necessary and material to NGM's adjustment of his claim. Additionally, Stanford never submitted to a medical examination even though such an examination was necessary for NGM's assessment of Stanford's claim.... From mid-2004 to May 2011, NGM did not receive any correspondence from Stanford. In 2007, NGM closed Stanford's file. Accordingly, to the extent that Stanford contends that NGM's investigation of or delay in making an offer to settle the claim was in bad faith, NGM had a reasonable ground for doing so: NGM believed that Stanford failed to comply with the insurance policy requirements.¹⁰⁷⁴

The court noted other reasons for delay as well, not the fault of NGM, including the disbarment of plaintiff's former counsel.

§10:13(b) — Cases (Property Claims)

(1) *Hoffman v. State Farm Fire & Cas. Co.*, 2016 U.S. Dist. LEXIS 158795 (M.D. Pa. Nov. 16, 2016) (Carlson, M.J.)

Plaintiffs sought coverage under their homeowners's policy with defendant State Farm after their home was damaged in a fire in July 2013. The fire department concluded that an electrical malfunction was the cause. State Farm had an origin and cause investigator inspect the scene; that expert concluded that there were some factors that raised suspicion that the fire had been deliberately set. After a five month investigation, State Farm concluded that the claim was covered, and paid approximately \$150,000 for losses associated with the damage when it received supporting documentation. Plaintiffs brought this bad faith action. After discovery, State Farm filed a motion for summary judgment. Magistrate Judge Carlson of the Middle District granted the motion, discussed in more detail in §10:07(b).

Plaintiffs claimed that State Farm delayed covering the claim in bad faith. The court disagreed. The court noted that the investigation was appropriately done upon the discovery of red flags regarding the cause of the fire. The court also explained that the investigation began "immediately" while advancing sums to plaintiffs for alternative housing and clothing. The court also cited to the fact that once the decision was made to cover the claim, payments began promptly upon receipt of supporting documentation. The court also noted that some of the delay was caused by plaintiffs in that "the plaintiffs contributed directly to the duration of the investigation by delaying their examinations under oath" for approximately two months.¹⁰⁷⁵ In determining that plaintiffs failed to provide evidence creating a genuine issue of material fact, the court stated: "The plaintiffs have not responded with any countervailing evidence to support their assertion that State Farm's conduct of the investigation . . . overlong . . ." ¹⁰⁷⁶

(2) *Porter v. Safeco Ins. Co.*, 2017 U.S. Dist. LEXIS 17142 (M.D. Pa. Feb. 6, 2017) (Carlson, M.J.), adopted by 2017 U.S. Dist. LEXIS 43498 (M.D. Pa. Mar. 24, 2017) (Mariani, J.)

Plaintiff Porter owned 2 adjoining properties and had separate policies on each. After an October 2014 fire starting at one property caused damage to both, Porter sought coverage from Safeco, the insurer for the second property. Safeco had issued a policy covering the property where the fire started, but the policy had lapsed for failure to pay premiums prior to the fire. By December 2014, Safeco began to pay for Porter's temporary housing and for various mitigation firms to clean up; when it undertook an investigation, it concluded that its policy covered only the one property, not both. After this decision, it made further payments relating to the insured property between February and June 2015. Safeco continued making payments relating to the property it insured over the course of the next several months, but because Porter believed he was entitled to payments relating to the first property, he filed this breach of contract and bad faith action. After discovery, Safeco filed a motion for summary judgment. Magistrate Judge Carlson of the Middle District recommended that the motion be granted, and Judge Mariani subsequently adopted the recommendation, overruling plaintiff's objections as to the breach of contract count.

Porter contended that Safeco had delayed resolution of the claim in bad faith. The court found, however, that there was no genuine issue of material fact because the claim had been handled timely and that at least some of the delay was caused by plaintiff. The court noted that within two months of the fire, Safeco had made arrangements for Porter's housing and had remediated the property. But, the court explained, Safeco "was stymied, in part, by Porter, who wanted threshold coverage issues addressed before work was undertaken at 133 ½ Morris."¹⁰⁷⁷ Further, within two months of the loss, Safeco paid \$30,000 for losses at the insured property, and then made an additional \$20,000 in payments in the three months following its coverage decision. The court explained:

Thus, contrary to the plaintiff's unsubstantiated claims that Safeco was unresponsive, it is evident that . . . any attendant delays in the initial investigation and ultimate adjustment of the claim were not

¹⁰⁷⁴. *Stanford v. Nat'l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323, at *16 (E.D. Pa. Nov. 3, 2014).

¹⁰⁷⁵. *Hoffman v. State Farm Fire & Cas. Co.*, 2016 U.S. Dist. LEXIS 158795, at *40-41 (M.D. Pa. Nov. 16, 2016).

¹⁰⁷⁶. *Hoffman v. State Farm Fire & Cas. Co.*, 2016 U.S. Dist. LEXIS 158795, at *41 (M.D. Pa. Nov. 16, 2016).

¹⁰⁷⁷. *Porter v. Safeco Ins. Co.*, 2017 U.S. Dist. LEXIS 17142, at *18 (M.D. Pa. Feb. 6, 2017).

solely or even principally attributable to Safeco, but resulted largely from disputes over the scope of insurance coverage, disputes which were the result of [plaintiff's] decision to allow his insurance to lapse on one of these adjoining townhomes.¹⁰⁷⁸

(3) *Turner v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 81922 (M.D. Pa. May 30, 2017) (Conaboy, J.)

After plaintiffs' home was destroyed in a fire in December 2013, they sought coverage from their defendant homeowner's insurer. Defendant eventually paid the policy limits for the loss of personal property claim by October 2015. Claiming that the insurer had not paid for some their claim for debris removal and damage to landscaping and that it had delayed payment of loss of personal property benefits, they filed this bad faith suit. Before the court was Defendant's motion for summary judgment. Judge Conaboy of the Middle District granted the motion as to the bad faith count.

The court concluded that this nearly 2-year delay was not in bad faith under the facts presented. The court explained that the policy required plaintiffs to provide an inventory of damages, and that the adjuster, as well as the public adjuster, had explained that to plaintiffs. Plaintiffs did not provide that inventory until June 2015. This, the court concluded, did not evince bad faith: "Thus, the delay in payment for the value of their personal property was a direct result of Plaintiffs' failure to perform their contractual duties and, as such, may not serve as an appropriate basis for a finding of bad faith on Defendant's part. Stated another way, Plaintiffs may not now seek to profit due to their lack of action."¹⁰⁷⁹ The court rejected plaintiffs' argument that defendant knew that all of their personal property had been destroyed, finding that "[t]he fact that Plaintiffs had experienced a total loss begged the question of the value of that loss. . . . Defendant justifiably waited for Plaintiffs to provide some documentation of the magnitude of their loss and the Court will not fault State Farm for expecting Plaintiffs to perform under the contract of insurance."¹⁰⁸⁰ The court also explained that defendant had made two separate payments exhausting the personal property loss coverage, within 11 weeks of receiving the amended inventory from plaintiffs, finding that it "cannot regard this as an unreasonable delay justifying any additional compensation for bad faith."¹⁰⁸¹

(4) *Great Lakes Reinsurance PLC v. Stephens Garden Creations, Inc.*, 2015 U.S. Dist. LEXIS 100827 (E.D. Pa. Aug. 3, 2015) (DuBois, J.)

Plaintiff Great Lakes issued a commercial property policy to defendant company. After total destruction of one of defendant's buildings in a November 2012 fire, and damage to three other buildings, defendant submitted claims for property damage and business personal property. Plaintiff and defendant differed on the value of both claims, but Great Lakes made advance payments in late November 2012 and in January and April 2013, following which plaintiff filed this declaratory judgment action and defendant filed a bad faith counterclaim. Plaintiff filed a motion for summary judgment as to the bad faith claim. Judge DuBois of the Eastern District granted the motion, as is also discussed in §§10:03(b) and 10:07(b).

The court explained that delay alone could not support a bad faith claim, and that "[a] delay attributable to the uncertainty of a claim's value or the insurer's need to investigate further does not constitute bad faith."¹⁰⁸² In this case, the court concluded that the 5 month delay stemmed only from a need for further investigation of the values of various components of the claim and of whether there was a lien on the property: "The record demonstrates that Great Lakes' delay stemmed from a dispute over the claimed damages and Great Lakes' need to investigate further, which does not evidence bad faith."¹⁰⁸³

(5) *Moran Industries, Inc. v. Netherlands Ins. Co.*, 2014 U.S. Dist. LEXIS 20081 (M.D. Pa. Feb. 19, 2014) (Brann, J.)

Plaintiff Moran owned a commercial property that was insured by defendant Netherlands. After the property was damaged in a fire in August 2009, Moran submitted a claim to defendant in November 2010, and the adjuster spoke with Moran's representative two days later. The adjuster inspected the property a week later. The investigation continued through June 2011, when Netherlands notified Moran that no further payments would be made. Moran then filed this bad faith suit. After discovery, Netherlands filed a motion for summary judgment. Judge Brann of the Middle District of Pennsylvania granted the motion, in an opinion discussed in more detail in §§10:07(b) and 10:11.

The court concluded that Moran failed to prove that the 8 month delay was bad faith because the evidence showed that Netherlands was properly and reasonably investigating during that time: "...Netherlands began its process of investigating the claim within two days of Moran filing a formal claim. The undisputed facts demonstrate Netherlands acted with reasonable diligence throughout the investigation of the claim. Moreover, Netherlands made payment on

¹⁰⁷⁸. *Porter v. Safeco Ins. Co.*, 2017 U.S. Dist. LEXIS 17142, at *18-19 (M.D. Pa. Feb. 6, 2017).

¹⁰⁷⁹. *Turner v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 81922, at *11-12 (M.D. Pa. May 30, 2017).

¹⁰⁸⁰. *Turner v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 81922, at *12 (M.D. Pa. May 30, 2017).

¹⁰⁸¹. *Turner v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 81922, at *13 (M.D. Pa. May 30, 2017).

¹⁰⁸². *Great Lakes Reinsurance PLC v. Stephens Garden Creations, Inc.*, 2015 U.S. Dist. LEXIS 100827, at *20 (E.D. Pa. Aug. 3, 2015).

¹⁰⁸³. *Great Lakes Reinsurance PLC v. Stephens Garden Creations, Inc.*, 2015 U.S. Dist. LEXIS 100827, at *20 (E.D. Pa. Aug. 3, 2015).

the claim and gave Moran notice of its final position on the claim with reasonable diligence and well before the limitations period expired. Given these undisputed facts, Moran cannot establish bad faith on this evidence.”¹⁰⁸⁴

(6) *Atwood v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 121319 (M.D. Pa. Aug. 27, 2013) (Rambo, J.)

Plaintiff obtained a homeowner’s policy with defendant in 2011. In 2012, after the DEA raided plaintiff’s home, he fled the area. His home, unsecured after the DEA knocked down the front door, was the subject of numerous break-ins and thefts. A fire occurred on March 31, 2012 and plaintiff thereafter sought coverage from State Farm. The insurer began an investigation, and discovered that in May 2012, plaintiff had been arrested in Colorado, and the home was subject to a forfeiture proceeding. Plaintiff filed this bad faith action in March 2013, before the insurer rendered a coverage decision, but after it had notified plaintiff that it would not make any payments until certain motions were resolved relating to forfeiture. State Farm filed a motion to dismiss the bad faith claim. Judge Rambo of the Middle District granted the motion.

Plaintiff argued that the insurer’s 10-month delay in making a coverage decision was in bad faith. The court disagreed. The court noted that at the time the insurer had not yet even decided to deny coverage, because the government, in the forfeiture proceeding, had requested that State Farm not disburse any insurance payments in excess of the lien; the insurer decided to await ruling on the government’s motion before making payments. The court concluded: “[I]t appears that Defendant had a reasonable basis to delay its final coverage decision in light of the pending criminal motion, and that this position was adequately communicated to plaintiff.”¹⁰⁸⁵

(7) *Mirarchi v. Seneca Specialty Ins. Co.*, 2013 U.S. Dist. LEXIS 40513 (E.D. Pa. Mar. 22, 2013) (Pratter, J.)

Plaintiff’s commercial property, which was insured by defendant Seneca, was damaged by fire. Believing Seneca acted in bad faith in delaying the claims process, Plaintiff filed this bad faith action. Seneca filed a motion for summary judgment on the bad faith claim. Judge Pratter of the Eastern District granted defendant Seneca’s motion.

The fire occurred on May 8, 2008, and plaintiff provided notice to Seneca immediately after. On May 12, Seneca retained an independent adjuster to perform an inspection, as well as a construction company to prepare an estimate. Plaintiff hired an adjustment firm to represent him. The adjuster contacted plaintiff’s firm on May 16, and again in June and July, before receiving the requested information on July 22. Seneca’s construction firm estimated the replacement cost as approximately \$400,000. Plaintiff’s firm provided an estimate of over \$980,000 for replacement cost. Plaintiff provided a formal partial proof of loss on August 4, 2008, which requested \$100,000. Seneca paid the requested \$100,000. In October 2008, plaintiff submitted two additional partial proofs of loss. In response, Seneca paid the personal property policy limits. In November 2008, Seneca paid \$230,000, the undisputed amount for the remaining property damage claim. In December 2008, plaintiff submitted a claim for business interruption coverage for the period of the year following the fire. On May 9, 2009, a year after the fire, Seneca paid that amount. The parties were never able to resolve the property damage claim, so Seneca requested appraisal. Following this process, which concluded on October 20, 2009, Seneca paid the balance of the policy limits on November 6, 2009.

Plaintiff contended that Seneca acted in bad faith in delaying the partial payments it made during claims handling. The court noted that the policy did not require partial payments and there was no Pennsylvania law requiring partial payments. The court concluded that Seneca could not have acted in bad faith with respect to a duty that did not exist: “Whether the payments of undisputed portions of the claim were timely or not, then, does not matter, since Seneca had no duty to pay them in the first place. Thus, any supposed delays in making partial payments do not support Mr. Mirarchi’s [plaintiff’s] bad faith claim.”¹⁰⁸⁶ Furthermore, the court noted that plaintiff did not even request a partial payment.¹⁰⁸⁷

(8) *Seto v. State Farm Ins. Co.*, 2012 U.S. Dist. LEXIS 3306 (W.D. Pa. Jan. 11, 2012) (McVerry, J.)

Plaintiffs’ home was damaged in a fire on December 24, 2008. Two days later, State Farm, their homeowner’s carrier, began an investigation into the cause of the fire, and on December 28, 2008, the claims representative inspected the property. The representative concluded that all of the contents of the home were destroyed and that much of the structure had been destroyed. The representative concluded that plaintiffs qualified for additional living expenses. Shortly thereafter, the origin and cause investigator concluded that he could not determine the cause of the fire but that it was potentially caused by Christmas lights.

On January 27, 2009, State Farm issued plaintiffs a check representing the actual cash value for damages to the home, totalling over \$116,000. Plaintiffs obtained their own estimate, which valued the replacement cost value at \$208,000, which was \$50,000 higher than State Farm had valued it. Approximately a week after plaintiffs submitted this estimate, on March 2, 2009, a second fire completely destroyed the home. State Farm referred the claim to the

¹⁰⁸⁴. *Moran Industries, Inc. v. Netherlands Ins. Co.*, 2014 U.S. Dist. LEXIS 20081, at *25-26 (M.D. Pa. Feb. 19, 2014).

¹⁰⁸⁵. *Atwood v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 121319, at *14 (M.D. Pa. Aug. 27, 2013).

¹⁰⁸⁶. *Mirarchi v. Seneca Specialty Ins. Co.*, 2013 U.S. Dist. LEXIS 40513, at *26 (E.D. Pa. Mar. 22, 2013).

¹⁰⁸⁷. *Mirarchi v. Seneca Specialty Ins. Co.*, 2013 U.S. Dist. LEXIS 40513, at *29 (E.D. Pa. Mar. 22, 2013).

Special Investigative Unit (“SIU”), which was unable to determine the cause of the fire. On May 4, 2009, State Farm sent plaintiffs a check for over \$43,000 for additional damages. Plaintiffs obtained a second estimate of replacement cost value in August 2009.

In late November 2009, the parties settled the property loss claim for approximately \$160,000 and State Farm paid all additional living expenses, totalling more than \$30,000. In mid-December 2009, plaintiffs filed this breach of contract and bad faith action, serving the complaint in March 2010. During the litigation, in March 2011, State Farm paid an additional actual cash value amount of \$29,000 based on plaintiffs’ second estimate. State Farm filed a motion for partial summary judgment on the bad faith claim. In this opinion also discussed in §10:19, Judge McVerry of the Western District of Pennsylvania granted the motion.

Plaintiffs contended that State Farm delayed payment following the second fire, in light of the second estimate, in bad faith. The court explained that delay alone was not evidence of bad faith: “In order for an insured to recover for bad faith stemming from delay, an insured must demonstrate that ‘the delay is attributable to the defendant, that the defendant had no reasonable basis for the actions it undertook which resulted in the delay, and that the defendant knew or recklessly disregarded the fact that it had no reasonable basis to deny payment.’”¹⁰⁸⁸ The court found that much of the delay in responding to the August 2009 estimate was caused by plaintiffs themselves, who provided the estimate to State Farm as an attachment to the complaint, which was not served until March 2010. Further, any delay attributable to State Farm was not in bad faith: “[T]he Court finds that any delay attributable to State Farm is supported by a reasonable basis as it was actively engaged in investigation, valuations, and negotiations.”¹⁰⁸⁹

(9) *Mitch’s Auto Serv. Ctr., Inc. v. State Auto. Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 123199 (E.D. Pa. Oct. 24, 2011) (Robreno, J.)

Plaintiffs had a commercial policy with State Auto to cover plaintiff automotive repair shop. Following a fire at the shop, plaintiffs submitted various claims; State Auto provided coverage for most of the claims, but denied coverage for nearly \$65,000. Plaintiffs then filed this breach of contract and bad faith suit. State Auto moved for summary judgment. Judge Robreno of the Eastern District granted the motion as to the bad faith claim, as also discussed in §§5:05(a) and 10:07(b).

Plaintiffs claimed that State Auto delayed several payments in bad faith. The court disagreed for several reasons. First, it appeared that one payment had been processed two months before it was actually tendered. Rather than find this evidence of bad faith, the court noted that plaintiffs had filed their proof of loss approximately one month before the check was tendered; the policy provided that payments should be made within a month of a proof of loss, and this policy provision had been complied with. Plaintiffs failed to show that this was unreasonable. Second, plaintiffs contended that State Auto had delayed several other payments. The court rejected that argument because plaintiffs did not specifically point to particular payments and because plaintiffs did not show that they “were entitled to such money when requested.”¹⁰⁹⁰

Additionally, the court found that even if it assumed there had been a delay, the courts had concluded that there was no bright line test to measure whether such a delay would be found to be in bad faith. The court pointed to the fact that the Eastern District had even found that a 42 month delay was not in bad faith.¹⁰⁹¹ “Therefore, [w]ithout more evidence from Plaintiffs, no reasonably [sic] jury could conclude by clear and convincing evidence, that a delay of at worst two months was unreasonable.”¹⁰⁹²

Finally, the court concluded that even assuming that any delay was unreasonable, plaintiffs had still failed their burden of proving that the delay was prompted by some ill motive: “[T]here is no record evidence to indicate what this delay was for and, therefore, no evidence as to why Defendant did delay submission of payments to Plaintiffs. Thus, there is no evidence this delay was knowing or reckless.”¹⁰⁹³

(10) *El Bor Corp. v. Fireman’s Fund Ins. Co.*, 787 F. Supp. 2d 341 (E.D. Pa. 2011) (Robreno, J.)

In this case discussed in greater detail in §10:05, Judge Robreno of the Eastern District granted the insurer’s motion for summary judgment as to the bad faith claim. The plaintiff insured alleged that there was a delay in handling the claim attributable to the insurer, including a 7-month delay after receipt of an expert report until the claim was denied. The court held that the mere existence of the delay was not enough from which to draw a conclusion of bad faith:

¹⁰⁸⁸. *Seto v. State Farm Ins. Co.*, 2012 U.S. Dist. LEXIS 3306, at *11 (W.D. Pa. Jan. 11, 2012) (quoting *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360, 370 (E.D. Pa. 2011)).

¹⁰⁸⁹. *Seto v. State Farm Ins. Co.*, 2012 U.S. Dist. LEXIS 3306, at *12-13 (W.D. Pa. Jan. 11, 2012).

¹⁰⁹⁰. *Mitch’s Auto Service Center, Inc. v. State Auto. Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 123199, at *27 (E.D. Pa. Oct. 24, 2011).

¹⁰⁹¹. *Mitch’s Auto Service Center, Inc. v. State Auto. Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 123199, at *27 (E.D. Pa. Oct. 24, 2011) (citing *Thomer v. Allstate Ins. Co.*, 2011 U.S. Dist. LEXIS 49511 (E.D. Pa. May 9, 2011)).

¹⁰⁹². *Mitch’s Auto Service Center, Inc. v. State Auto. Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 123199, at *28 (E.D. Pa. Oct. 24, 2011).

¹⁰⁹³. *Mitch’s Auto Service Center, Inc. v. State Auto. Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 123199, at *28 (E.D. Pa. Oct. 24, 2011).

[A]lthough Defendant was responsible for some of the delay in adjusting Plaintiff's claim, . . . there is no evidence this delay was knowing or reckless . . . [T]he seven month delay in processing Plaintiff's claim after receipt of the expert report is "not indicative of bad faith."¹⁰⁹⁴

(11) *Morrisville Pharmacy, Inc. v. Hartford Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 116607 (E.D. Pa. Oct. 29, 2010) (Rufe, J.)

The owner of the plaintiff pharmacy apparently overdosed on OxyContin, in a suicide attempt, while at the pharmacy on August 1, 2008, after which she was hospitalized until late September 2008. After staffing the store with temporary employees under the supervision of the owner's sister on August 4, 2008, the pharmacy was closed. During September, the sister removed most of the pharmacy's products and had them stored.

In a mid-September 2008 letter, the owner of the pharmacy's building asked the owner of the pharmacy to surrender the premises and remove any other property in the building. Two weeks later, having received no response, the lessor changed the locks on the building. Later on that same day, the pharmacy's owner attempted to get into the building to remove additional property. When she could not, she notified police; the police report did not indicate any complaints of theft or loss.

In early November 2008, the attorney for the landlord sent a letter to the pharmacy owner to request that she indicate how she planned to take control of the controlled substances left in the building. The pharmacy owner wrote back, indicating that because she had surrendered her license, she could not take control of the remaining pharmaceuticals and asking for a time when she could remove her personal property. On December 12, 2008, the pharmacy filed a claim with defendant Hartford under the all-risks policy alleging that it had experienced a theft loss. The pharmacy owner later indicated that the claim was that the landlord had prevented access to the property in the building, including files and other documents, which interfered with her ability to sell the pharmacy files, not that the property had been stolen.

Despite at least two reminders by Hartford, the pharmacy owner did not file a proof of loss until mid-February 2009. The investigation was continuing when the pharmacy filed suit alleging breach of contract and bad faith in May 2009. Hartford filed a motion for summary judgment, which Judge Rufe of the Eastern District granted.

The plaintiff pharmacy contended that Hartford's alleged five-month delay in investigating the claim was in bad faith. The court disagreed, holding that the alleged delay (two months of which were prior to the time the pharmacy submitted its proof of loss) did not support a claim of bad faith:

[T]he Court notes that Defendant did not deny benefits under the policy prior to the filing of this lawsuit, although it now takes the position that no covered loss occurred. Plaintiffs [sic] claim is based on a *delay* in investigating the claim, and not on an adverse decision rendered by Defendant. Plaintiff cites to no case law in which a court permits a claim for bad faith based upon an insurer taking five months to investigate a claim, only three of which followed the claimant's submission of proof-of-loss statements. During Ms. Markowitz's [pharmacy owner] initial statement to the insurance company, she stated that she could not be sure if anything had been taken from the pharmacy. Despite two telephone reminders from Defendant, on January 14th and 30th of 2009, Plaintiff did not file proof of loss until February 18, 2009.¹⁰⁹⁵

The court cited approvingly "cases in which Courts have found that spans of thirteen to fifteen months to process claims are reasonable and not indicative of bad faith. . . . The Court finds the cited cases persuasive."¹⁰⁹⁶

(12) *Addlespurger v. Motorists Mut. Ins. Co.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 137 (Allegheny Apr. 16, 2010) (James, J.)

Plaintiffs suffered damage at their condominium following a fire on March 8, 2002 and made a claim under their homeowner's policy with Motorists Mutual. The insurer's adjuster visited the condominium three days later and noted that the repairs should not be particularly extensive or difficult and that repairs should be able to be completed in approximately one month. The insurer offered to arrange for plaintiffs to stay at a temporary residence near their condo, but they refused and instead stayed at a hotel, which was far more expensive than the temporary residence and had no kitchen. The hotel charges were only partially reimbursable under the policy, which plaintiffs disputed. Plaintiffs also disputed the amount that the repairs would cost. In spite of the disagreements the insurer had advanced policy proceeds of about \$18,000 for living expenses and contents coverage by the end of June 2002. The dispute over the costs of repair continued for months, and was resolved by the end of September 2002. The dispute over contents coverage likewise dragged on and the insurer eventually retained the services of a third party contents valuation company. By the conclusion of that process, the insurer had paid out the policy limits for contents coverage. The

¹⁰⁹⁴ *El Bor Corp. v. Fireman's Fund Ins. Co.*, 787 F. Supp. 2d 341, 349 (E.D. Pa. 2011).

¹⁰⁹⁵ *Morrisville Pharmacy, Inc. v. Hartford Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 116607, at *14-15 (E.D. Pa. Oct. 29, 2010) (footnotes omitted).

¹⁰⁹⁶ *Morrisville Pharmacy, Inc. v. Hartford Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 116607, at *15 n.40 (E.D. Pa. Oct. 29, 2010) (citing *Williams v. Hartford Cas. Ins. Co.*, 83 F. Supp. 2d 567, 572 (E.D. Pa. 2000), *aff'd without opinion*, 2001 U.S. App. LEXIS 8687 (3d Cir. Apr. 4, 2001); *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 592 (E.D. Pa. 1999); and *Quaciari v. Allstate Ins. Co.*, 998 F. Supp. 578, 582-83 (E.D. Pa. 1998)).

insurer paid further additional living expenses, and by February 2003, all of the contractual disputes between the parties had been resolved.

Plaintiffs filed suit alleging that the insurer's delay (11 months) in paying out the policy proceeds constituted bad faith. A non-jury trial took place before Judge James in Allegheny County. Judgment was entered in favor of Motorists Mutual.

The court found that the evidence did not establish bad faith on the insurer's part. The court concluded, "The Plaintiffs have failed to show with clear and convincing evidence that the Defendant acted unreasonably in delaying payment with ill will or self-interest. The evidence establishes that the Defendant acted reasonably in responding promptly to communication and did not act in bad faith."¹⁰⁹⁷

(13) 3039 B Street Assocs., Inc. v. Lexington Ins. Co., 2010 U.S. Dist. LEXIS 89576 (E.D. Pa. Aug. 27, 2010) (Robreno, J.), aff'd, 444 F. App'x 610 (3d Cir. 2011) (Barry, J.)

This case is also discussed in §10:07(b). Plaintiffs submitted a claim that their commercial real estate and personal property were damaged on or about January 6, 2008, when a frozen sprinkler pipe allegedly burst, flooding the building. Lexington's investigation was delayed as it looked into the question of whether plaintiffs had heated the building. Lexington provided an advance payment in April 2008 while its investigation continued. In May 2008, Lexington submitted its estimate of loss. Lexington continued to request information from plaintiffs through the summer of 2008. In December 2008, Lexington rejected plaintiffs' final proof of loss, because plaintiffs, having originally claimed flooding as the cause of loss, then claimed vandalism as a contributing factor. Plaintiffs filed suit in February 2009, alleging breach of contract and bad faith. After litigation commenced, Lexington paid the undisputed flooding damages, and, pursuant to the policy's appraisal provision, the parties were able to resolve the remaining damages claims. Lexington thereafter filed a summary judgment motion on the remaining bad faith claims, which was granted by Judge Robreno of the Eastern District.

Noting that Lexington had paid all of the undisputed claims, the court observed that the bad faith count related only to the long investigation of the disputed claims. The court concluded that Lexington timely inspected the property, met with plaintiffs' adjuster and worked up an estimate:

Defendant retained an initial adjuster, who conducted an initial inspection on January 11, 2008, only five days after the loss occurred. Defendant's adjuster and Plaintiffs' adjuster met to "detail the damages," eight days later. When the initial adjuster assigned to the claim was replaced, Plaintiffs were properly notified. The new adjuster hired an expert who provided an estimate of the loss by April 30, 2010, eighty days after the day of the loss.¹⁰⁹⁸

The court also concluded that plaintiffs failed to provide Lexington with the information it believed necessary to its investigation:

Here, Plaintiffs did not file a proof of loss within the thirty days following the submission of their claim on January 6, 2008. . . . In fact, Plaintiffs did not file a sworn proof of loss until April 3, 2008. . . . In response, on May 13, 2008, Cheney, Defendant's new adjuster, submitted the official estimate of the loss, just over one month from the date Plaintiffs submitted a proof of loss and four months after Plaintiffs submitted their claim. . . .

Further, despite attempts by Defendant to obtain necessary documentation confirming that the premises were heated, Plaintiffs either failed to provide the requisite information or provided deficient and/or conflicting documentation.¹⁰⁹⁹

The court concluded that the plaintiffs had not demonstrated by clear and convincing evidence "that Defendant [Lexington] acted without a reasonable basis in continuing to investigate whether the premises were heated, which may have caused or contributed to the ruptured water pipe."¹¹⁰⁰

The Third Circuit, in an opinion authored by Judge Barry, affirmed the grant of summary judgment. Noting that plaintiffs contended that Lexington acted in bad faith by delaying payment of the claim, the court noted that the claim "was highly questionable" ¹¹⁰¹ Therefore, "[i]n light of these substantial problems with B Street's claim, its position – that Lexington should have simply taken [B Street's employee] at his word and immediately paid the claim – cannot prevail as a matter of law. B Street's claim was highly questionable, and 'Pennsylvania law provides that it is not bad faith to conduct a thorough investigation into a questionable claim.'" ¹¹⁰²

¹⁰⁹⁷. *Addlespurger v. Motorists Mut. Ins. Co.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 137, at *6 (Allegheny Apr. 16, 2010).

¹⁰⁹⁸. *3039 B Street Assocs., Inc. v. Lexington Ins. Co.*, 2010 U.S. Dist. LEXIS 89576, at *28 (E.D. Pa. Aug. 27, 2010).

¹⁰⁹⁹. *3039 B Street Assocs., Inc. v. Lexington Ins. Co.*, 2010 U.S. Dist. LEXIS 89576, at *28-29 (E.D. Pa. Aug. 27, 2010) (citations to record omitted).

¹¹⁰⁰. *3039 B Street Assocs., Inc. v. Lexington Ins. Co.*, 2010 U.S. Dist. LEXIS 89576, at *30 (E.D. Pa. Aug. 27, 2010).

¹¹⁰¹. *3039 B Street Assocs., Inc. v. Lexington Ins. Co.*, 444 F. App'x 610, 612 (3d Cir. 2011).

¹¹⁰². *3039 B Street Assocs., Inc. v. Lexington Ins. Co.*, 444 F. App'x 610, 612 (3d Cir. 2011).

(14) *Celebrations Caterers, Inc. v. Netherlands Ins. Co.*, 2008 U.S. Dist. LEXIS 7477 (E.D. Pa. Feb. 1, 2008) (Tucker, J.)

In this bad faith case arising under a commercial property policy, the insured sued its insurer for bad faith in connection with a commercial property policy. The insurer moved for summary judgment. The insured responded to the summary judgment with unsupported allegations of the “untimely payment of monies.” Judge Tucker of the Eastern District held that such vague allegations were insufficient to defeat summary judgment and found in favor of the insurer, stating, “Bensalem’s bald allegations of untimely payments cannot sustain its claim of bad faith. As there is no evidence before the Court that Netherlands acted unreasonably or with frivolous motivation, Netherlands’s motion for summary judgment will be granted.”¹¹⁰³

(15) *Alberici v. Safeguard Mut. Ins. Co.*, 664 A.2d 110 (Pa. Super. 1995) (Beck, J.)

A theater was seriously damaged by fire in 1977. The insurer denied coverage to Alberici and his wife for several reasons, including the fact that Alberici came under suspicion for arson. He was ultimately convicted of mail fraud in connection with fire loss claims submitted to his insurers. There were also questions whether his wife had an insurable interest in the property. The suit was filed in Delaware County where summary judgment was granted. This was appealed to the Superior Court, which remanded the case in part. On remand, a trial was held, which was appealed again. A final decision was made by the Superior Court in 1995, holding that the wife did in fact have an insurable interest in the property. Despite the delay of nearly 18 years, the Superior Court found no bad faith as to the wife’s claim, noting, “although this litigation has been protracted, it is clear that the issues were complex and that the denial of liability by the insurers was not done in bad faith.”¹¹⁰⁴

(16) *Portside Investors, L.P. v. N. Ins. Co. of N.Y.*, 2011 Phila. Ct. Com. Pl. LEXIS 19 (Philadelphia Jan. 5, 2011) (Bernstein, J.), *aff’d*, 41 A.3d 1 (Pa. Super. 2011) (Stevens, J.)

This case is discussed in greater detail in §10:07(b) and 10:19. In October 2000, Portside filed a claim with its property insurance carrier, Northern, after its pier collapsed, seeking \$15 million in coverage. In February 2001, Northern indicated that certain aspects of the property claim would be covered, but because the pier was not to be rebuilt, it would pay only the actual cash value of the pier. Based on its expert’s conclusions, in June 2001, Northern determined that although the pier was worthless just prior to collapse, it would pay \$200,000 to settle that portion of the claim. In August 2001, Portside rejected that settlement offer and demanded appraisal. Shortly after that demand, the two principals in the pier’s lessee were indicted for involuntary manslaughter in the deaths resulting from the pier collapse. As a result of this new development, in September 2001, Northern sought an examination under oath from the two principals prior to appointing an appraiser. The appraisal was not held.

Portside filed suit in December 2002, seeking recovery for breach of contract and statutory bad faith. Sitting non-jury, Judge Bernstein of the Philadelphia Court of Common Pleas found that Northern had not acted in bad faith. The court found no bad faith delay with respect to the insurer’s request to postpone appraisal, noting, “Portside itself failed to appoint an appraiser or seek any court assistance to compel Northern to appoint an appraiser. When Portside did nothing to compel the appointment of an appraiser, it was reasonable for Northern to conclude that Portside had abandoned its request, or at a minimum acquiesced in deferring the appraisal process until the examination under oath or at least the criminal case against its principal had been concluded.”¹¹⁰⁵

Portside appealed the judgment in Northern’s favor on the bad faith claim, but did not raise this particular argument on appeal. The Superior Court affirmed, in an opinion by Judge Stevens.

(17) *Somerset Indus., Inc. v. Lexington Ins. Co.*, 639 F. Supp. 2d 532 (E.D. Pa. 2009) (Goldberg, J.)

In this case also discussed in §10:07(b), Somerset claimed that Lexington acted in bad faith in its investigation of the water damage at its property which occurred after a storm in July 2006. Lexington inspected the facility, hired an accounting firm to assist in assessing damages, and sent Somerset a reservation of rights letter. Lexington’s accounting firm had sought information relevant to the investigation and had to wait up to several months before it received the pertinent information. In one instance, Somerset failed to respond to a request, despite several reminders. Lexington denied Somerset’s request for advance payment in January 2007. Lexington continued to ask for additional information and continued its investigation until Somerset filed suit in April 2007, alleging bad faith and breach of contract.

Lexington filed a motion for summary judgment as to the coverage claim and the bad faith claim. Judge Goldberg of the Eastern District denied Lexington’s motion for summary judgment on the coverage issue, but granted Lexington’s motion on the bad faith claim. Although noting that “a delay in making payment on a claim is a relevant factor in determining whether bad faith has occurred,”¹¹⁰⁶ the court further observed that bad faith claims did not

¹¹⁰³. *Celebrations Caterers, Inc. v. Netherlands Ins. Co.*, 2008 U.S. Dist. LEXIS 7477, at *12-13 (E.D. Pa. Feb. 1, 2008).

¹¹⁰⁴. *Alberici v. Safeguard Mutual Mut. Ins. Co.*, 664 A.2d 110, 115 (Pa. Super. 1995).

¹¹⁰⁵. *Portside Investors, L.P. v. N. Ins. Co. of N.Y.*, 2011 Phila. Ct. Com. Pl. LEXIS 19, at *19-20 (Phila. Jan. 13, 2011).

¹¹⁰⁶. *Somerset Indus., Inc. v. Lexington Ins. Co.*, 639 F. Supp. 2d 532, 543 (E.D. Pa. 2009) (citing *Cher-D, Inc. v. Great Am. Alliance Ins. Co.*, 2009 U.S. Dist. LEXIS 30206 (E.D. Pa. Apr. 7, 2009)).

follow from any investigatory delay, and “[i]t is not bad faith for an insurer to take a stand with a reasonable basis or to aggressively investigate and protect its interests.”¹¹⁰⁷ The court found Lexington’s claims handling to have been reasonable:

Given the extent of the alleged loss, which required a thorough investigation by Lexington, and Somerset’s delayed response to the requests for information, this Court finds that Somerset has not provided clear and convincing evidence that Lexington did not have a reasonable basis for its handling of the investigation.¹¹⁰⁸

As for the company’s decision to not make an advance payment, the court held, “[C]onsidering Lexington’s delayed and unanswered requests for information, Lexington’s delay in denying the advance payment was not without a reasonable basis.”¹¹⁰⁹

§10:13(c) — Cases (Life/Health/Disability Claims)

(1) *Sicherman v. Nationwide Life Ins. Co.*, 2012 U.S. Dist. LEXIS 47630 (E.D. Pa. Apr. 4, 2012) (McLaughlin, J.)

The details of this case are discussed in more detail in §10:07(c). After plaintiff’s decedent died in December 2010, plaintiff sought benefits under his life insurance policy with Nationwide. Nationwide refused to pay benefits on the grounds that the policy had lapsed. In June 2011, plaintiff, through counsel, requested that the denial be reversed and benefits issued. Nationwide paid out the benefits in September 2011. Plaintiff filed suit alleging bad faith. Nationwide filed a motion to dismiss. Judge McLaughlin of the Eastern District granted the motion. The court found that plaintiff’s allegations failed to state a claim:

[H]er allegation that the defendant “refused to effectuate a prompt and fair settlement of [her] claim” is belied by the evidence that upon the plaintiff’s challenge to the defendant’s initial rationale for claim denial, the defendant promptly paid the policy proceeds in full with interest.... Such conduct does not constitute bad faith.¹¹¹⁰

(2) *Pittas v. Hartford Life Ins. Co.*, 513 F. Supp. 2d 493 (Pa. 2007) (Ambrose, J.)

In this case discussed in §10:03(d), the plaintiff alleged that the insurer unreasonably delayed the handling of a hospital benefit claim. As to the allegations of undue delay, the court held that there was no bad faith. According to the court, “a delay of seven months after receiving notice of the claim, without more, ...is not a clear and convincing evidence of bad faith.”¹¹¹¹ The court ruled that the insurer appropriately considered a toxicology report as part of the proof of loss, and that it had timely requested such a report. The claims decision was issued within sixty days of the report, pursuant to the policy terms, so the initial denial was made in a timely manner.

(3) *Ressler v. Enter. Rent-A-Car Co.*, 2007 U.S. Dist. LEXIS 50967 (W.D. Pa. July 13, 2007) (Ambrose, J.)

Plaintiffs’ decedents purchased optional personal accident insurance (PAI) when renting a car from Enterprise. The PAI was underwritten by Empire Fire & Marine Insurance Company. The decedents were involved in a fatal automobile accident. In November 2005, a representative of the decedent’s estate presented a claim for life insurance benefits. Approximately five months later, a third party administrator, Cambridge, issued checks totaling \$110,000 in payment of benefits. Thereafter, suit was filed alleging bad faith stemming from the delay in payment.

Judge Ambrose of the Western District granted defendants’ summary judgment as to bad faith. Citing *Wiener v. Banner Life*, the court stated, “to recover for a bad faith delay, insured must show that insurer had no reasonable basis for delay of coverage and defendant delayed coverage with knowledge or reckless disregard of unreasonable basis.”¹¹¹² The court held that there was no unreasonable delay in the claims handling, which resulted in payment of full benefits within seven months of the accident, and within three months of filing the formal claim forms. According to the court:

To the extent these relatively short time periods even qualify as a “delay” in processing the claim, such delay was far from unreasonable. Indeed, courts within this circuit have held that similar and, in some cases, far longer time periods did not support a claim for bad faith delay.... If anything, defendant here acted more swiftly and more reasonably than the insurers in the above-cited cases.¹¹¹³

¹¹⁰⁷. *Somerset Indus., Inc. v. Lexington Ins. Co.*, 639 F. Supp. 2d 532, 543 (E.D. Pa. 2009).

¹¹⁰⁸. *Somerset Indus., Inc. v. Lexington Ins. Co.*, 639 F. Supp. 2d 532, 544 (E.D. Pa. 2009).

¹¹⁰⁹. *Somerset Indus., Inc. v. Lexington Ins. Co.*, 639 F. Supp. 2d 532, 544 n.12 (E.D. Pa. 2009).

¹¹¹⁰. *Sicherman v. Nationwide Life Ins. Co.*, 2012 U.S. Dist. LEXIS 47630, at *14 (E.D. Pa. Apr. 4, 2012).

¹¹¹¹. *Pittas v. Hartford Life Ins. Co.*, 513 F. Supp. 2d 493, 502 (Pa. 2007).

¹¹¹². *Ressler v. Enter. Rent-A-Car Co.*, 2007 U.S. Dist. LEXIS 50967, at *21 (W.D. Pa. July 13, 2007) (citing *Wiener v. Banner Life Ins. Co.*, 2003 U.S. Dist. LEXIS 4957, at *20).

¹¹¹³. *Ressler v. Enter. Rent-A-Car Co.*, 2007 U.S. Dist. LEXIS 50967, at *23-24 (W.D. Pa. July 13, 2007).

§10:14 Misrepresentation/Fraud by Insured

§10:15 — Cases

(1) *Fugah v. State Farm Fire & Cas. Co.*, 2016 U.S. Dist. LEXIS 47009 (E.D. Pa. Apr. 7, 2016) (Dalzell, J.) (alleged misrepresentation by insured in homeowner's claim)

Plaintiff Fugah brought this breach of contract action when his claim with his homeowner's carrier, defendant State Farm, was denied. The details of the claim were not outlined in the opinion. After arbitration, plaintiff filed a motion for leave to amend to add a bad faith claim. Judge Dalzell of the Eastern District denied the motion.

Plaintiff claimed that State Farm's investigation had been inadequate, and detailed several items that he had provided during the course of the investigation that supported his claim. State Farm explained that there were a number of items that undercut the claim, including that the water bills showed no usage, plaintiff could not substantiate his claim that he had spent money renovating the property, and it had developed evidence showing that plaintiff did not live at the property. The court found that State Farm had sufficient reason to doubt the claim based on its investigation, and thus had not acted in bad faith:

An insurer does not act in bad faith when it conducts a thorough investigation into a questionable claim, and State Farm both conducted a thorough investigation and had reason to believe that Fugah's claims were dubious. *See, e.g., Babayan*, 430 F.3d at 138. While Fugah disagrees with the conclusions State Farm reached as a result of its investigation, he does not contest that State Farm investigated the facts and circumstances surrounding both claims. Further, State Farm had a reasonable basis for denying Fugah's claims as it had reason to believe, based on its investigation, that Fugah (1) had purchased the property under suspicious circumstances, (2) might not have spent the money he claimed he spent to purchase or improve the house, and (3) was not living at the property at the time of the fire loss. Those concerns alone – even if they turned out to be mistaken – constitute a reasonable basis for the denial of benefits under the policy, and such a reasonable mistake does not constitute bad faith on State Farm's part.¹¹¹⁴

(2) *Jones v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 125601 (W.D. Pa. Sept. 9, 2014) (Motz, J.) (material misrepresentations in homeowner's application)

Plaintiff applied for a homeowner's policy through an agent. Plaintiff claims she told the agent that her home had previously been damaged in a fire and that it was currently unoccupied as renovations were being done at the time that she applied for the insurance, which was ultimately placed with defendant State Farm. The application did not reflect these statements. Shortly thereafter, her home was destroyed in a fire, and plaintiff sought coverage from State Farm, which denied coverage and rescinded the policy due to misrepresentations in the application. Plaintiff filed this bad faith action. Defendant State Farm filed a motion to dismiss the bad faith claim. Judge Motz of the Western District granted the motion.

The court explained that despite plaintiff's allegations that she told the agent of the facts above, State Farm acted reasonably in denying the claim because the application did not contain those facts. The court stated:

As State Farm correctly argues, even accepting as true that [plaintiff] told a [broker's] employee she had previously had a fire and that the dwelling was not her primary residence, and accepting that State Farm knew or should have learned of those statements, State Farm nonetheless was confronted with conflicting information. [Plaintiff] intentionally or unintentionally provided untrue information on the rate quote and insurance application forms on which State Farm relied.

Those material misrepresentations provide a reasonable basis under §8371 for State Farm's denial of [plaintiff's'] claim and, therefore, bars liability under §8371."¹¹¹⁵

(3) *Meczkowski v. State Farm Ins. Cos.*, 3 Pa. D. & C.5th 308 (Monroe 2006) (Zulick, J.) (alleged misrepresentation to auto insurer of insured's residency)

In this claim arising out of a car theft, the insured sued State Farm alleging breach of contract and bad faith. In defense of the claim, State Farm asserted misrepresentation by the insured on the issue of his residency, and breach of the duty to cooperate based on the insured's refusal before suit to produce requested documents pertaining to residency.

In discovery, State Farm sought documents reflecting the insured's residency at the time he purchased the policy and at the time of the claim. In permitting discovery of these documents by the insurer, Judge Zulick of Monroe County observed as follows:

¹¹¹⁴. *Fugah v. State Farm Fire & Cas. Co.*, 2016 U.S. Dist. LEXIS 47009, at *13-14 (E.D. Pa. Apr. 7, 2016) (citation to record omitted).

¹¹¹⁵. *Jones v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 125601, at *9-10 (W.D. Pa. Sept. 9, 2014).

Other courts which have considered the issue . . . have given leeway to an insurance company to investigate fraud in the procurement of the policy before paying a claim. “The (Pennsylvania Bad Faith) law is meant to dissuade an insurance company from using its economic power to coerce and mislead insureds; it does not purport to interfere with an insurance company’s right to investigate and litigate the legitimate issue of misrepresentation in an application.”¹¹¹⁶

(4) *Hasan v. Allstate Ins. Co., Inc.*, 2013 U.S. Dist. LEXIS 58981 (E.D. Pa. Apr. 24, 2013) (Sitarski, M.J.)

Plaintiffs owned a building containing three apartments. They lived on the first floor, and rented the second and third floors to tenants. In 2010, Plaintiffs filed landlord-tenant actions against both tenants when they withheld rent due to uninhabitable conditions. In November 2010, the building was damaged by fire. Plaintiffs filed a claim with their homeowner’s insurer, Allstate. After an investigation, Allstate concluded that the fire was intentionally set. Following EUOs, in which plaintiffs were represented by counsel, Allstate denied the claim due to misrepresentation of facts relating to the claim. Plaintiffs brought this breach of contract and bad faith action, and Allstate filed a counterclaim for insurance fraud. Following discovery, Allstate filed a motion for summary judgment. Magistrate Judge Sitarski of the Eastern District granted the motion as to the bad faith claim.

Plaintiffs maintained that Allstate purportedly acted in bad faith in investigating the claim in the following ways: it “created” misstatements of fact where plaintiffs were not fluent in English; it relied on “self-serving statements” of people plaintiffs suspected had set the fire; it found significant plaintiff Sood’s residency status at the home; and it failed to articulate the reasons for the denial. These arguments were rejected by the court.

The court explained that an insurer has a duty to investigate claims “fairly and objectively,” but an investigation is not required to be perfect, and it must simply be “sufficiently thorough.”¹¹¹⁷ The court also noted that “[m]ere negligence or bad judgment is not bad faith.”¹¹¹⁸ The court found that the facts presented “raised sufficient questions to support its decision to deny the claim.”¹¹¹⁹ The court further stated:

Specifically, when a fire is of suspicious origin, questions of who resides in a property, for whom are losses claimed, where insureds stayed on the night of the fire, when an insured last left a property on the day of the fire and when he returned, how a fire is discovered, whether neighbors and tenants might have a motive to start a fire, and an insured’s actions increasing the insured against hazard, are all reasonable issues for the insurer to investigate before paying a fire loss claim. Although Plaintiffs have come forward with sufficient evidence to create a genuine issue of material fact on whether Allstate breached its contract duty to pay the fire loss claim, they have not satisfied their heightened summary judgment burden of coming forward with clear and convincing evidence that Allstate lacked a reasonable basis for denying the claim. Given the record of myriad inconsistencies disclosed by Allstate’s investigation — which may be the product of a language barrier or an attempt to misrepresent facts — the Court cannot say as a matter of law that Allstate acted without a reasonable basis when it denied benefits or that it knew or recklessly disregarded its lack of reasonable basis. Accordingly, Allstate’s motion for summary judgment on Plaintiffs’ breach of contract claim is granted.¹¹²⁰

(5) *Verdetto v. State Farm Fire & Cas. Co.*, 510 F. App’x 209 (3d Cir. 2013) (Cowen, J.)

In this case discussed in §§10:03(b) and 10:07(b), the Third Circuit held that State Farm properly voided the policy for the plaintiffs’ failure to cooperate under the policy terms because “[t]he record is abundantly clear that the Verdetto repeatedly failed to provide State Farm with financial and telephone records that they were required to turn over.”¹¹²¹ The court further noted that “a thorough investigation into a questionable claim” is not in bad faith, and there were a number of “red flags” that surfaced during their investigation.¹¹²²

(6) *Lehman v. Victoria Fire & Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 64212 (W.D. Pa. June 16, 2011) (Standish, J.)

Plaintiff worked as an independent contractor for an auto body shop, driving a tow truck. The pick up truck was owned by the auto body shop, but leased by plaintiff, and plaintiff had attached a vehicle bed to the truck and had outfitted it with various other equipment. Plaintiff obtained insurance through Victoria. The truck was involved in an accident, the details of which were disputed. Ultimately, Victoria denied coverage on the grounds of misrepresentation and fraud during the investigation. Plaintiff filed this suit for breach of contract and bad faith. Defendant Victoria filed a motion for summary judgment on the bad faith claim. Judge Standish of the Western District granted the motion.

¹¹¹⁶ *Meczowski v. State Farm Ins. Cos.*, 3 Pa. D. & C.5th 308, 2007 Pa. Dist. & Cnty. Dec. LEXIS 558, at *5 (Monroe 2006) (citing *Kauffman v. Aetna Cas. & Sur. Co.*, 794 F. Supp. 137, 141. (E.D. Pa. 1992) and *Jung v. Nationwide Mut. Fire Ins. Co.*, 949 F. Supp. 353, 361 (E.D. Pa. 1997)).

¹¹¹⁷ *Hasan v. Allstate Ins. Co., Inc.*, 2013 U.S. Dist. LEXIS 58981, at *44-45 (E.D. Pa. Apr. 24, 2013) (citations omitted).

¹¹¹⁸ *Hasan v. Allstate Ins. Co., Inc.*, 2013 U.S. Dist. LEXIS 58981, at *45 (E.D. Pa. Apr. 24, 2013) (citation omitted).

¹¹¹⁹ *Hasan v. Allstate Ins. Co., Inc.*, 2013 U.S. Dist. LEXIS 58981, at *45 (E.D. Pa. Apr. 24, 2013).

¹¹²⁰ *Hasan v. Allstate Ins. Co., Inc.*, 2013 U.S. Dist. LEXIS 58981, at *45-46 (E.D. Pa. Apr. 24, 2013).

¹¹²¹ *Verdetto v. State Farm Fire & Cas. Co.*, 510 F. App’x 209, 211-12 (3d Cir. 2013).

¹¹²² *Verdetto v. State Farm Fire & Cas. Co.*, 510 F. App’x 209, 211 (3d Cir. 2013).

The court found that the inconsistencies in plaintiff Lehman's versions of the events was sufficient to provide a reasonable basis for Victoria to deny coverage: "Several inconsistencies in his reports about the incident support Victoria's decision to deny coverage pursuant to the concealment provision of the Policy" ¹¹²³ In particular, the court explained that Lehman's initial version of events, reported to the police department, differed in relevant ways from the versions reported later to Victoria and to the subsequent police investigation. Lehman originally notified the police that at about 1:00 a.m. at the entrance to a particular bar, he was knocked out during a fight with other patrons who were commenting on his clothes. When he came to, Lehman told the police officer, his truck was missing; he found it later, after several more drinks with friends at his motorcycle club, a friend drove him home. In later interviews with a police detective and Victoria's representatives, Lehman informed them that he went to the bar at a different time, and was in a fight at the entrance to the parking lot that started after another truck blocked his entrance to the lot when he was trying to turn in. He claimed that when he came to, a friend was there who took him to their motorcycle club for more drinks, and that he did not know whether his truck was still in the parking lot when they left. The court noted that it was significant that after the initial police interview, and before the later police interviews or insurance investigation, Lehman went to the bar, inquired about what areas the surveillance cameras covered, and found out that the entrance to the bar was covered but the entrance to the parking lot was not. The court concluded:

[T]he inconsistencies between what Plaintiff told Officer Petak within a few hours of the incident and his reports to Detective Synkowski [and Victoria's representatives] could reasonably be considered material. . . . The most important facts—the location where the confrontation began (parking lot or entrance to the bar), what Mr. Lehman did upon regaining consciousness, and when he discovered the vehicle was not at Spencer's [bar] are all germane and important to Victoria's decision-making process and, . . . were the basis of Defendant's decision to deny coverage. We conclude that Mr. Lehman has failed to establish by clear and convincing evidence that Victoria acted in bad faith by doing so. ¹¹²⁴

(7) *Hered LLC v. Seneca Ins. Co., Inc.*, Docket No. 3:CV-06-0255 (M.D. Pa. Feb. 13, 2009) (Judge Vanaskie), verdict upheld, 420 F. App'x 143 (3d Cir. Pa. 2011) (Fuentes, J.)

Plaintiff was in the process of developing a commercial building and sought commercial property insurance. In its application for insurance with Seneca, Plaintiff did not answer any questions regarding the sprinkler system, despite the insurer's indication that the application needed to be complete. After receiving the application, Seneca issued the policy. About a month prior to the subject fire loss, Seneca obtained an inspection report completed by plaintiff's liability insurer indicating that the sprinkler system was "dry" and scheduled for repair. Plaintiff's building suffered damages in the subsequent fire. Plaintiff originally submitted a list of expenses incurred in re-opening the building that totaled approximately \$190,000. Defendant Seneca made two advance payments to plaintiff, totaling over \$95,000 (approximately the estimate Seneca made of the value of the loss). Plaintiff subsequently submitted a claim of loss for over \$3.4 million. Seneca denied the claim and sought to rescind the policy, stating that it did not owe coverage because the plaintiff made misrepresentations regarding whether the sprinkler system in the building was functioning. Plaintiff sued, alleging breach of contract and bad faith. The insurer filed a counterclaim based in part on plaintiff's alleged misrepresentations sought a declaration that it did not owe coverage.

The parties filed cross motions for summary judgment, which were denied, for the most part, because the court ruled that factual issues existed. The matter proceeded to trial on the breach of contract and bad faith issues. The Special Verdict Questions form indicated that the jury found that plaintiff had made material misrepresentations in its insurance application and that Seneca had not waived its right to deny coverage on that basis. By answering those two breach of contract-related questions in this way, the form instructed the jury not to answer any further questions, including the question relating to bad faith. Judgment was entered in favor of Seneca on the contract and bad faith claims. ¹¹²⁵ The Third Circuit upheld the verdict.

(8) *Tangle v. State Farm Ins. Cos.*, 2010 U.S. Dist. LEXIS 89349 (W.D. Pa. Aug. 4, 2010) (Baxter, M.J.), adopted by, 2010 U.S. Dist. LEXIS 89345 (W.D. Pa. Aug. 30, 2010) (McLaughlin, J.), *aff'd on other grounds*, 444 F. App'x 592 (3d Cir. 2011) (Rendell, J.)

This case is also discussed in §10:13(b). After plaintiff's property was damaged in a fire, he filed a claim under his homeowner's policy with State Farm. The police and fire departments initiated an investigation of the fire, and State Farm began its own investigation. Following the recorded statements of plaintiff and his girlfriend, State Farm requested the prior two years of income tax records, the prior two months of phone records, and documentation of any liens on the property, which plaintiff never produced. State Farm also requested in writing several times that plaintiff submit to an examination under oath (EUO), but it took several months before State Farm was able to contact plaintiff,

¹¹²³ *Lehman v. Victoria Fire & Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 64212, at *31 (W.D. Pa. June 16, 2011).

¹¹²⁴ *Lehman v. Victoria Fire & Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 64212, at *39-40 (W.D. Pa. June 16, 2011).

¹¹²⁵ *Hered LLC v. Seneca Ins. Co.*, Docket No. 3:CV-06-0255 (M.D. Pa. July 23, 2009).

through his recently obtained counsel, to schedule it. Plaintiff's counsel rescheduled the EUO several times, and when it actually occurred, plaintiff failed to bring any of the requested documents.

Plaintiff filed this suit alleging breach of contract and bad faith. State Farm finished its investigation and issued a check to plaintiff in the amount of approximately \$46,000 to cover actual cash value of repairs and depreciated value of the damaged contents of the home. State Farm then filed a motion for summary judgment. Magistrate Judge Baxter of the Western District recommended that the motion be granted. Judge McLaughlin of the Western District later adopted the report and recommendation without substantive discussion.

The court found that State Farm had acted appropriately in investigating the fire, having found several "red flags" pointing to possible arson. In particular, State Farm noted the following: the police and fire departments were investigating possible arson; fire investigators noted a time delay ignition device and the presence of an accelerant; both plaintiff and his girlfriend had been at the home earlier in the day; plaintiff had the only set of keys and the doors were all locked when the fire department arrived at the fire; plaintiff owed back taxes and past due bills; and the detective's interview of plaintiff resulted in a number of inconsistencies. Magistrate Judge Baxter concluded that "State Farm had a reasonable justification for conducting an investigation of the fire and Plaintiff's possible involvement in causing the fire."¹¹²⁶

The Third Circuit, in an opinion by Judge Rendell, affirmed. The decision as to the bad faith count was not appealed.

(9) *Bonsu v. Jackson Nat'l Life Ins. Co.*, 2010 U.S. Dist. LEXIS 89 (M.D. Pa. Jan. 4, 2010) (Conner, J.)

Asamoah applied for life insurance and named Bonsu as beneficiary. A year later, the 35-year-old Asamoah died suddenly in Ghana of unknown causes (he had listed no medical conditions on the application), and was buried there shortly after his death. No postmortem examination or autopsy was done and no police report was completed before the burial. Over two weeks after the supposed death, Jackson National received a policy payment purportedly from Asamoah. Two months later, Bonsu contacted Jackson National to report the death.

Finding the circumstances surrounding the death suspicious, Jackson National hired a third party to more thoroughly investigate the claim, which included a trip to Ghana to search records and interview witnesses and interviews with Bonsu and his mother. The investigation raised numerous causes for concern, including: Asamoah's passport and travel papers were missing; the telephone number Asamoah listed on the application was Bonsu's workplace; Asamoah failed to include a reckless driving conviction and subsequent license suspension on his application; none of the villagers in the town where Asamoah died recalled Asamoah being there or being buried there; the address at which Asamoah was allegedly staying was a community hall, not a residence; the death certificate Bonsu provided could not be located in the appropriate files in Ghana; and the affidavit of another brother in Ghana purportedly issued by the Ghana High Court could not to be found in court files. As the investigation was pending, Jackson National was notified by the U.S. Department of Immigration and Customs Enforcement that Bonsu had been arrested for several types of fraud and that the name Kwaku Asamoah was fictitious and used by Bonsu as an alias. Jackson National thereafter denied the claim on the basis of fraud.

Bonsu sued Jackson National, claiming that he was entitled to benefits and bad faith damages under the life insurance policy. He was deported to Ghana while the case was pending. Jackson National filed a summary judgment motion seeking to void the policy due to fraud and seeking dismissal of Bonsu's bad faith claim because its denial of benefits was reasonable given the facts they unearthed during investigation. Judge Conner of the Middle District granted the insurer's motion. The court concluded as a matter of law that Asamoah made false representations in the insurance application, specifically when he made false statements that his driver's license was never suspended and that he had never been convicted of a misdemeanor offense. The court found that Asamoah must have known that these answers on the application were false, because the event had happened less than a year before the application, and that statement was material to obtaining the policy. The court voided the contract *ab initio* and concluded that "[w]ithout a valid policy, Bonsu's claims for breach of contract and insurance bad faith necessarily fail"¹¹²⁷

(10) *Grammenos v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 36155 (E.D. Pa. Apr. 28, 2009) (Rueter, M.J.)

Allstate insured a house recently purchased by the plaintiff. Allstate received notice of a water loss and promptly investigated. The plaintiff claimed that the source of the loss was a leaking water pipe which plaintiff had attempted to repair, without success. In investigating the claim, Allstate retained a master plumber and two forensic engineers to examine the pipes, all of whom concluded that there was no evidence of the attempted repair as claimed by the plaintiff. There was also evidence from a cleaning and restoration company that the loss had occurred the day before the plaintiff had claimed, and that water-damaged walls and carpets were removed from the home several days before Allstate received first notice of the claim.

Allstate denied the claim because the insured made numerous material misrepresentations concerning the facts of the loss. The insured filed suit, including a claim for bad faith. Allstate moved for partial summary judgment on the

¹¹²⁶ *Tangle v. State Farm Ins. Cos.*, 2010 U.S. Dist. LEXIS 89349, at *14 (W.D. Pa. Aug. 4, 2010).

¹¹²⁷ *Bonsu v. Jackson Nat'l Life Ins. Co.*, 2010 U.S. Dist. LEXIS 89, at *20 (M.D. Pa. Jan. 4, 2010).

bad faith claim, which was granted by Magistrate Judge Rueter of the Eastern District. Noting that Allstate had assigned two adjusters and a contractor to investigate the claim, and two separate experts examined the pipe in question, the court held, “[P]laintiff has failed to show by clear and convincing evidence that Allstate had no reasonable basis for denying plaintiff’s claim. There is also no clear and convincing evidence that Allstate acted improperly in investigating plaintiff’s claim.”¹¹²⁸ According to the court, “the two experts’ opinions directly contradict the sworn statement of plaintiff, thus providing strong evidence to Allstate that plaintiff made material misrepresentations as to the cause of the discharge of the water, thus justifying the denial of the claim because of misrepresentations.”¹¹²⁹

(11) *Neiman v. Am. Int’l Grp., Inc.*, 2009 U.S. Dist. LEXIS 113483 (M.D. Pa. Dec. 7, 2009) (Rambo, J.)

Plaintiff’s decedent purchased a term life insurance policy from defendant American General, a subsidiary of defendant AIG. Plaintiff’s decedent had health problems prior to purchasing this policy that were not disclosed on the insurance application. Shortly after purchasing the policy, plaintiff’s decedent was diagnosed with cancer and died. Following the death, the insurer refused to pay the proceeds to plaintiff on the grounds that plaintiff’s decedent knowingly or in bad faith concealed pertinent medical information that had it known, would have resulted either in a refusal to issue a policy or a higher premium.

Plaintiff filed suit alleging breach of contract and statutory bad faith; defendants counterclaimed seeking to have the policy declared void *ab initio* because of the misrepresentations. Defendants filed a motion for summary judgment on their rescission counterclaim, which was denied because the court held that there was a genuine issue of material fact whether plaintiff’s decedent’s misrepresentations were made knowingly or in bad faith. Prior to trial, the defendants filed a motion in limine to strike the bad faith claim. Judge Rambo of the Middle District granted the defendants’ motion, concluding that it would not allow plaintiff to present the bad faith claim at trial:

The reason given by Defendants for the denial of coverage is that “facts pertaining to past medical history were misrepresented in the application.” On summary judgment, the court has determined as a matter of law that there were material misrepresentations contained in the application. Defendants did not lack a reasonable basis for denying coverage. To be clear, the denial of benefits under the policy may have been improper and may constitute a breach of contract. Furthermore, Defendants may not be able to demonstrate by clear and convincing evidence that they are entitled to rescission. However, because there was a reasonable basis upon which Defendants rested its [sic] denial of the claim, Plaintiff’s bad faith claim fails as a matter of law and the court will grant Defendants’ motion to strike this claim.¹¹³⁰

(12) *Barrie v. Great N. Ins. Co.*, 2008 U.S. Dist. LEXIS 66029 (E.D. Pa. Aug. 28, 2008) (Stengel, J.)

Barrie hired Fritz Moving Company to move her belongings from an apartment, where she lived with several roommates, to a home. Barrie allegedly instructed the movers to leave her case and jewelry box in the bedroom; this was disputed by the movers. Four days later, Barrie contacted the Reading Police Department, claiming Fritz Moving either lost or stole her property. Great Northern issued an insurance policy to Barrie providing itemized coverage in the amount of \$82,425.00 for sixty-four listed items of jewelry. Barrie provided a telephonic sworn statement to an adjuster the day she submitted her claim to Great Northern. The following day, Barrie provided conflicting facts about whether she looked for the jewelry boxes in her apartment. She later provided conflicting factual statements to Great Northern’s SIU investigator, and Fritz Moving’s claims investigator. Barrie gave a statement under oath, as permitted under the policy, and again provided inconsistent facts. When asked at the statement under oath about her prior inconsistent statements, she responded, “No. That is all a lie.”

Great Northern denied coverage under the concealment of fraud provision of the policy, and Barrie filed a breach of contract and bad faith suit. Judge Stengel of the Eastern District granted Great Northern’s motion for summary judgment on the plaintiff’s breach of contract claim, finding her “conflicting statements regarding the involvement and current location of her three roommates indicates that at least part of her testimony is comprised of material misrepresentation.”¹¹³¹ The court further found that Great Northern had a reasonable basis for denying coverage, so there could be no finding of bad faith:

Having found that Great Northern had a reasonable basis as a matter of law for denying benefits under the concealment provision, I need not undertake an in-depth analysis of Ms. Barrie’s claim. Her version of the loss claimed is not only implausible, but it is also wanting in support. Ms. Barrie’s own testimony works against her, as she has failed to tell a consistent story as to several material issues leading up to the disappearance of her jewelry. . . . With the heightened evidentiary standard of proof

¹¹²⁸. *Grammenos v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 36155, at *12 (E.D. Pa. Apr. 28, 2009).

¹¹²⁹. *Grammenos v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 36155, at *11 (E.D. Pa. Apr. 28, 2009).

¹¹³⁰. *Neiman v. Am. Int’l Grp., Inc.*, 2009 U.S. Dist. LEXIS 113483, at *16-17 (M.D. Pa. Dec. 7, 2009).

¹¹³¹. *Barrie v. Great N. Ins. Co.*, 2008 U.S. Dist. LEXIS 66029, at *17-18 (E.D. Pa. Aug. 28, 2008).

by clear and convincing evidence, plaintiff was required to furnish substantially more, and substantially more reliable evidence in order to survive summary judgment.¹¹³²

(13) *Aquila v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 93823 (E.D. Pa. Nov. 13, 2008) and 2008 U.S. Dist. LEXIS 101518 (E.D. Pa. Dec. 15, 2008) (Strawbridge, M.J.)

Aquila, Sr. and his wife owned a car insured by Nationwide. Plaintiffs alleged that the vehicle was stolen from a parking spot in Philadelphia. When the police located the vehicle it was seriously vandalized and burned. Plaintiffs reported the loss to Nationwide in September 2005, shortly after the vehicle was recovered. Nationwide's claims investigation unearthed several "red flags" concerning the loss, including: the vehicle had gone missing despite being equipped with an anti-theft device; one of the special microtransmitter-equipped keys was missing, and plaintiffs could not account for it; there were questions about the original location where the vehicle had supposedly been parked; the plaintiffs had experienced some financial difficulties; and plaintiffs had failed to fully respond to Nationwide's inquiries. Despite these "red flags," in April 2006, Nationwide decided to pay the claim.

Plaintiffs filed a complaint alleging generally that Nationwide had committed "actions constituting bad faith in violation of the law." Magistrate Judge Strawbridge of the Eastern District found that Nationwide had not acted in bad faith. The court noted that "Pennsylvania statutory law requires insurers to develop and implement anti-fraud plans and to report annually their efforts to combat insurance fraud to the Pennsylvania Insurance Department."¹¹³³ The court held that "[a]gainst this statutory backdrop,"¹¹³⁴ Nationwide had a reasonable basis to investigate the various "red flags" which surrounded plaintiff's claim. Therefore, according to the court, Nationwide had not acted in bad faith.

(14) *Leach v. Northwestern Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 83624 (W.D. Pa. Nov. 16, 2006) (Cohill, J.), *aff'd*, 2008 U.S. App. LEXIS 1990 (3d Cir. Jan. 29, 2008) (Jordan, J.)

Leach suffered a heart attack and began receiving total disability benefits under a policy issued by Northwestern. Later, he claimed and received total disability benefits based upon a muscle condition and exhaustion, as opposed to his heart attack. Northwestern began a detailed review of Leach's claims, and discovered that, during his period of alleged disability, he became an owner and manager of a restaurant and a marina, and that he owned and operated a fishing boat, that he traveled to Russia to negotiate an oil contract, and that he performed paid consulting work for his former company. Northwestern stopped paying disability benefits and demanded that Leach reimburse it for over \$200,000 in paid benefits.

Leach filed an action alleging, among other things, breach of contract and bad faith. Northwestern counterclaimed for fraud and misrepresentation. Judge Cohill of the Western District granted Northwestern's motion for summary judgment on the bad faith claim. The case went to trial on the remaining counts and resulted in a jury verdict in favor of Northwestern on all claims. The Third Circuit affirmed, stating:

The District Court found that Leach failed to meet his burden, and it further held that he had presented no competent evidence from which a reasonable jury could find that the insurer acted in bad faith. In particular, the District Court determined that Northwestern provided ample documentation showing that it had conducted an extensive evaluation into Leach's claim and had a reasonable basis for denying benefits. We agree.¹¹³⁵

(15) *Excelsior Ins. Co. v. Mitchell*, 2008 U.S. Dist. LEXIS 100695 (E.D. Pa. Dec. 10, 2008) (Ludwig, J.)

A fire took place at a store owned by Excelsior Insurance Company's insured, Mitchell, who made a claim for insurance proceeds under his policy. Based on evidence of fraud during the claim process, Excelsior filed an action against Mitchell seeking to void the policy and asserting breach of contract, breach of the implied duty of good faith, common law fraud, and a claim under Pennsylvania's Insurance Fraud Act, 18 Pa.C.S.A. §4117, *et seq.* Mitchell thereafter filed a complaint in state court against Excelsior alleging breach of contract and bad faith. That case was removed to federal court and consolidated with the insurer's case.

On Excelsior's motion for summary judgment, Judge Ludwig of the Eastern District found that Mitchell knowingly made misrepresentations, thus violating the fraud and concealment provision in the policy, and voiding the policy. The court granted Excelsior's motion:

Mitchell submitted no evidence in support of his bad faith claim against Excelsior, and in view of Mitchell's own misrepresentations, and Excelsior's suspicion of arson, Mitchell cannot establish that Excelsior did not have a reasonable basis to commence an investigation, refuse further payment, and file this declaratory judgment action.¹¹³⁶

¹¹³² *Barrie v. Great N. Ins. Co.*, 2008 U.S. Dist. LEXIS 66029, at *18-19 (E.D. Pa. Aug. 28, 2008).

¹¹³³ *Aquila v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 101518, at *26 (E.D. Pa. Dec. 15, 2008).

¹¹³⁴ *Aquila v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 101518, at *27 (E.D. Pa. Dec. 15, 2008).

¹¹³⁵ *Leach v. Northwestern Mut. Ins. Co.*, 2008 U.S. App. LEXIS 1990, at *7-8 (3d Cir. Jan. 29, 2008).

¹¹³⁶ *Excelsior Ins. Co. v. Mitchell*, 2008 U.S. Dist. LEXIS 100695, at *6-7 (E.D. Pa. Dec. 10, 2008) (citing *Parasco v. Pacific Indem. Co.*, 920 F. Supp. 647, 656 (E.D. Pa. 1996)).

(16) *Tuschak v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 55020 (W.D. Pa. July 14, 2008) (Ambrose, J.)

The insured was insured under an auto policy with State Farm. On December 24, 2005, while on his way home from a nightclub, the insured crashed his car into a dumpster. Though he had his cell phone, he did not call the police, a tow truck company, or his parents. Instead, he abandoned the car and walked home. He later reported to both the police and State Farm that the car was stolen. The car was recovered a few blocks from the insured's house. After State Farm began processing the claim, the insured confessed his lie to the police. He did not, however, personally inform anyone at State Farm at that time. According to the insured, the police explained that they would contact State Farm. The police did advise State Farm on January 24, 2006. The insured did not inform anyone at State Farm that he had falsely reported that his car had been stolen until February 10, 2006.

The insured was prosecuted for insurance fraud and false reporting, and entered into a plea agreement. He was also ordered to pay State Farm restitution for payments State Farm made for taxes on the vehicle, for car rental charges and for towing expenses. The insured then made a claim upon State Farm related to his damaged car. State Farm denied that claim, relying upon the "Concealment and Fraud" condition of the policy. The insured then filed suit against State Farm, asserting breach of contract and bad faith claims for alleged failure to pay the collision claim.

State Farm filed a motion for summary judgment as to both counts, which was granted by Judge Ambrose of the Western District. In granting summary judgment on the bad faith claim, the court held:

State Farm had a reasonable basis for denying Tuschak's claim. Tuschak engaged in, indeed was convicted of, insurance fraud. He lied to State Farm about the very cause of the claim he submitted. His lies during the processing of the claim provided a contractual basis upon which State Farm could reasonably deny coverage. As previously stated, a reasonable basis for State Farm's position defeats a claim for bad faith. . . .¹¹³⁷

(17) *Scheibler v. AMERICO Fin. Life & Annuity Ins. Co.*, 2007 Pa. Dist. & Cnty. Dec. LEXIS 324 (Westmoreland July 24, 2007)

The insurance agent who sold a life insurance policy to the decedent completed the application in April 2004, which the decedent then signed. The application questioned whether, within the past three years, the insured had been treated for or taken medication for a heart attack, congestive heart failure, angina pectoris, stroke, or cancer other than of the skin. The insured answered "no" to these questions and the insurer issued the policy. The decedent died in February 2005. The plaintiff as beneficiary of the policy submitted a claim to the insurer. The insurer's claim investigation revealed that the decedent had been diagnosed and treated for a heart attack in July 2003. The claim was denied.

The plaintiff filed suit against the insurer, the agent, and the insurance broker that employed the agent. The plaintiff asserted claims for specific performance on the contract, bad faith, and other claims relating to misrepresentation and fraud in the inducement. The plaintiff's claims were based upon the alleged misrepresentation of the insurance agent to the decedent that he was eligible for full coverage under the life insurance policy regardless of the decedent's health history.

The insurer, Americo, filed a motion for judgment on the pleadings, or in the alternative, a motion for summary judgment as to the breach of contract and bad faith claims. Judge Ackerman of Westmoreland County granted the insurer's motion. The court concluded that there was no breach of contract on the part of the insurer because the insured knowingly made false statements in his application. Moreover, the court held that "Plaintiff has not pointed to any evidence of record that would suggest that Americo acted in bad faith in its denial, investigation or handling of plaintiff's claim."¹¹³⁸ In the court's view, the plaintiff had offered no evidence as to the relationship between the insurance agent and the insurer for purposes of imputing to the insurer knowledge of, and liability for, the alleged statement of the insurance agent. According to the court, "In sum, plaintiff has failed to offer any evidence, let alone evidence that is clear and convincing, that Americo did not have a reasonable basis for denying benefits under her husband's life insurance policy or that Americo knew of or recklessly disregarded any lack of reasonable basis in denying the claim."¹¹³⁹

(18) *Wezorek v. Allstate Ins. Co. v. Barosh*, 2007 U.S. Dist. LEXIS 57321 (E.D. Pa. Aug. 7, 2007) (Rice, J.)

This case arose from a homeowner's coverage claim based upon a fire at the insured premises that damaged the building. In September 2005, the insured, Wezorek, submitted to Allstate an application for homeowner's insurance, and did so with the assistance of her business partner, Barosh. The application contained several false representations as to the ownership and use of the property. Upon receipt of the application, Allstate's underwriting department determined that due to the age of the property, it did not qualify for the particular policy requested and sent a notice of cancellation. On October 25, 2005, two days before the Allstate policy was to lapse, a fire occurred at the property.

¹¹³⁷. *Tuschak v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 55020, at *13-14 (W.D. Pa. 2008) (citations omitted).

¹¹³⁸. *Scheibler v. AMERICO Fin. Life & Annuity Ins. Co.*, 2007 Pa. Dist. & Cnty. Dec. LEXIS 324, at *15 (Westmoreland 2007).

¹¹³⁹. *Scheibler v. AMERICO Fin. Life & Annuity Ins. Co.*, 2007 Pa. Dist. & Cnty. Dec. LEXIS 324, at *17-18 (Westmoreland 2007).

Upon receipt of Wezorek's claim, Allstate reserved its rights and investigated the claim. Allstate then voided the policy *ab initio* based on several misrepresentations it found in the policy application. Wezorek filed suit, alleging breach of contract and bad faith; Allstate counterclaimed on a theory of insurance fraud and named Borash as an additional defendant.

The court held that Wezorek's breach of contract claim failed because Wezorek made fraudulent misrepresentations that were material to the risk to be insured, and Allstate was therefore entitled to rescind the policy.¹¹⁴⁰ The court also held that with respect to Allstate's counterclaim, Wezorek and Borash committed insurance fraud.¹¹⁴¹

As to the bad faith claim, the court held that Wezorek failed to prove her bad faith claim:

To defeat a bad faith claim, an insurer need only show it had a reasonable basis for believing that the three-part test used to determine the propriety of rescinding the insurance contract was met.

Allstate not only had a reasonable basis for believing it could lawfully rescind the policy based on material misrepresentations in the application, it was legally correct in doing so. Its refusal to cover the loss was not frivolous or unfounded. Thus, because I have found Allstate properly rescinded the insurance contract based on material misrepresentations that were known to Wezorek and Barosh, and Allstate performed a reasonable and proper claims investigation, Wezorek has not proven Allstate acted in bad faith.¹¹⁴²

(19) *Estakhrian v. Cont'l Gen. Ins. Co.*, 2006 U.S. Dist. LEXIS 95607 (E.D. Pa. Dec. 18, 2006) (Davis, J.)

In this case, discussed in §10:07, the court found no bad faith in the insurer's initial conclusion that the insured had made material misrepresentations on her application for the policy, and its threats to rescind the plaintiff's policy unless she signed a rider excluding coverage for her breasts. According to the court:

[T]he bad faith claim can be resolved as long as CGI can demonstrate that it had a reasonable basis for its actions; that reasonable minds may disagree about whether plaintiff actually made material misrepresentations on her application in this case does not preclude the grant of summary judgment for defendant.¹¹⁴³

(20) *Finney v. Royal Sun Alliance Ins. Co.*, 2005 U.S. Dist. LEXIS 18413 (W.D. Pa. Aug. 29, 2005) (Schwab, J.), *aff'd*, 2006 U.S. App. LEXIS 16369 (3d Cir. June 28, 2006) (Rendell, J.)

A fire destroyed Finney's house and barn. Finney had a policy of homeowners' insurance with Royal for over one million dollars, including personal property coverage, and he made a claim immediately after the fire. Royal's investigation indicated the fire had been intentional and that Finney had made a claim against another insurance company in November 1996 for a fire at his previous residence that Royal learned had been caused by arson. Finney did not disclose that previous claim on his application for insurance with Royal, which deemed that to be fraud in the application. Finney filed for bankruptcy. The bankruptcy trustee filed an adversary action against Royal for breach of contract and bad faith. Royal filed a counterclaim asserting that Finney had committed fraud in his application for insurance and had caused the fire intentionally. A jury before Chief Judge Donetta Ambrose of the Western District found that Royal had breached its contractual obligations to plaintiff by refusing to pay additional amounts on the claim, and awarded damages in the amount of \$147,225.54. The jury returned a verdict for Royal on the bad faith claim, however, and for Finney on Royal's counterclaim. Finney then filed a Second Amended Complaint alleging that Royal and its attorney acted without probable cause and for an improper motive in filing and prosecuting the counterclaim alleging that he committed arson and fraud.

Judge Schwab of the Western District granted summary judgment in favor of Royal and its attorney in the second action. According to the court, the jury's "rejection of plaintiff's bad faith claim and rejection of defendant's counterclaim are consistent with a finding that there was sufficient evidence to deny the claim and raise arson and fraud in the counterclaim, but not enough to prove arson and fraud by a preponderance of the evidence."¹¹⁴⁴ The decision was upheld by the Third Circuit.

(21) *McGeehan v. Am. Gen. Assurance Co.*, 2004 U.S. Dist. LEXIS 23295 (E.D. Pa. Nov. 12, 2004) (Gardner, J.)

The plaintiff beneficiary sued the insurer for benefits under a life insurance policy. The insurer counterclaimed for rescission, alleging that there was fraud in the application. Judge Gardner of the Eastern District granted summary judgment in favor of the insurer, finding that there was a material misrepresentation made in bad faith in connection with the insurance application. Finding no coverage, the court also granted judgment in favor of the insurer on the \$8371 bad faith claim.

¹¹⁴⁰ *Wezorek v. Allstate Ins. Co. v. Barosh*, 2007 U.S. Dist. LEXIS 57321, at *38-39 (E.D. Pa. Aug. 7, 2007).

¹¹⁴¹ *Wezorek v. Allstate Ins. Co. v. Barosh*, 2007 U.S. Dist. LEXIS 57321, at *42-50 (E.D. Pa. Aug. 7, 2007).

¹¹⁴² *Wezorek v. Allstate Ins. Co. v. Barosh*, 2007 U.S. Dist. LEXIS 57321, at *41-42 (E.D. Pa. Aug. 7, 2007).

¹¹⁴³ *Estakhrian v. Cont'l Gen. Ins. Co.*, 2006 U.S. Dist. LEXIS 95607, at *31-32 (E.D. Pa. Dec. 18, 2006) (emphasis in original).

¹¹⁴⁴ *Finney v. Royal Sun Alliance Ins. Co.*, 2005 U.S. Dist. LEXIS 18413, at *17-18 (W.D. Pa. 2005).

(22) *Adams v. Reassure Am. Life Ins. Co.*, 2003 U.S. Dist. LEXIS 5433 (M.D. Pa. Apr. 4, 2003) (Kosik, J.)

The plaintiff, a claimant under a disability insurance policy, made fraudulent misrepresentations concerning his medical history in his application for the policy. Upon learning of these misrepresentations during the claims process, the insurer denied the claim, and the claimant instituted suit. The Middle District granted the insurer's motion seeking summary judgment for rescission of the contract and further held that plaintiff's bad faith claim was without merit as a matter of law.

(23) *Risha v. Farmer's Fire Ins. Agency*, 56 Pa. D. & C.4th 194 (Fayette July 2001) (Warman, J.)

The insured husband and wife obtained a policy of property insurance for a house that they purchased. The application for insurance contained a question pursuant to Pennsylvania's Anti-Arson Application Law¹¹⁴⁵ which asked whether the proposed insured had suffered any losses during the preceding five years exceeding \$1,000 in damages. The plaintiff-husband answered "no" to this question; the plaintiff-wife did not sign the application. In fact, one year earlier, both insureds had suffered a \$400,000 property loss as a result of fire.

When a fire occurred three years later, the insurer denied the claim as to both insureds on the basis of the fraudulent statement made in the application. Litigation followed.

With respect to the plaintiff-wife and the mortgagee, the Court of Common Pleas of Fayette County, by Judge Warman, denied the insurer's motion for summary judgment.¹¹⁴⁶ However, with respect to the plaintiff-husband, who had actually signed the false representation in the application, the court granted the insurer's motion, and awarded judgment in favor of the insurer on the husband's breach of contract and bad faith claim.

(24) *Jones v. Allstate Ins. Co.*, 2001 U.S. Dist. LEXIS 24179 (E.D. Pa. Nov. 6, 2001) (Tucker, J.)

Plaintiff Joseph Jones and his adult daughter were insured under a homeowners' policy with Allstate. In December of 2000, the insured home suffered severe damage as a result of fire. The company declined to pay the claim based upon material misrepresentations of fact on the insurance application and the failure of the insured to satisfy conditions for recovering under the policy.

Specifically, Allstate alleged that the plaintiff father misrepresented that he would be the owner-occupier of the house and never listed his daughter as an adult resident of the household that caused the company not to investigate the daughter's prior loss history. In addition, the insurer alleged that the plaintiff father misrepresented on the application that no insured suffered any losses at the present or prior residences within the previous five years. The company also claimed that the plaintiffs did not comply with the policy conditions in that they failed to provide signed proofs of loss in a timely manner, did not submit to an examination under oath as required under the policy, and otherwise failed to cooperate with the investigation.

The plaintiffs instituted action against the insurer, alleging breach of contract and bad faith. Allstate moved for summary judgment as to both counts. The Eastern District, by Judge Tucker, denied the insurer's motion with respect to the breach of contract count, but granted the insurer's motion for summary judgment with respect to the bad faith claim, holding:

This Court finds that defendant Allstate reasonably believed that plaintiffs Joseph Jones and his adult daughter violated their duty when plaintiff Joseph Jones stated on his homeowners' insurance that he was the owner/occupier at his Greenwood Road home. Also, the court finds that defendant reasonably investigated the claim and acted to protect its best interest, and defendant's subsequent conduct was not in bad faith.¹¹⁴⁷

(25) *Savadove v. Vigilant Ins. Co.*, 1999 U.S. Dist LEXIS 5550 (E.D. Pa. Apr. 21, 1999) (Dalzell, J.)

The plaintiffs maintained contents coverage on their homeowners' insurance policy, which included \$150,000 in coverage for an antique grandfather clock. In September of 1996, the clock was reported destroyed in a fire, and the plaintiffs made a claim. After a lengthy investigation, Vigilant denied the claim and litigation ensued. Ultimately, the court entered summary judgment in Vigilant's favor. With respect to the count for bad faith, the court stated that there was nothing in the record to suggest that Vigilant handled the plaintiff's claim or conducted its investigation in a biased or improper fashion or that it attempted to evade its contractual duty to pay a valid claim. To the contrary, the record suggested that the plaintiffs submitted fabricated "estimates" of the value of the clock, and they concealed the fact that the clock was purchased as an investment and was never part of the contents of their home.

(26) *Federated Life Ins. Co. v. Walker*, 1997 U.S. Dist. LEXIS 566 (E.D. Pa. Jan. 17, 1997) (Yohn, J.)

In this case, the insurer filed a declaratory judgment action alleging that the claimant's disability claim resulted from a preexisting condition and that the policyholder had fraudulently concealed this information in the policy application. The policyholder counterclaimed for compensatory damages and bad faith. The insurer moved for summary judgment on the bad faith claim. Judge Yohn of the Eastern District held that the insurer had a reasonable

¹¹⁴⁵. *Risha v. Farmer's Fire Ins. Agency*, 56 Pa. D. & C.4th 194 (Fayette July 2001).

¹¹⁴⁶. See Section 9:07.

¹¹⁴⁷. *Jones v. Allstate Ins. Co.*, 2001 U.S. Dist. LEXIS 24179, at *15-16 (E.D. Pa. Nov. 6, 2001).

basis for denying the claim and suspending disability payments. He granted summary judgment in favor of the insurer and dismissed the bad faith claim.

(27) *Sphere Drake Ins. Co. v. Zakloul Corp.*, 1997 U.S. Dist. LEXIS 7934 (E.D. Pa. June 3, 1997) (Friedman, J.)

In this case, Judge Newcomer of the Eastern District ruled that the policyholders could not, as a matter of law, assert a claim based on the insurer's alleged bad faith denial of insurance coverage since the policy at issue was void due to the policyholders' material misrepresentations. The policy voided coverage if "the insured has willfully concealed or misrepresented any material fact."¹¹⁴⁸ The court opined that defendants falsely testified that they had never been sued and were debt free when, in fact, they had signed a judgment note to settle a prior collection suit. The court also noted that defendants had submitted inflated property values on the proof of loss. The court therefore declared the policy void under its fraud provisions.

Because the policy was void due to defendants' material misrepresentations, the court held that defendants could not assert a claim of bad faith denial of insurance coverage. In addition, the court concluded that the insurer had not acted in bad faith by investigating the legitimacy of defendants' claim. Summary judgment was granted in favor of the insurers; the policyholder's counterclaim for bad faith was dismissed.

(28) *Parasco v. Pacific Indem. Co.*, 920 F. Supp. 647 (E.D. Pa. 1996) (Joyner, J.)

In this case, the court held that the record demonstrated the insured made material misrepresentations during the insurer's investigation of a fire loss. Specifically, the insured made false statements concerning his tax returns and in representations to a bank in order to secure a loan. The insurer denied the claim under a fraud provision in the policy, and the court found no bad faith.

(29) *U.S. Metal & Coin v. Jewelers Mut. Ins. Co.*, 1996 U.S. Dist. LEXIS 12388 (E.D. Pa. Aug. 26, 1996) (Dalzell, J.)

In this case, the Eastern District held that it was not bad faith to issue a non-renewal notice to an insured after (1) it was learned that the insured had pleaded guilty to income tax evasion, a criminal offense, and (2) in light of allegations that the insured had engaged in sexual harassment in the workplace.

(30) *Peer v. Minnesota Mut. Fire & Cas. Co.*, 1995 U.S. Dist. LEXIS 4045 (E.D. Pa. Mar. 28, 1995)

In light of evidence of fraud obtained by the insurer in its investigation of an \$850,000 fire loss claim, the district court held that there was a reasonable basis for denying the plaintiffs' claim and no bad faith as a matter of law. The plaintiffs had submitted an application asserting that they had not within the past three years made any claims under a homeowners' policy. In fact, the plaintiffs had submitted three separate claims under their homeowners' insurance policies within the previous three years and received benefits in excess of \$290,000. Further, in the insureds' examination under oath, they asserted that they did not have any outstanding debts at the time. In fact, there was an outstanding loan in the amount of \$224,000 to a vendor. In light of this, the court stated that, "as a matter of law, that the Peers testified falsely and intentionally concealed material facts relating to the issuance of the insurance policy, it follows *a fortiori* that it is also sufficient to establish that Minnesota had a reasonable basis for denying a claim."¹¹⁴⁹

§10:16 Reasonable Handling of UM/UIM Claim

§10:17 — Cases

(1) *Paul v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 133699 (W.D. Pa. Sept. 28, 2016) (Conti, J.)

Paul was hit by a vehicle when he was crossing the street as a pedestrian in September 2010 and suffered injuries, including a head injury. After resolving his claim with the driver of the vehicle, he submitted a UIM claim to his parents' auto insurer, State Farm. Plaintiff filed this bad faith action after the parties were unable to resolve the claim. The parties filed cross motions for summary judgment on the bad faith issue. Judge Conti of the Western District denied both motions, as is discussed in greater detail in §9:11.

In the course of its opinion, the court concluded that two of plaintiff's theories of bad faith claims handling would not be submitted to the jury. First, the court concluded that the first party claim adjuster's initial conclusion that the claim was not covered did not create a genuine issue of material fact. The adjuster had determined that because Paul did not live with his parents, he could not make a claim under their policy. Shortly thereafter, the adjuster determined that he was a college student living away from home and reversed her claim decision. The court found that this decision "was done in error" and benefits were extended. Second, the court concluded that closing the first party file after the UIM claim had been submitted was not in bad faith because the medical benefits had been exhausted.

¹¹⁴⁸ *Sphere Drake Ins. Co. v. Zakloul Corp.*, 1997 U.S. Dist. LEXIS 7934, at *16 (E.D. Pa. June 3, 1997).

¹¹⁴⁹ *Peer v. Minnesota Mutual Mut. Fire & Cas. Co.*, 1995 U.S. Dist. LEXIS 4045, at *37 (E.D. Pa. Mar. 28, 1995).

(2) *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267 (M.D. Pa. Apr. 10, 2017) (Carlson, M.J.)

Ridolfi was injured in an auto accident in 2008, and she subsequently sought UIM benefits in 2013 after resolving her claim with the tortfeasor. When the parties were unable to resolve the claim, Ridolfi filed this contract and bad faith action. State Farm filed a motion for summary judgment on the bad faith count. Magistrate Judge Carlson of the Middle District of Pennsylvania granted the motion.

Ridolfi claimed that State Farm acted in bad faith by delaying resolution of her claim. The court found that such claim did not create an issue of fact under the facts presented in this case. Noting that the process of resolving factual and legal issues in litigation with the tortfeasor “can create some delay in claims adjustment, delays that are not evidence of bad faith but simply reflect the process of careful claims evaluation.”¹¹⁵⁰ The court noted the four-year litigation with the tortfeasor, which resulted in a settlement for an amount less than the liability policy limits, a fact the court explained was significant for State Farm’s claims evaluation. Given the significance of the underlying litigation to the UIM claims handling, the court found that it would measure any alleged bad faith delay not from the time State Farm was first aware of the accident (2009), but from the time when Ridolfi’s counsel first placed State Farm on notice of a possible UIM claim (2013).¹¹⁵¹ The court explained that although attempts to resolve the UIM claim were “unsuccessful[,] but that lack of success, standing alone, does not demonstrate clear and convincing evidence of bad faith.”¹¹⁵² Rather, the court noted, the significant demands “dictated a careful review of this claim, and it appears that State Farm undertook such a review.”¹¹⁵³

The court also concluded that State Farm’s initial erroneous position as to the available UIM limits was not in bad faith. Noting that State Farm initially reported the limits in accordance with Ridolfi’s application for insurance, it was discovered that State Farm had issued a policy with greater limits. State Farm’s position was corrected well in advance of any demand it received, and “[o]n these facts, the brief delay and confusion regarding policy limits simply cannot be seen as part and parcel of some bad faith self-dealing by State Farm.”¹¹⁵⁴

Ridolfi also contended that State Farm had acted in bad faith in insisting on taking her SUO, when she had invited State Farm to sit in her deposition in the underlying litigation. The court found this would not support bad faith recovery because the policy gave State Farm the right to take an SUO and because there had been additional medical treatment after the deposition that State Farm was entitled to inquire about. In addition, the court explained, the SUO revealed new information that had not been disclosed in the deposition. The court found that it was not bad faith for State Farm to not attend the deposition because as a non-party to the litigation, its participation would not have been “meaningful.”¹¹⁵⁵

The court also rejected Ridolfi’s claim that State Farm acted in bad faith during the investigation by not seamlessly obtaining the pertinent medical records. The court concluded that although “this process was marked by missteps, delays and confusion by all parties,” State Farm had been sufficiently proactive about obtaining the needed information to discount a claim of bad faith.

(3) *Miezejewski v. Infinity Auto Ins. Co.*, 2014 U.S. Dist. LEXIS 7425 (M.D. Pa. Jan. 22, 2014) (Mannion, J.), *aff’d*, 609 F. App’x 69, 2015 U.S. App. LEXIS 6984 (3d Cir. 2015) (Roth, J.)

Plaintiff was involved in an auto accident in December 2009, following which she attempted to return to work. Plaintiff submitted a first party benefits claim to her auto insurer, defendant Infinity. In May 2010, defendant notified her that her first party coverage was exhausted. Plaintiff’s employer terminated her in November 2010. Plaintiff settled with the tortfeasor for the bodily injury limits in August 2011, and then submitted a UIM claim to Infinity. The adjuster reviewed medical records and the human resources manager from the former employer, and calculated a value range that did not include wage loss. The adjuster sought pre-accident medical records but none were ever sent. When the parties could not agree on a value for the UIM claim, plaintiff filed this bad faith suit. Defendant moved for summary judgment on the bad faith claim. Judge Mannion of the Middle District granted the motion.

Plaintiff contended that the insurer acted in bad faith in performing its investigation because defendant did not review the first party medical file, did not speak with plaintiff during the investigation and did not review prior medicals. The court found that plaintiff failed to show how a review of the first-party file contained any materials not provided by plaintiff in the UIM demand package “or how it would have affected the adjustors [sic] determination. ‘A plaintiff in a bad faith claim must show that the outcome of the case would have been different if the insurer had done what the insured wanted done.’ . . . As the record contains no evidence that the plaintiffs communicated this desire to

¹¹⁵⁰. *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *19 (M.D. Pa. Apr. 10, 2017).

¹¹⁵¹. *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *22 (M.D. Pa. Apr. 10, 2017) (citing *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 149095 (M.D. Pa. Oct. 20, 2014), *aff’d*, 643 F. App’x 201 (3d Cir. 2016)).

¹¹⁵². *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *23 (M.D. Pa. Apr. 10, 2017).

¹¹⁵³. *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *23 (M.D. Pa. Apr. 10, 2017).

¹¹⁵⁴. *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *24 (M.D. Pa. Apr. 10, 2017).

¹¹⁵⁵. *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *27 (M.D. Pa. Apr. 10, 2017).

the defendant or any indication of how those records would impact the valuation of the claim, this argument fails.”¹¹⁵⁶ The court also concluded that plaintiff failed in this regard with respect to each of the claims of bad faith investigation.

As to speaking with plaintiff during the investigation, the court explained that she was represented by counsel during the claims process and the insurer was aware of plaintiff’s position through counsel. There was no evidence that the defendant would have refused to speak with plaintiff if such a request had been made. Finally, as to the prior medical records, the court noted that defendant requested these records, but plaintiff failed to provide them, and given the post-accident findings of pre-existing arthritis and degenerative changes, defendant reasonably requested these records. The court concluded that the investigation, while not perfect, was not required to be so, and was sufficient under the circumstances: “The court does not find those alleged shortcomings amount to bad faith even when looking at all three together. There is no legal requirement that insurance companies conduct perfect investigations.”¹¹⁵⁷

Plaintiff also argued that defendant acted in bad faith in failing to consider lost wages in its evaluation of the UIM claim because her supervisor had testified that she was terminated because she could no longer perform her job due to her injuries. The court found that defendant increased its offer following the testimony, but same was “not sufficient evidence of bad faith.”¹¹⁵⁸ Additionally, plaintiff had received good job performance reviews following the accident, the medical records revealed pre-existing arthritis, was able to perform her job adequately for almost a year after the accident, and was laid off at the same time as several others. The court found these factors provided a good reason for a thorough investigation and a “reasonable basis”¹¹⁵⁹ for the initial offer and subsequent higher offer.

The Third Circuit, in a decision by Judge Roth, affirmed. The court looked to the following in support of its conclusion that defendant did not act in bad faith: the fact that there was a reasonable basis for the adjuster’s assessments; the adjuster was interacting throughout the claim with plaintiffs’ counsel; the adjuster indicated at the time of the initial offer that it would be reassessed with the receipt of additional information; the adjuster sought additional pertinent information and considered all information provided; with the receipt of new information, defendant paid the policy limits. The court concluded: “At every turn, [defendant’s] claim representative acted reasonably in light of the evidence, both presented and inexplicably withheld. There is no evidence whatsoever that [defendant’s] handling of the claim was motivated by ‘self-interest or ill will.’”¹¹⁶⁰

(4) *Lieb v. Allstate Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 171359 (E.D. Pa. Dec. 10, 2014) (Rufe, J.), *aff’d*, 640 F. App’x 194 (3d Cir. 2016) (Fuentes, J.)

Plaintiffs were involved in an auto accident, following which they sought UIM coverage from their auto carrier, Allstate. Allstate denied coverage on the grounds that plaintiffs had rejected UIM protection. Plaintiffs, who claimed the forms were deficient and thus they were entitled to such coverage, filed this bad faith suit. After removal, plaintiffs filed a motion to remand, which is discussed in §7:15, and Allstate filed a motion to dismiss the bad faith claim. Judge Rufe of the Eastern District granted the motion to dismiss, a decision that was subsequently appealed to the Third Circuit, which affirmed in this opinion authored by Judge Fuentes.

The district court examined the requirements for the form, and the form signed by the named insured. Plaintiffs contended that because the form came to them already dated, and the named insured did not fill in a date himself, the form was invalid. The district court disagreed, as the relevant statutory provision required that the insured sign the form and that the form be dated, implying that the date did not need to be filled in by the insured himself. Therefore, the entire complaint was dismissed. The Third Circuit agreed, for the same reasons espoused by the district court.

(5) *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302 (W.D. Pa. Mar. 20, 2014) (Gibson, J.)

About three years after plaintiff was in an auto accident, following which he settled with the tortfeasor for the \$15,000 bodily injury limits, he sought UIM benefits from his auto carrier, Nationwide, in May 2010. Nationwide requested additional records. Plaintiff gave an EUO in September 2010, and Nationwide sought an IME and a dermatologist’s review. The review was complete in January 2011. The IME was scheduled in early 2011, but was ultimately done in January 2012 due to plaintiff’s travel restrictions. Nationwide made a \$5000 offer shortly after the IME, and plaintiff rejected the offer in February 2012. Plaintiff then brought this breach of contract and statutory bad faith action, and the parties were eventually able to resolve the UIM claim for \$50,000 following mediation. The parties filed cross motions for summary judgment. Judge Gibson of the Western District granted Nationwide’s motion and denied plaintiff’s.

Plaintiff made a number of allegations of bad faith. First, he alleged that Nationwide acted in bad faith in making him attend an IME in Pittsburgh, which was problematic, given the travel restrictions his physician had place on him. Although the court noted that Nationwide was provided with disability slips that indicated plaintiff was required to be able to stand and stretch and prohibited him from sitting for longer than an hour, plaintiff testified that he drove 3

¹¹⁵⁶ *Miezejewski v. Infinity Auto Ins. Co.*, 2014 U.S. Dist. LEXIS 7425, at *13-14 (M.D. Pa. Jan. 22, 2014) (quoting *Blaylock*, 2008 U.S. Dist. LEXIS 1098 (M.D. Pa. Jan. 7, 2008)).

¹¹⁵⁷ *Miezejewski v. Infinity Auto Ins. Co.*, 2014 U.S. Dist. LEXIS 7425, at *15 (M.D. Pa. Jan. 22, 2014).

¹¹⁵⁸ *Miezejewski v. Infinity Auto Ins. Co.*, 2014 U.S. Dist. LEXIS 7425, at *17 (M.D. Pa. Jan. 22, 2014).

¹¹⁵⁹ *Miezejewski v. Infinity Auto Ins. Co.*, 2014 U.S. Dist. LEXIS 7425, at *18 (M.D. Pa. Jan. 22, 2014).

¹¹⁶⁰ *Miezejewski v. Infinity Auto Ins. Co.*, 609 F. App’x 69, 2015 U.S. App. LEXIS 6984, at *8 (3d Cir. Apr. 28, 2015) (footnote omitted).

hours each way for business trips every other week. Nationwide had told plaintiff's counsel that it would be willing to make travel accommodations for the 1 hour trip to Pittsburgh, but when plaintiff's counsel continued to object, Nationwide chose a physician closer to plaintiff's home: "Plaintiffs have failed to show with clear and convincing evidence that Nationwide acted in bad faith by scheduling an IME in Pittsburgh."¹¹⁶¹

Plaintiff also alleged that Nationwide acted in bad faith in delaying resolution of the claim for almost 2 years. The court noted that the delay in the IME was due to plaintiff's refusal to attend because of travel restrictions and thus could not provide the basis for bad faith liability: "Thus, the record before the Court indicates legitimate delays that arose based on the circumstances of this case, largely due to Mr. Rowe's travel restrictions. The evidence shows that Nationwide attempted to accommodate Mr. Rowe's disability. There is simply no evidence from which a reasonable jury could find that the delay was the result of bad faith."¹¹⁶²

The court also rejected plaintiff's contention that there was a bad faith delay in settlement, because the evidence showed that any delays were due in part to a legitimate investigation by Nationwide and in part to plaintiff's failure to submit medical records. The court concluded: "Most of the delays are directly attributable Plaintiffs' failure to provide requested documentation and Mr. Rowe's inability to appear for the scheduled IME appointments. Here, the length of time it took to resolve Plaintiffs' UIM claim does not provide clear and convincing evidence for a reasonable jury to conclude that Nationwide acted in bad faith."¹¹⁶³

Plaintiff's argument that Nationwide's failure to comply with various regulations relating to communications with the insured constituted bad faith was similarly unavailing, because the court concluded that any such violations was evidence, at most, of negligence, which could not provide a basis for bad faith.

Last, plaintiff alleged that Nationwide acted in bad faith by making a lowball offer. Nationwide based its offer on the results of the IME, which concluded that plaintiff had no limitations as a result of his soft tissue injuries, and the dermatologist review, which concluded that the accident did not cause an existing lipoma to increase in size. Further, Nationwide took into account that while plaintiff did not provide prior medicals, he testified he had pre-existing back pain for which he treated with a chiropractor, and the fact that he continued to perform the same activities as pre-accident, although with pain and stiffness at times. Post-accident treatment was minimal. The court reviewed this evidence and concluded that the offer was supported by the evidence and therefore was not in bad faith: "The foregoing evidence shows that Nationwide...had a reasonable basis for its offer on the UIM claim. Plaintiffs disagreed with Nationwide's valuation of the UIM claim. However, Plaintiffs have failed to present any evidence to dispute Nationwide's valuation."¹¹⁶⁴

(6) *Deibler v. Nationwide Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 119723 (W.D. Pa. Aug. 23, 2013) (Bissoon, J.)

After plaintiff was injured in an auto accident in 2007, the other driver sought bodily injury damages from plaintiff's auto insurer, Nationwide, which concluded that plaintiff was 100 percent at fault for the accident. Following settlement with the other driver in February 2008, plaintiff sought UM benefits from the insurer in November 2008. During the course of its investigation, the insurer took plaintiff's Examination Under Oath (EUO) in March 2009, and then the other driver's EUO in December 2009. The parties agreed to arbitrate the matter, and the insurer eventually resolved the UM claim with plaintiff for the policy limits on an unspecified date prior to arbitration. Plaintiff then filed this bad faith action. Nationwide filed a motion for summary judgment. Judge Bissoon of the Western District of Pennsylvania granted the motion.

Plaintiff contended that Nationwide acted in bad faith by failing to take plaintiff's statement in the context of the other driver's bodily injury claim, which resulted in failing to inform plaintiff that he could file a UM claim. Plaintiff also argued that the insurer failed to timely take his statement in the context of the UM investigation. The court noted that as the bodily injury and UM investigations proceeded separately, evidence of possible delay as to one could not be used as evidence of possible delay of the other. Further, as to any delay of taking the UIM-related statement, the court noted that it was taken 4 months after the UM claim was filed, and plaintiff was represented by counsel, who was responsible for some of the delays. Once plaintiff's EUO was taken, the insurer realized it needed the other driver's EUO to complete its analysis, and for reasons not necessarily attributable to the insurer, that EUO was not taken until 9 months after plaintiff's. Once both EUOs were complete, the insurer proposed arbitration, given the factual disputes, and that process was delayed partly due to plaintiff's need to hire an accident reconstruction expert. The court found these delays could not provide the basis for bad faith liability: "Given the scope of the investigation, this period of time—30 months—was neither unreasonable nor evidence of bad faith. Furthermore, all delays were reasonably related to the need for further investigation."¹¹⁶⁵

¹¹⁶¹. *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302, at *31 (W.D. Pa. Mar. 20, 2014).

¹¹⁶². *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302, at *32 (W.D. Pa. Mar. 20, 2014).

¹¹⁶³. *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302, at *32 (W.D. Pa. Mar. 20, 2014).

¹¹⁶⁴. *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302, at *41-42 (W.D. Pa. Mar. 20, 2014).

¹¹⁶⁵. *Deibler v. Nationwide Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 119723 (W.D. Pa. Aug. 23, 2013).

(7) ***Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762 (W.D. Pa. Jan. 24, 2013) (Conti, J.)**

Plaintiff was involved in a motor vehicle accident with an uninsured vehicle. Plaintiff filed a UM claim with his automobile insurer, defendant Geico. When the parties could not agree on the value of the claim, plaintiff filed this action alleging breach of contract seeking UM benefits; common law bad faith; and statutory bad faith under §8371. Defendant filed a motion for summary judgment on the bad faith claims. As also discussed in §§5:03 and 10:19, Judge Conti of the Western District granted the insurer's motion as to the §8371 claim but denied the insurer's motion as to the common law bad faith claim.

Plaintiff contended that his insurer acted in bad faith by unreasonably valuing his claim and making a low-ball order as a result. Plaintiff alleged that his lost wages were \$17,000, and that because his insurer offered only \$7,000, such an offer was in bad faith. The court noted that the evidence presented showed that the insurer was unaware of the amount of lost wages, and concluded: "In light of the facts available to defendant at the time the offer was made, plaintiff identifies no relevant legal authority supporting his argument that a disagreement over the valuation of a claim is sufficient to constitute bad faith as a matter of law."¹¹⁶⁶

As to the value of the claim for UM benefits, the court, citing *Kosierowski v. Allstate Ins. Co.*,¹¹⁶⁷ noted that it was not bad faith for an insurer to offer at the low range of the settlement value range where the value of the claim was disputed. The court decided that there was ample evidence to support the insurer's valuation of the claim, as the medical records did not bear out plaintiff's claim of serious injury. The court also found notable that plaintiff did not have surgery, despite two doctor's opinions indicating that it was an option and pointed to the insurer's IME, which called into question the severity of plaintiff's injuries. The court further pointed out that a subsequent accident called into question the extent of the injuries. The court concluded: "Given the lack of evidence supporting plaintiff's claims about the seriousness of his injuries and the extent to which those injuries may or may not have required costly medical treatment, it was not unreasonable or bad faith for defendant to refuse to settle at plaintiff's demand of the policy limits."¹¹⁶⁸

Plaintiff contended that defendant acted in bad faith by failing to follow its own procedures in valuing his claim. The court noted that "plaintiff presents no evidence indicating that defendant failed to follow any of its procedures."¹¹⁶⁹ The court reviewed the evidence presented as to the method defendant used to value the claim, including that three examiners reviewed the file and jointly decided on the offer, and that they reviewed the available evidence, which did not include evidence of lost wages and found no evidence of bad faith.¹¹⁷⁰

The court also rejected plaintiff's argument that the offer was so low as to constitute bad faith. Citing *Smith v. State Farm Mut. Auto. Ins. Co.*, *Thomer v. Allstate Ins. Co.*, and *Hollingsworth v. State Farm Fire & Cas. Co.*, the court explained that low offers do not, without more, support a claim for bad faith. The court reviewed the evidence presented and found that "plaintiff offers nothing to rebut the record evidence indicating that the \$7,000 offer was merely an initial offer and thus a "starting point for negotiations."¹¹⁷¹

The court then turned to plaintiff's claim that defendant acted in bad faith during negotiations at the parties' mediation. The court rejected plaintiff's argument that the refusal of defendant to raise its offer was in bad faith because the evidence showed that plaintiff refused to move off of his demand, so the mediation was adjourned and that plaintiff had not provided any additional evidence to "bolster his negotiating position."¹¹⁷² The court also expressed concern over plaintiff's failure to reject defendant's offer prior to filing suit:

It is troubling that plaintiff seeks to proceed with his bad faith claim despite having made no effort to engage in negotiations with defendant. Plaintiff was under no duty to negotiate, but courts have recognized that stonewalling negotiations is a relevant consideration in determining whether an insurer acted in bad faith. *Johnson*, 987 A.2d at 785. If plaintiff's bad faith claim were to proceed, future plaintiffs could survive summary judgment on bad faith claims by simply filing suit after receiving an offer that the plaintiff believes is too low. The mere fact that defendant's initial offer was lower than plaintiff's unsubstantiated claim of lost wages, in absence of any other substantive evidence of bad faith, including unreasonable delay, intentional deception, or the like, is not sufficient to constitute clear and convincing evidence. *Smith*, 2012 U.S. Dist. LEXIS 19373, 2012 WL 508445, at *7-8 (even "low-ball offers" may not be sufficient to support a claim of bad faith; particularly where the plaintiff's other allegations of bad faith are "conclusory and not supported by any factual averments").¹¹⁷³

¹¹⁶⁶ *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *21 (W.D. Pa. Jan. 24, 2013).

¹¹⁶⁷ *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583 (E.D. Pa. 1999).

¹¹⁶⁸ *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *24 (W.D. Pa. Jan. 24, 2013).

¹¹⁶⁹ *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *25 (W.D. Pa. Jan. 24, 2013).

¹¹⁷⁰ *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *26 (W.D. Pa. Jan. 24, 2013).

¹¹⁷¹ *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *26 (W.D. Pa. Jan. 24, 2013) (quoting *Hollingsworth*, 2005 WL 56314, at *8).

¹¹⁷² *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *29 (W.D. Pa. Jan. 24, 2013).

¹¹⁷³ *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *30 (W.D. Pa. Jan. 24, 2013).

Finally, the court examined plaintiff's claim that defendant acted in bad faith in relying on the results of the IME, where the settlement offer was made before the IME was performed. The court rejected that defendant acted in bad faith in this respect, instead concluding that defendant properly requested the IME as part of its investigation and that "[t]he IME also provided a reasonable basis for why defendant continued to assert its initial offer, since it further called into question the extent of plaintiff's injuries and the treatment necessary for those injuries."¹¹⁷⁴

(8) *Schlegel v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 111514 (M.D. Pa. Aug. 8, 2013) (Mannion, J.)

Plaintiff was involved in an accident in December 2007, in which his car was hit by a negligent tortfeasor. Plaintiff subsequently settled with the tortfeasor's carrier for \$25,000 of the available \$100,000 limits and then presented her auto insurance carrier, defendant State Farm, with a UIM claim. State Farm requested medical records and bills to evaluate the claim in November 2009. State Farm continued to request documents, but did not receive any until October 2010. Two weeks later, State Farm concluded that the value of plaintiff's injuries did not exceed \$100,000, and denied the claim. Plaintiff provided additional medical records in March 2011, but State Farm continued to value the claim at less than \$100,000. This breach of contract and bad faith suit followed. State Farm filed a motion for summary judgment on the bad faith claim. Judge Mannion of the Middle District granted the motion.

Plaintiff maintained that State Farm acted in bad faith by requesting medical records it already had, thus possessing no reasonable basis for its request. The court rejected this position because State Farm believed, given plaintiff's continued treatment, the records it possessed were incomplete and thus "State Farm had a reasonable basis for requesting updated medical records."¹¹⁷⁵ The court also concluded that even if there had been no reasonable basis for this request, "the facts presented to the court demonstrate a level of culpability akin to negligence at best,"¹¹⁷⁶ and thus could not support a bad faith claim.

Plaintiff also argued that State Farm acted in bad faith in requiring verification of plaintiff's policy coverage when it already had documents to support coverage. State Farm argued that it never required such a verification, but rather had only asked for a verification if plaintiff was questioning coverage. Based on the language of the letter sent to plaintiff's counsel, the court agreed with State Farm's interpretation. Additionally, the affidavit was sent to State Farm well before the medical records, so this "requirement" could not support a claim of unreasonable delay by the insurer.

(9) *Sypek v. State Farm Mut. Auto Ins. Co.*, 2012 U.S. Dist. LEXIS 83326 (M.D. Pa. June 15, 2012) (Caputo, J.)

Plaintiff was injured in an auto accident, and sought UIM benefits from her auto insurer, State Farm after she settled with the tortfeasor's insurer for the policy limits. State Farm offered \$5,000 to settle her claim. After plaintiff filed this bad faith suit, State Farm filed a motion to dismiss. Judge Caputo of the Middle District granted the motion as to the bad faith claim.

Plaintiff claimed that the offer made by State Farm was unreasonably low, and hence in bad faith. Plaintiff also claimed that State Farm acted in bad faith in raising a statute of limitations defense. The court disagreed, stating that both allegations could lead to a conclusion that State Farm acted negligently, rather than in bad faith, and there were no specific allegations that could support a finding of bad faith:

Ms. Sypeck argues that she has presented specific factual evidence of her extensive injuries, and State Farm's offer of \$5,000 was facially unreasonable. But even if the offer was facially unreasonable, that does not prove that State Farm acted in bad faith—rather, it might have negligently failed to investigate and evaluate, leading to an unreasonable settlement offer. The same flaw exists in Ms. Sypeck's argument that she has alleged bad faith by stating that State Farm "knew or should have known" that its statute of limitations defense was meritless. First, "knew or should have known" offers the possibility of negligence, so cannot establish bad faith under the Pennsylvania law.¹¹⁷⁷

(10) *Watson v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 83065 (E.D. Pa. June 14, 2012) (Surrick, J.)

Plaintiff Mrs. Watson was injured in an auto accident, following which she sought UM benefits from her auto insurer, Nationwide. Nationwide offered to settle for \$1,700. Plaintiffs demanded \$2,000, but ultimately settled for \$1,700. Plaintiffs subsequently brought suit when the parties were unable to resolve issues relating to the PIP claim, and the suit included a bad faith count. Defendant Nationwide filed a motion for summary judgment, which Judge Surrick of the Eastern District granted.

Plaintiffs argued that Nationwide acted in bad faith in handling the UM claim because it attempted to settle for an unreasonable amount with them, where they were uneducated and did not understand UM benefits. The court found that the evidence could not support a conclusion that Nationwide acted in bad faith. The court pointed to the fact that

¹¹⁷⁴. *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *31 (W.D. Pa. Jan. 24, 2013).

¹¹⁷⁵. *Schlegel v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 111514, at *13 (M.D. Pa. Aug. 8, 2013).

¹¹⁷⁶. *Id.* at *13.

¹¹⁷⁷. *Sypek v. State Farm Mut. Auto Ins. Co.*, 2012 U.S. Dist. LEXIS 83326, at *8-9 (M.D. Pa. June 15, 2012).

plaintiffs negotiated with Nationwide over the settlement amount, Nationwide did not press them for decisions on the settlement amounts it was offering, Nationwide did not ask plaintiffs to waive rights or release future liability, and plaintiffs consulted an attorney about the offer.

Plaintiffs also argued that Nationwide's investigation was done in bad faith. The court concluded that the evidence did not show bad faith, pointing in particular to the fact that the parties communicated regularly after the accident, and Nationwide was able to provide a reasonable explanation for its valuation, an amount very close to that plaintiffs' counsel had recommended demanding. The court also noted that plaintiffs had failed to demonstrate what pertinent information a better investigation would have unearthed and how that might have affected the settlement value.

(11) *Chemij v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 80688 (E.D. Pa. June 11, 2012) (Schiller, J.)

This bad faith case, stemming from a dispute over UIM benefits, is discussed in more detail in §§10:13(a) and 10:25. The parties filed cross motions for summary judgment. Judge Schiller of the Eastern District granted Allstate's motion for summary judgment and denied plaintiff's motion.

The court addressed issues of delay, finding that because plaintiff's counsel was responsible for much of the alleged 4-year delay, there was no genuine issue of material fact regarding Allstate's alleged bad faith. The court also concluded that there was no evidence to support a finding that Allstate's failure to provide the entire policy, rather than just the declarations pages, was in bad faith. The court rejected plaintiff's argument that Allstate's use of the "Colossus" computerized claim evaluation system to assist in evaluating the claim was in bad faith. Instead, the court pointed out, Allstate's adjuster also manually evaluated the claim, for a much higher amount, and used that higher number in the attempted settlement negotiations.

(12) *Rossi v. Progressive Ins.*, 813 F. Supp. 2d 643 (M.D. Pa. 2011) (Caputo, J.)

This case is discussed in greater detail in §§10:07(a) and 10:13(a). Rossi was in an auto accident in January 2007. In February 2008, he made a claim with Progressive for the entire amount of UIM benefits, \$30,000. When the parties were unable to resolve the claim, Rossi and his wife brought this bad faith and breach of contract suit against Progressive in April 2009. The claim was ultimately settled for the policy limits in February 2010. Progressive filed a motion for summary judgment. Judge Caputo of the Middle District granted the motion. The court found that Progressive's investigation was "objectively reasonable" and no evidence showed "dilatatory conduct, dishonesty, obfuscation, or malice."¹¹⁷⁸

(13) *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360 (E.D. Pa. 2011) (Kelly, S.J.)

This case is discussed in further detail in §§10:13(a) and 10:19. Thomer was in an auto accident in April 2002, following which she sought first party medical benefits from her insurer, Allstate. Allstate paid those benefits until April 2003, when a PRO concluded that further treatment was not reasonable or necessary. In July 2005, Thomer sought payment of the policy limits for UIM benefits. Allstate settled the UIM claim for the policy limits in December 2008. In the bad faith suit which followed, Allstate filed a motion for summary judgment. Senior Judge Kelly of the Eastern District granted the motion.

In Thomer's challenge to Allstate's handling of the UIM claim, she contended that Allstate failed in bad faith to consider the economic report she provided, detailing her wage loss and other economic damages. Simply because Allstate had paid lost wages following prior litigation, Allstate maintained, did not preclude it from challenging UIM benefits where it questioned her claimed disability. The court agreed with Allstate that "under Pennsylvania law, 'an insurer's payment of first party benefits does not preclude an insurer from later denying third party UM/UIM benefits.'"¹¹⁷⁹

Thomer also challenged Allstate's failure to credit the diagnoses she had received of a concussion, which could have explained her symptoms, instead basing its decision on unsubstantiated belief that her injuries did not exist. The court discounted this position, noting that there were medical records that called this diagnosis into question. According to the court, "In light of the unclear nature of Thomer's injuries evidenced by the conflicting medical records, we find that Allstate had a reasonable basis to question the diagnoses of Thomer's treating physicians."¹¹⁸⁰

(14) *Carcarey v. GEICO General Ins. Co.*, 2011 U.S. Dist. LEXIS 123679 (E.D. Pa. Oct. 26, 2011) (McLaughlin, J.)

Plaintiff Carcarey filed suit on behalf of her son's estate seeking UM benefits under a GEICO auto policy. It appears that the UM limits were \$400,000. The son had been hit and killed by an unidentified driver while he was walking along a road. Following some negotiation, GEICO offered \$75,000 to settle the claim. Plaintiff then filed suit seeking recovery for breach of contract and bad faith; GEICO then offered \$100,000 to settle. GEICO filed a motion for summary judgment on the bad faith claim. Judge McLaughlin of the Eastern District granted the motion.

¹¹⁷⁸. *Rossi v. Progressive Ins.*, 813 F. Supp. 2d 643, 653 (M.D. Pa. 2011).

¹¹⁷⁹. *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360, 373 (E.D. Pa. May 9, 2011) (quoting *Pantelis v. Erie Ins. Exch.*, 890 A.2d 1063, 1068 (Pa. Super. Ct. 2006)).

¹¹⁸⁰. *Id.* at 375.

Plaintiff contended that GEICO acted in bad faith when it offered such a low amount to settle. The court disagreed, pointing to several factors that GEICO legitimately took into account in calculating such a settlement figure, including the son's limited income and questions about whether the son lived with his mother and thus was entitled to coverage at all. Furthermore, when GEICO increased its offer to \$100,000, there was even greater evidence regarding the son living apart from his mother and about the son's own negligence.

Plaintiff also claimed that GEICO acted in bad faith in speaking with her former attorney, knowing that a new attorney had taken over the case. Again, the court found these allegations could not withstand summary judgment because plaintiff had not provided evidence of a clear and convincing nature to support her claim. Rather, the court noted that the evidence showed that there was confusion about who was representing plaintiff, and GEICO contacted both attorneys in order to resolve that question, not to fish for information: "The record suggests that the defendant was acting conscientiously in ascertaining the plaintiff's representation and did not seek out information from the plaintiff's former legal counsel."¹¹⁸¹

Finally, plaintiff claimed that GEICO acted in bad faith in talking to the son's girlfriend, who was with the son when he was killed, without counsel present. The court explained that this claim could not withstand summary judgment because the evidence showed that the day prior to the deposition, the girlfriend had informed GEICO's counsel that she did not want an attorney and that the day of the deposition, after being informed by plaintiff that the girlfriend did want an attorney, GEICO's counsel talked to her to sort out whether or not she did. The court stated: "No reasonable jury could conclude that Mr. Moring's [GEICO's counsel's] decision to determine if Ms. Caserta [girlfriend] wanted representation before delaying the deposition was an act of bad faith. Neither counsel had been informed by Ms. Caserta or her legal counsel that she was represented when Mr. Moring spoke with her. In addition, there is no evidence that Mr. Moring engaged in improper communication with Caserta during their conversation."¹¹⁸²

(15) Costello v. Gov't Employees Ins. Co., 2010 U.S. Dist. LEXIS 28511 (M.D. Pa. Mar. 25, 2010) (Vanaskie, J.)

This case is also discussed in §§10:03(b), 10:07(a), and 10:13(a). Plaintiffs were insured by defendant GEICO for the car they owned. In the course of plaintiff Mr. Costello's employment with the state, he was driving a state-owned car when he was in an accident. Defendant subsequently paid a first party benefit claim for medical and wage loss benefits. Thereafter, plaintiffs notified defendant of a possible underinsured motorist (UIM) claim. GEICO advised plaintiffs that the "regular use" exclusion might result in a denial of the claim. Following plaintiffs' submission of the UIM claim, GEICO investigated and denied the claim.

Plaintiffs filed suit alleging, *inter alia*, bad faith. GEICO filed a motion for judgment on the pleadings, which was granted by Judge Vanaskie of the Middle District. Given that the "regular use" exclusion had been well litigated in the courts, the court ruled that defendant acted reasonably: "As the 'regular use' exception is applicable in this situation, has been historically enforced, and is not a violation of public policy, . . . there is no basis to find that Defendants [sic] acted in bad faith."¹¹⁸³ The court concluded that "no reasonable jury could find under a clear and convincing evidence standard that these actions amount to reckless disregard."¹¹⁸⁴

(16) Crawford v. Allstate Ins. Co., 2009 U.S. Dist. LEXIS 79200 (E.D. Pa. Sept. 1, 2009) (Buckwalter, J.)

Crawford was in an auto accident with another car, the driver of which was not insured. Crawford demanded the policy limits for both the uninsured motorist (\$100,000) and wage loss (\$5000) provisions and refused Allstate's offer of \$75,000. After a lengthy investigation, Allstate offered Crawford the policy limits on both provisions, and she accepted. Thereafter, Crawford sued, claiming that Allstate had acted in bad faith. Allstate filed a motion for summary judgment, which was granted by Judge Buckwalter of the Eastern District.

In finding in favor of the insurer, the court noted that courts "have refused to find bad faith when an insurer makes a low but reasonable offer. . . . Similarly, bad faith has not been found where the insurer acted to 'aggressively investigate and protect its interest.'"¹¹⁸⁵

The court rejected Crawford's argument that Allstate unduly delayed the processing of the claim. Crawford was injured on September 8, 2005, but did not settle with Allstate until nearly two years later, in August 2007. Despite the length of time, the court pointed out that Crawford's lengthy delay in submitting medical authorizations and other records to defendant accounted for a majority of that time, throughout which Allstate repeatedly sought access. Further, a legitimate question arose in the course of the investigation about whether some of her injuries might have been attributable to a prior auto accident, so Allstate reasonably needed earlier records to analyze the claim, and Crawford continued to delay providing access to those. The court found that Allstate was permitted to make a reasonable and good faith examination of the records, and in fact, its investigation redounded to Crawford's benefit, as

¹¹⁸¹. *Carcarey v. GEICO General Ins. Co.*, 2011 U.S. Dist. LEXIS 123679, at *7-8 (E.D. Pa. Oct. 26, 2011).

¹¹⁸². *Id.* at *9.

¹¹⁸³. *Costello v. Gov't Employees Ins. Co.*, 2010 U.S. Dist. LEXIS 28511, at *25-26 (M.D. Pa. Mar. 25, 2010) (citation omitted).

¹¹⁸⁴. *Id.* at *26.

¹¹⁸⁵. *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200, at *11 (E.D. Pa. Sept. 1, 2009) (quoting *O'Donnell ex rel. Mitro v. Allstate Ins. Co.*, 734 A.2d 901 (Pa. Super. 1999)).

it increased the settlement amount. Allstate would not be found to act in bad faith where Crawford failed to cooperate.¹¹⁸⁶

The court rejected Crawford's argument that Allstate acted unreasonably in making its settlement offer. To the extent that this claim attacked Allstate's early offer of less than the policy limits, the court found that "a low, but reasonable offer, is not evidence of bad faith."¹¹⁸⁷ Allstate was not required to accept Crawford's claim at face value, without an investigation. Further, that the case ultimately settled for a higher amount was also not proof of bad faith because Crawford must prove by clear and convincing evidence "that Allstate's initial offer was unreasonable and that it knew the offer was such."¹¹⁸⁸

The court rejected the insured's argument that Allstate misrepresented the contents of Crawford's records. Allstate's attorney stated that prior medical records showed that to some extent, her injuries could be attributed to an earlier accident and Crawford believed that he should have identified which records supported that position. The court pointed out that Crawford's counsel refused to provide any records at the deposition to which Allstate's counsel could refer to refresh his recollection. Crawford also claimed that Allstate's attorney refused to share the medical records. It was clear from the record, though, that Allstate's attorney had made the medical records available for examination and copying, but Crawford's attorney had never done so. Further, the medical records were hers, and she could have obtained copies from her providers.¹¹⁸⁹

The court rejected Crawford's argument that Allstate issued an improper release and delayed the issuance of the settlement check. After the parties settled, Allstate sent a release to Crawford that would have released it from "all claims," including first party wage loss and the bad faith claims, instead of releasing just the UM claims. When Crawford's counsel received this release, he changed it to reflect the verbal agreement and returned it to Allstate's attorney, who was on vacation when it arrived in his office. Upon his return, Allstate's counsel approved of the revised release, and arranged for the settlement check to be issued. The check arrived a week after Crawford's counsel finally provided his taxpayer I.D. number.¹¹⁹⁰ The court found no basis for concluding that Allstate acted in bad faith in this regard.

Finally, the court dismissed Crawford's argument that Allstate was unfair in its selection of the IME doctor and arbitrator. The court found no basis in the record for either of these claims. According to the court, the physician's IME addressed points both favorable to and unfavorable to Crawford's position. The arbitrator claim was moot because the arbitration never happened.¹¹⁹¹

(17) *Brown v. Great Northern Ins. Co.*, 2009 U.S. Dist. LEXIS 13758 (M.D. Pa. Feb. 23, 2009) (Caputo, J.)

The facts of this UIM case are discussed in §10:13. Judge Caputo of the Middle District found that the insurer was entitled to summary judgment. In so ruling, the court agreed with the insurer that UIM claims are adversarial in nature and that an insurer was entitled to investigate a UIM claim and protect its interests, though still bound by a duty to negotiate in good faith with the insured.

(18) *Spinelli v. State Farm Mut. Automobile Ins. Co.*, 2009 U.S. Dist. LEXIS 22191 (E.D. Pa. Mar. 18, 2009) (Schiller, J.)

This case, also discussed in §§10:11 and 10:13, arose from an October 19, 2004 automobile accident and a UIM benefits claim by the plaintiff, Spinelli. On September 11, 1998, Spinelli's attorney notified the insurer, State Farm, of her demand for UIM arbitration. State Farm responded on October 5, 1998 assigning counsel, and requesting information such as the tortfeasor's policy limits, any settlement offer, and medical documentation of Spinelli's injuries. State Farm also identified its arbitrator. From that point, the claim spanned *nearly eight years*, during which time there were a number of delays attributable to events such as the deposition of Spinelli, obtaining medical records, an IME, and eventual surgery by the plaintiff. The arbitration was continued a number of times for a myriad of reasons such as the neutral arbitrator having to attend a funeral; the selection of a new neutral arbitrator; Spinelli's health unrelated to the accident; and the schedules and personal health issues of counsel. The arbitration finally took place on December 13, 2006. Spinelli received a net award of \$57,312 on the UIM claim after a large credit based on Spinelli's prior recovery from the tortfeasor. State Farm paid that sum to Spinelli on January 15, 2007.

Spinelli filed a breach of contract and bad faith action on February 25, 2008. State Farm removed the case and later filed a motion for summary judgment. Judge Schiller of the Eastern District held that State Farm was entitled to summary judgment because Spinelli could not establish her claims that the insurer acted unreasonably with respect to any delayed resolution of the UIM claim. According to the court, there was not sufficient evidence of any such claim, and "[g]iven the overwhelming evidence in the record, and Plaintiff's failure to cite any actual evidence of deliberate delay, the Court finds no reasonable basis to conclude that State Farm acted in bad faith and sought to deliberately

¹¹⁸⁶ *Id.* at *24-25.

¹¹⁸⁷ *Id.* at *27.

¹¹⁸⁸ *Id.* at *30.

¹¹⁸⁹ *Id.* at *37-44.

¹¹⁹⁰ *Id.* at *44-49.

¹¹⁹¹ *Id.* at *50-52.

delay the resolution of Plaintiff's claim."¹¹⁹² Noting evidence of "copious documentation of State Farm's substantial investigation of Plaintiff's claim,"¹¹⁹³ which included an IME report, the court held that the facts that "State Farm acted based on the IME's evaluation and other information, do not constitute bad faith."¹¹⁹⁴

(19) Allstate Prop. & Cas. Ins. Co. v. Vargas, 2008 U.S. Dist. LEXIS 67516 (E.D. Pa. Aug. 29, 2008) (Davis, J.)

In June 2003, Vargas was injured when her car was sideswiped by another vehicle. Vargas was insured under a policy issued by Allstate which provided UIM benefits. In March 2005, Vargas' counsel advised Allstate that Vargas would be presenting a UIM claim. Allstate believed that Vargas' UIM coverage was \$200,000, an amount based upon the belief that Vargas was entitled to "stack" two vehicles, one of which was believed to belong to her spouse.

Allstate assigned a claim to an adjuster, with 12 years' experience in handling UIM claims, and retained counsel to represent it. From June 2005 through May 2006, Allstate, through its counsel, obtained all of Vargas' medical records, MRI films and various legal files, conducted depositions, conducted an independent medical examination and secured expert reports.

In May 2006, Allstate determined that Vargas had not been married to the other insured on the policy at the time of the accident, so that Vargas was not entitled to stacked coverage, and her UIM coverage was limited to \$100,000. Allstate so advised Vargas' attorney, who disputed that conclusion. Allstate had evaluated the claim as being at least worth \$160,000, and therefore in June 2006 tendered to Vargas \$100,000 – the unstacked policy limit.

In June 2006, Allstate's counsel sought to postpone the arbitration while the parties attempted to resolve the dispute as to stacking. In July 2006, Allstate filed a declaratory judgment action in the Eastern District, seeking a determination whether Vargas was a "resident spouse" so as to entitle her to stacking. Allstate moved successfully to stay the UIM arbitration pending the declaratory judgment action. In August 2006, Vargas accepted the \$100,000 as partial settlement of the claim. Vargas then counterclaimed in the federal court action for breach of contract and bad faith. Allstate moved for summary judgment with respect to Vargas' bad faith claim. Judge Davis of the Eastern District granted Allstate's motion, finding no bad faith as a matter of law.

Vargas submitted the report of an expert who identified a UIM claim as a "first party claim" which required an insurance company to take a non-adversarial position toward the claimant. Citing *Condio v. Erie*, reported in this section, the court stated that the expert's "characterization of Pennsylvania law is incorrect," noting that in *Condio*, "the Pennsylvania Superior Court rejected the identical opinion" which had been tendered by the same expert.¹¹⁹⁵ According to *Condio*, UIM claims "are inherently and unavoidably arms length and adversarial."¹¹⁹⁶

Vargas argued that Allstate acted in bad faith by failing to conduct an investigation on her UIM claim before Allstate retained its counsel. Observing that the claimant was required to prove entitlement to UIM coverage, the court stated that this argument was "frivolous," adding that Vargas had misinterpreted the relationship in the UIM claim which "is inherently and unavoidably adversarial."¹¹⁹⁷

Vargas argued that Allstate acted in bad faith because its claims consultant had originally stated that the coverage was \$200,000, when the recorded statements in the file had reflected that Vargas was not married at the time of the accident. The court held that this did not constitute bad faith:

[Allstate's claims consultant's] mistaken belief and failure to discover the conflicting statements concerning Vargas' marital status constitute classic examples of negligence and deficient judgment and Vargas fails to cite to evidence in this record from which this court could conclude that Allstate's initial misrepresentations of the available coverage was anything other than a mistake. . . .

Stripped of its rhetoric, Vargas' argument is an assertion that Allstate should have approved an invalid claim and its failure to do so, and its subsequent discovery of the true facts, demonstrates bad faith against its client. Vargas, of course, is unable to provide legal support for this extraordinary proposition.¹¹⁹⁸

(20) Barry v. Ohio Casualty Group, 2007 U.S. Dist. LEXIS 2684 (E.D. Pa. Jan. 12, 2007) (Gibson, J.)

Ohio Casualty provided automobile insurance to the plaintiff, providing medical payment coverage and UIM coverage. Plaintiff was involved in an accident and claimed injuries to her neck and shoulder area. The question of whether the claimed injuries were caused by the accident was disputed. The insurer acknowledged and paid medical expenses, but disputed causation with respect to the UIM claim. Plaintiff ultimately filed a breach of contract and bad faith action in connection with the company's handling of the UIM claim.

¹¹⁹² *Spinelli v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 22191, at *21-22 (E.D. Pa. Mar. 18, 2009).

¹¹⁹³ *Id.* at *23.

¹¹⁹⁴ *Id.* at *25.

¹¹⁹⁵ *Allstate Prop. & Cas. Ins. Co. v. Vargas*, 2008 U.S. Dist. LEXIS 67516, at *23 (E.D. Pa. Aug. 29, 2008).

¹¹⁹⁶ *Id.* at *22 (citing *Condio v. Erie Ins. Exch.*, 899 A.2d 1136, 1144 (Pa. Super. 2006)).

¹¹⁹⁷ *Id.* at *26 (quoting *Zappile v. AMEX Assurance Co.*, 928 A.2d 251, 255-57 (Pa. Super. 2007)).

¹¹⁹⁸ *Id.* at *35-36.

The action was filed in the Western District of Pennsylvania. Both plaintiff and defendant filed a motion for summary judgment with respect to the bad faith claim. Judge Gibson ultimately concluded that there were questions of fact as to the allegations of bad faith, and denied both motions for summary judgment.

In support of his claim of bad faith in the handling of his UIM claim, the plaintiff argued that the insurer improperly questioned causation even though it had paid the first party medical payment claim. The court challenged this reasoning on the part of the plaintiff:

In *Pantellis v. Erie Insurance Exchange*, 2006 Pa. Super. 1, 890 A.2d 1063 (Pa. Super. Ct. 2006), the Pennsylvania Superior Court explained that the “payment of first party benefits does not preclude an insurer from later denying third party UM/UIM benefits. . . .” “[A] payment of first party benefits does not, in and of itself, constitute an admission of causation and a concomitant obligation to pay UM/UIM benefits. . . .” For this reason, the defendant’s prior acceptance of its obligations to provide coverage to Barry under the first party provisions of the policy did not operate as a bar preventing the defendant from later raising the issue of causation with respect to the UIM benefits.¹¹⁹⁹

(21) *Motorist Mutual Ins. Co. v. Musto*, Slip Opinion, No. 3:cv-05-0135 (M.D. Pa. Aug. 4, 2005) (Blewitt, M.J.)

Motorist Mutual filed a complaint seeking declaratory judgment against the defendant estate, in part seeking a declaration that the decedent was not entitled to UIM benefits because he did not have a valid driver’s license for 30 years and was not listed as a driver under the applicable policy. The defendant estate counterclaimed for bad faith under §8371. Magistrate Judge Blewitt of the Middle District granted the insurer’s motion to dismiss the counterclaim.

The defendant Estate argued that because Motorist had apparently paid first party benefits to the defendant, the position taken with respect to the UIM claim was inconsistent, and therefore evidence of bad faith. The court rejected this argument. The court cited *Cerankowski v. CNA Insurance Company*,¹²⁰⁰ for the proposition that “merely because the defendant made payments required by one endorsement of the policy does not lead to the conclusion that they are bound to make payments under another.”¹²⁰¹ The court held that Motorist “has every right to investigate who is insured for different provisions of the policy,” and found that the insurer’s “alleged inconsistent action concerning first party benefits and UIM benefits not determinative of bad faith.”¹²⁰²

(22) *Corley v. Infinity Leader Ins. Co.*, 113 F. App’x 478 (3d Cir. 2004) (Van Antwerpen, J.)

The plaintiff was seriously injured on a motorcycle operated by her husband when an automobile turned in front of the motorcycle. She recovered the monetary policy limits from the insurer of the automobile and the insurer covering her husband’s motorcycle. The plaintiff also submitted a UIM claim to Infinity, which provided coverage pursuant to a commercial policy on a dump truck issued to her husband. Infinity denied the claim on the grounds that the motorcycle was not a listed vehicle on the commercial policy.

Judge Van Antwerpen of the Third Circuit affirmed the opinion by Judge Lancaster of the Western District and found in favor of the insurer. The Third Circuit ruled that the commercial policy did not provide UIM coverage for accidents arising out of the use of the motorcycle. The plaintiff claimed that Infinity acted in bad faith because it refused to arbitrate the dispute as provided under the UIM provision of the policy. The court rejected this argument, finding that the dispute whether the plaintiff’s injuries were covered by the dump truck policy fell outside the arbitration clause, and therefore the company did not act in bad faith.

(23) *Ravindran v. Harleysville Mut. Ins. Co.*, 65 Pa. D. & C.4th 338 (Phila. 2002) (DiBona, J.), *aff’d*, Memorandum Opinion, 839 A.2d 1170 (Pa. Super. Oct. 29, 2003) (Memorandum Decision; Todd, J. concurring), *petition for allowance of appeal denied*, 790 A.2d 1018 (Pa. 2004)

Plaintiff, a passenger involved in a two-car accident, brought a UIM claim against Harleysville, which insured the van in which she was riding. Prior to the UIM arbitration, Harleysville offered \$200,000 to settle. The plaintiff counter-offered at \$500,000. In June 1999, the arbitrators in the UIM proceeding awarded plaintiff \$750,000.

The plaintiff filed a claim for bad faith under §8371 against Harleysville. The plaintiff alleged, *inter alia*, that the company failed to attempt to settle the UIM claim in good faith before proceeding to arbitration, improperly conducted itself at arbitration, and had improper *ex-parte* contact with the arbitrators after the UIM proceeding. The case was tried before Judge DiBona of the Philadelphia Court of Common Pleas, who entered a verdict in favor of the insurer on all counts.

The court held that the insurer properly considered all information regarding the nature and extent of the plaintiff’s injuries and wage-loss claim, as well as made reasonable settlement offers:

¹¹⁹⁹. *Barry v. Ohio Cas. Grp.*, 2007 U.S. Dist. LEXIS 2684, at *33-34 (E.D. Pa. Jan. 12, 2007).

¹²⁰⁰. 2004 U.S. Dist. LEXIS 13260 (E.D. Pa. 2004).

¹²⁰¹. *Motorist Mut. Ins. Co. v. Musto*, Slip Opinion, No. 3:cv-05-0135 (M.D. Pa. Aug. 4, 2005), at 9.

¹²⁰². *Id.* at 9.

Based on the evidence presented, this Court finds that there existed a reasonable basis for Harleysville's settlement offers and that in light of the disparity between the demands and the settlement offers, the defendant's decision to exercise its contractual right to arbitrate the case was reasonable.¹²⁰³

The court opined that the insurer's defenses at arbitration regarding lack of causation, given a prior accident, and the extent of the plaintiff's wage loss, were supported by the evidence considered in resolving the claim. The court further held that the insurer did not act in bad faith by proposing a settlement which would involve the plaintiff waiving claims for medical bills or wage loss covered by worker's compensation, as well as the plaintiff admitting that all wage loss was due to the prior accident rather than the accident out of which the UIM claim arose. The court noted that the plaintiff was well represented by a lawyer who understood the ramifications of such a settlement and refused to enter into same.

The evidence established that after the arbitration hearing and before the arbitration award was entered, counsel for the insurer engaged in several private conversations with the defense arbitrator regarding the merits of the plaintiff's claim and the progress of the ongoing deliberations. There was no evidence that Harleysville knew or should have known that the ex parte communications with the defense arbitrator were taking place, or that the company instructed counsel to engage in the ex parte communications.

The court rejected the plaintiff's claim that the post-arbitration conduct on the part of the insurer's counsel constituted bad faith under §8371. In so deciding, the court noted that, as a general rule, "an attorney acts as an independent contractor when hired by the insurance company and, therefore, any conduct by the attorney cannot be imputed to the client."¹²⁰⁴ The court stated that §8371 was designed to provide "a remedy for bad faith conduct by an insurer in its capacity as an insurer and not as a legal adversary in a lawsuit filed against it by an insured."¹²⁰⁵

In a non-published Memorandum Opinion, the Superior Court affirmed the decision of the trial court. The court held that Harleysville had reasonably relied upon its counsel, noting that the trial court determined that Harleysville's reliance on the advice of counsel was reasonable. The court rejected plaintiff's argument that Harleysville's counsel's ex parte contacts with the defense arbitrator were illegal, reasoning that parties who select party-appointed arbitrators expect them to serve as non-neutrals. The court also found the trial court's findings of fact supported in the record.

Concurring, Judge Todd disagreed with the decision inasmuch as it appeared to sanction *ex parte* communications between a party and its non-neutral arbitrator. She agreed, however, that the bad faith claim was properly rejected.

(24) *Dinner v. United Services Automobile Ass'n*, No.99-CV- 4603 (E.D. Pa. Feb. 2000) (unreported decision, Kelly, J.), *aff'd*, 29 F. App'x 823 (3d Cir. 2002) (Stapleton, J.)

Dinner, the plaintiff, was injured in an automobile accident. She recovered the \$15,000 policy limits of the tortfeasor's policy, and then sought UIM benefits from the driver's insurer, Allstate. She settled with Allstate for \$80,000.

The plaintiff then filed a UIM claim with her automobile insurer, USAA. The USAA policy covered two of her cars, providing \$100,000 in UIM coverage on each vehicle. USAA investigated the claim for approximately six months and offered to settle for \$100,000, finding that to be the value of her claim in light of the money she had already received. During its investigation, USAA learned in 1981 that the plaintiff had dislocated her right elbow, the same one re-injured in the car accident. The plaintiff rejected the settlement offer and demanded the full \$200,000 policy limits.

USAA continued its investigation and turned the case over to defense counsel to prepare for a possible arbitration. Its counsel looked into the 1981 injury, but in the end did not discover any additional records. Approximately 11 months after the initial demand, USAA paid the plaintiff \$200,000 in UIM benefits.

Dinner sued USAA, alleging that the insurer acted in bad faith by delaying payment and failing to timely investigate the claim. The plaintiff's assertions were rejected by a federal court jury which rendered a verdict in favor of the defendant, USAA. The defense verdict was affirmed by the Third Circuit.

(25) *Nationwide Mut. Ins. Co. v. Harris*, 53 Pa. D. & C.4th 117 (Fayette Apr. 6, 2001) (Solomon, J.)

Harris was involved in a car accident with another driver. She settled her claims with the other driver's liability carrier and with the carrier providing UIM coverage for her own vehicle. Harris then made a UIM claim against Nationwide under a policy listing her mother as the policyholder. The insurer filed a declaratory judgment action against Harris alleging that her UIM claim was not covered under the policy. Harris's counterclaim alleged that the insurer acted in bad faith when it filed the declaratory judgment action because it knew that the policy provided for arbitration in the event of a dispute. Judge Solomon of Fayette County sided with the insurer. The Court held that "the arbitration clause in the . . . policy¹²⁰⁶ does not grant [Harris] the right to have the issue of whether [Harris] is an

¹²⁰³. *Ravindran*, 65 Pa. D. & C.4th at 345.

¹²⁰⁴. *Id.* at 351-52 (citing *Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co.*, 963 F. Supp. 452, 455 (M.D. Pa. 1997)).

¹²⁰⁵. *Id.* at 351 (citing *O'Donnell v. Allstate Ins. Co.*, 734 A.2d 901, 909 (Pa. Super. 1999)).

¹²⁰⁶. The provision read "questions between the injured party and us regarding whether the injured party is an insured under this coverage, or the limits of such coverage, are not subject to arbitration and shall be decided by a court of law."

insured submitted to arbitration.”¹²⁰⁷ Therefore, according to the court, “since the . . . policy does not require that this matter be submitted to arbitration, the bad faith claim made by [Harris] will be dismissed.”¹²⁰⁸

(26) *Segall v. Liberty Mutual Ins. Co.*, 2000 U.S. Dist. LEXIS 16382 (E.D. Pa. Nov. 9, 2000) (Buckwalter, J.)

The facts of this case appear in §10:13. The plaintiff alleged that the insurer acted in bad faith by (1) failing to timely investigate the UIM claim; (2) failing to make a timely settlement offer; and (3) failing to make an adequate settlement offer. Judge Buckwalter of the Eastern District rejected all of these claims. The court held that the delay was reasonable under the circumstances. With respect to the timing and the amount of the settlement offer, the court held that the value of the plaintiff’s personal injury claim was uncertain, and therefore the company was justified in making the offer that it did, particularly given the absence of a settlement demand from the plaintiff. Summary judgment was granted in favor of the insurer.

(27) *Smolinsky v. State Farm Ins. Co.*, 2000 U.S. Dist. LEXIS 12686 (E.D. Pa. Aug. 7, 2000) (Kauffman, J.)

The plaintiff filed a bad faith action alleging that his insurer improperly denied a first party wage-loss claim. In order to determine the amount of lost wages to which the insured, a self-employed contractor, was entitled, the company had retained an accountant and had requested several years’ worth of tax returns. The insured refused to provide the requested documentation, so the company denied the claim. The court ruled that there was no evidence that the company’s denial “was frivolous or unfounded or done for a dishonest purpose.”¹²⁰⁹

(28) *Quaciari v. Allstate Ins. Co.*, 998 F. Supp. 578 (E.D. Pa. 1998) (Brody, J.), *aff’d without opinion*, 172 F.3d 860 (3d. Cir. 1998) (Alito, J.)

Judge Anita Brody of the Eastern District held as a matter of law that an insurer who argued that its insured was not at fault when pursuing subrogation rights against another insurer did not act in bad faith when it subsequently alleged that its insured was at fault and refused to honor her UIM claim.

The plaintiff’s vehicle was insured under a policy issued by Allstate. After the plaintiff was injured in a two-vehicle accident, Allstate sought subrogation against the insurer of the other vehicle, asserting that the plaintiff was not at fault in the accident. However, when the plaintiff claimed underinsured motorist benefits, Allstate refused to honor the claim and demanded arbitration. At the arbitration, Allstate argued that the plaintiff was fully responsible for the accident and thus not entitled to benefits under the policy. The arbitration panel subsequently awarded the plaintiff \$55,000. The plaintiff then filed an action against Allstate under §8371, asserting that Allstate committed bad faith by adopting inconsistent positions with respect to the subrogation and UIM claims.

The court rejected this argument, stressing that “the only relevant issue is whether Allstate had a reasonable basis for its actions, and if it did not, whether it knew of or recklessly disregarded its lack of reasonable basis.”¹²¹⁰ Judge Brody noted that the nature of the plaintiff’s injuries, the inconclusive nature of the police report, and the arbitration award on the issue of liability provided a reasonable basis for Allstate to demand an independent medical examination of plaintiff before accepting her claim. Moreover, it was held that Allstate had a reasonable basis to believe that it acted permissibly in taking a different position at the arbitration.

(29) *Kantra v. Allstate Ins. Co.*, U.S.D.C. Western District of Pennsylvania, No. CV-99-92, PICS No. 99-2488-03-00 (W.D. Pa. Dec. 22, 1999) (Ziegler, J.)

The facts of this UIM case appear in §10:13. Former Chief Judge Ziegler of the Western District entered summary judgment in favor of Allstate with respect to the plaintiff’s claim that Allstate acted in bad faith in delaying its UIM investigation by seeking to obtain too many medical records. Stating that the “[v]igorous investigation of claims does not constitute bad faith,”¹²¹¹ the court held that without receiving and reviewing all of the relevant documents, Allstate could not complete its investigation and make a decision. The court further ruled that the plaintiffs’ demand for UIM arbitration was premature because it was made before plaintiff had given all relevant medical records to Allstate.

(30) *Dattillo v. State Farm Ins. Co.*, 1997 U.S. Dist. LEXIS 16188 (E.D. Pa. Oct. 17, 1997) (McGlynn, J.)

In a memorandum decision, the late federal District Judge Joseph McGlynn granted summary judgment in favor of the defendant company and held that State Farm did not act in bad faith by requesting an independent medical examination (IME) of the insured claimant, and by taking the case to a UIM arbitration.

The court held that State Farm’s investigation—an examination under oath and the IME—was reasonable given that six years had passed between the accident and the UIM claim. He added that there was evidence supporting State Farm’s belief that the claimant had been adequately compensated by the third party carrier, so that State Farm’s offer of settlement was reasonable. In addition, he also said that the claimant had inappropriately failed to respond to State Farm’s settlement offer, and he noted other dilatory steps on the part of the plaintiff. Lastly, he noted that invoking the

¹²⁰⁷ *Id.* at 121.

¹²⁰⁸ *Id.*

¹²⁰⁹ *Smolinsky v. State Farm Ins. Co.*, 2000 U.S. Dist. LEXIS 12686, at *16.

¹²¹⁰ 998 F. Supp. at 593.

¹²¹¹ *Kantra*, PICS No. 99-2488-03-00, C.V. 99-92, slip op. at 10.

arbitration procedure to resolve the dispute was not unreasonable in view of the wide gap between State Farm's offer and plaintiffs' extremely high demand.

(31) *Kauffman v. Aetna Cas. & Sur. Co.*, 794 F. Supp. 137 (E.D. Pa. 1992) (Pollak, J.)

The insured, under an auto policy, alleged that insurer acted in bad faith by (1) insisting on proceeding to arbitration rather than tendering the \$1 million policy limit; (2) opposing the insured's motion to confirm the arbitration award on a technicality; and (3) refusing to pay the remaining amount of the arbitration award until the appellate court had ruled on a relevant legal issue. Judge Pollak of the Eastern District rejected this argument. The court held that proceeding to arbitration was not bad faith conduct where the policy at issue contained an arbitration clause and where the arbitrators in fact awarded less than the full \$1 million limit. The court further held that Aetna's opposition to the plaintiff's petition to confirm the arbitration award did not give rise to a claim of bad faith because the plaintiff's petition was filed prematurely—less than 30 days after the arbitrators announced their award. Finally, the court held that withholding final payment of the award until all legal issues were resolved was not bad faith conduct.

(32) *Stanford v. Nat'l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323 (E.D. Pa. Nov. 3, 2014) (Tucker, C.J.)

This factually complicated UM/UIM case spanned a period of 17 years. In November 1997, plaintiff was injured in a two-vehicle automobile accident. At the time of the accident, plaintiff had a Delaware driver's license and residence, and was insured under a Delaware insurance policy issued by NGM. Plaintiff's policy provided UM and UIM coverages with a policy limit of \$25,000 per person or \$50,000 per accident stacked for two vehicles. In order to sustain a claim under the policy, plaintiff was required to submit to examinations under oath (EUO) and medical examinations "as often as reasonably require."

Soon after the accident, plaintiff submitted a claim under the policy. In November 1997, and several times afterward, NGM requested that plaintiff provide it an EUO pursuant to the policy. Plaintiff failed to undergo an EUO despite several requests over a five-year period. In December 2002, plaintiff finally submitted to an EUO. During the EUO, plaintiff refused to answer questions that were necessary and material to NGM's adjustment of plaintiff's claim.

NGM also asked plaintiff several times to submit to a medical examination pursuant to the policy. Plaintiff did not attend any medical examination. NGM ultimately closed plaintiff's file because plaintiff failed to cooperate under the terms of the policy and because plaintiff's file had been inactive for six months. In April 2001, plaintiff filed a petition in the Court of Common Pleas of Philadelphia County to compel arbitration, which was granted, though the court held that the arbitration should take place in Delaware. Because of plaintiff's counsel's lack of diligence, arbitration was not scheduled until April 2004. At that point, plaintiff's former counsel, Allen Feingold, became enmeshed in disciplinary problems, ultimately resulting in his disbarment in 2008. Hearing nothing on the claim for years, the arbitrators, NGM and its counsel closed their respective files.

In May 2011, plaintiff retained new counsel and renewed his demand for arbitration. Arbitration occurred in Delaware in August 2011. Prior to the proceeding, NGM offered plaintiff \$10,000 to settle plaintiff's claim, but plaintiff rejected the offer. During arbitration, the parties disputed whether the policy should be interpreted under Pennsylvania or Delaware law, which affected whether the policy could be "stacked." On October 5, 2011, the arbitrators found in favor of plaintiff. The arbitrators ruled that Pennsylvania law—which permits stacking—applied. The arbitrators awarded plaintiff \$50,000 in UM benefits—\$25,000 more than what is permitted under Delaware law.

Following the award, NGM considered its appellate options, i.e., whether it would seek to vacate the award under Delaware procedure. Under Delaware law, NGM had ninety days to do so. Under Pennsylvania arbitration practice, NGM had thirty days to appeal the arbitration award. On October 31, 2011, NGM concluded that it would not appeal the award. On November 4, 2011—one day before the conclusion of the thirty-day appeal period—NGM delivered a check for \$50,000 to plaintiff's counsel. Included with the check was a draft release and settlement agreement that sought to release NGM "from all uninsured/underinsured motorist coverage benefits claims which have resulted or may in the future develop [from the accident]." The check contained the written annotation that it was "in settlement of any & all claims." NGM's counsel later testified that providing a release and settlement check was standard practice in Delaware.

Plaintiff's counsel objected to the release, and also objected to the "settlement" language on the check. NGM agreed to reissue a check with corrected language that stated, "satisfaction of UM Arbitration Award," and send it via overnight mail that day. Plaintiff's counsel received the check the following day, November 8, 2011.

One week later, plaintiff filed a complaint against NGM among others and alleging bad faith. Following discovery, NGM filed a motion for summary judgment. Judge Tucker of the Eastern District granted the insurer's motion.

Plaintiff's arguments that NGM acted in bad faith included allegations that NGM delayed handling plaintiff's UIM claim by requesting that Stanford submit to an EUO and medical examination. The court disagreed, concluding that the policy required the insured to submit to such procedures:

Here, the insurance policy required Stanford to submit to EUOs and medical examinations. Stanford repeatedly refused to submit to EUOs and medical examinations. In 2002, when Stanford finally submitted to an EUO, he refused to answer questions that were necessary and material to NGM's

adjustment of his claim. Additionally, Stanford never submitted to a medical examination even though such an examination was necessary for NGM's assessment of Stanford's claim.... From mid-2004 to May 2011, NGM did not receive any correspondence from Stanford. In 2007, NGM closed Stanford's file. Accordingly, to the extent that Stanford contends that NGM's investigation of or delay in making an offer to settle the claim was in bad faith, NGM had a reasonable ground for doing so: NGM believed that Stanford failed to comply with the insurance policy requirements.¹²¹²

Plaintiff also contended that NGM's \$10,000 pre-arbitration settlement offer was inadequate and made in bad faith. The court rejected this argument because NGM believed that Delaware law would apply to the claim, in which case the policy limit would be \$25,000:

Stanford's argument that NGM's \$10,000 pre-arbitration settlement offer was made in bad faith also fails because NGM had reasonable grounds for limiting its demand to \$10,000. At the time of the accident, Stanford had a Delaware residence and driver's license. As a result, NGM believed that Stanford's UM/UIM claim would be governed by Delaware law. Under Delaware law, the stacking of UM and UIM benefits is prohibited.... Accordingly, if Delaware law applied to the arbitration proceeding, Stanford would have been entitled to a maximum of \$25,000 in UM/UIM benefits, not \$50,000.¹²¹³

Finally, plaintiff contended that NGM acted in bad faith by conditioning the payment of the arbitration award on plaintiff signing a waiver of claims arising from the accident. The court rejected this argument as well, finding that once plaintiff objected to the release and check, NGM reissued the check and did not require signing of a release. The court stated:

Stanford's remaining argument—that NGM acted in bad faith by conditioning the payment of the arbitration award on Stanford signing a release—also fails. When NGM originally issued the check and release to Stanford, the cover letter indicated that Stanford could not use the check unless Stanford also signed the release. After Stanford objected to this condition, NGM promptly reissued a check and eliminated any requirement that Stanford sign a release. [NGM's counsel] testified that providing a release and settlement check was standard practice in Delaware.... NGM had a reasonable ground for initially conditioning the arbitration award on Stanford signing a release since it relied on this practice. Stanford failed to provide any evidence that this was not Delaware practice.¹²¹⁴

(33) *Byars v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 3524 (E.D. Pa. Jan. 12, 2015) (Dalzell, J.)

Plaintiff was injured in an auto accident with an uninsured driver who also assaulted plaintiff after the accident. Plaintiff sought UM coverage from his auto carrier, State Farm, which denied coverage after concluding that the injuries did not arise from "ownership, maintenance or use of a motor vehicle." Plaintiff then filed suit against State Farm seeking UM benefits. When the parties filed cross motions for summary judgment, plaintiff also sought to amend his complaint to add a bad faith claim. Judge Dalzell of the Eastern District denied the motion for leave to amend.

Plaintiff sought to add a bad faith claim alleging bad faith in the process of discovery and in refusing to provide UM coverage after he got a default judgment against the tortfeasor in the underlying litigation. The court explained that because "Section 8371 is intended to provide redress to an insured for an insurer's bad faith conduct in its capacity as an insurer, not as a legal adversary in a lawsuit initiated by the insured, discovery violations do not fall within the statute's ambit."¹²¹⁵ Therefore, allegations that counsel's objections during the deposition of the State Farm representative and State Farm's redactions in production of its files could not support a bad faith claim, and amendment would be futile.

The court also accepted State Farm's argument that amendment would be futile because it was not bound by the default judgment against the tortfeasor under the consent to settlement provision of the policy: "State Farm, therefore, had a reasonable basis in law to refuse to pay plaintiff's state court judgment against [the tortfeasor] when it had not consented in writing to the judgment and plaintiff had not obtained a default judgment against State Farm itself. State Farm's reasonable basis for denying benefits under the policy precludes prevailing on a claim of bad faith."¹²¹⁶

^{1212.} *Stanford v. Nat'l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323, at *16 (E.D. Pa. Nov. 3, 2014).

^{1213.} *Stanford v. Nat'l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323, at *18.

^{1214.} *Stanford v. Nat'l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323, at *20-21.

^{1215.} *Byars v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 3524, at *24 (E.D. Pa. Jan. 12, 2015).

^{1216.} *Byars v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 3524, at *26 (E.D. Pa. Jan. 12, 2015).

(34) *Insetta v. First Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 34798 (E.D. Pa. Mar. 20, 2015) (Kelly, J.)

Plaintiff husband was injured in an auto accident, and after settlement with the tortfeasor, submitted a UIM claim to his defendant auto insurer demanding the full policy limits of \$100,000. Defendant offered \$34,000 in response, which was rejected; plaintiffs then filed this bad faith suit. Defendant filed a motion for partial summary judgment. Judge Kelly of the Eastern District granted the motion.

Plaintiffs contended that the defendant's offer was so low as to be bad faith. The court found that a low offer, that is a reasonable one, cannot be the basis for a bad faith claim and that plaintiffs failed to show that the valuation was unreasonable. Pointing to the defendant's medical review, which called several diagnoses into question, the court found sufficient basis for the defendant's offer.

Plaintiffs also contended that defendant's reliance on its medical reviewer, retained after litigation commenced, was done in bad faith and showed that defendant was improperly acting "in a self-interested fashion." Noting that the parties' experts had very different opinions, the court concluded that plaintiffs failed to meet its burden in a bad faith case: "Plaintiffs' argument attempts to eliminate Dr. Bennett's conclusions while filling the void with medical opinions favorable to their cause. However, Defendant is 'under no obligation to accept [the determinations of plaintiff's treating physicians] at face value to evaluate [plaintiff's] claim in good faith.'"¹²¹⁷

Finally, plaintiffs maintained that the investigation was done in bad faith. The court noted that the adjuster had 42 years of experience, had reviewed the file in developing her evaluation. The court rejected plaintiffs' position that the adjuster's failure to obtain a record review or consultation by a physician during the evaluation process was evidence of bad faith: "Plaintiffs' argument is without any legal support, and refuted by the testimony of [the adjuster], who stated that such consultation was unnecessary due to the 'pretty straightforward' nature of the case with the injuries and treatments being well described in the medical records provided by Plaintiffs."¹²¹⁸

(35) *Gibble v. Cincinnati Ins. Cos.*, 2015 U.S. Dist. LEXIS 57190 (E.D. Pa. Apr. 30, 2015) (Pratter, J.)

Plaintiff Gibble was driving home in a truck owned by his employer and was involved in an accident with an uninsured motorist. After being denied worker's compensation benefits, he sought coverage under the employer's commercial auto policy from defendant Cincinnati. That claim was denied based on an exclusion for those who do not reasonably believe that they have authority to drive the vehicle. Plaintiff Gibble then filed this bad faith suit. Cincinnati filed a motion for summary judgment. Judge Pratter of the Eastern District granted the motion as to the bad faith claim.

The court found no evidence in the record to create a genuine issue of material fact on bad faith because the testimony in the worker's compensation case indicated that Gibble knew that he was not supposed to drive the truck:

Mr. Gibble has not produced sufficient evidence from which a reasonable jury could find in his favor on a bad faith claim. Cincinnati had a reasonable basis to exclude payment, even if that basis ultimately proves incorrect. The workers' compensation judge found that Mr. Gibble was not acting in the scope of employment at the time of his motor vehicle accident. The testimony presented during the workers' compensation proceedings, as well as other evidence, provided a reasonable basis for Cincinnati to believe that unless Mr. Gibble was acting within the scope of his employment, he was not permitted to drive the truck, and that Mr. Gibble knew this. This gave Cincinnati a reasonable basis to deny coverage because Mr. Gibble appeared, arguably, to have lacked a reasonable belief that he was entitled to be driving the truck at the time of the accident. Mr. Gibble likewise does not have any evidence of the second element of a bad faith claim—that Cincinnati knew or recklessly disregarded its lack of a reasonable basis. Mr. Gibble argues that he "intends to call the adjuster as of cross examination to verify that this case was never properly investigated or evaluated," but such an intention is not evidence.

Especially in light of the "clear and convincing" standard by which a jury would have to find that evidence supports the claim of bad faith, Mr. Gibble's bad faith claim must be dismissed. There is insufficient evidence in the record from which a reasonable jury could conclude that Cincinnati acted in bad faith.¹²¹⁹

§10:18 Insurer Takes Reasonable Position Regarding Settlement

§10:19 — Cases

(1) *Gowton v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 29390 (W.D. Pa. Mar. 2, 2017) (Bissoon, J.) (homeowner's fire claim)

After plaintiff Gowton's home was damaged in a fire, he sought benefits from his homeowner's insurer, State Farm. The parties were unable to resolve the claim, as their calculations of replacement cost were over \$100,000 apart, so Gowton filed this bad faith complaint. State Farm filed a motion to dismiss. Judge Bissoon of the Western District granted the motion. An earlier version of the complaint is discussed in §7:02.

¹²¹⁷ *Insetta v. First Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 34798, at *12-13 (E.D. Pa. Mar. 20, 2015) (quoting *Richardson v. United Fin. Cas. Co.*, 2013 WL 2357519, at *9 (E.D. Pa. May 30, 2013)).

¹²¹⁸ *Insetta v. First Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 34798, at *14-15 (E.D. Pa. Mar. 20, 2015).

¹²¹⁹ *Gibble v. Cincinnati Ins. Cos.*, 2015 U.S. Dist. LEXIS 57190, at *5-6 (E.D. Pa. Apr. 30, 2015) (footnote and citation to record omitted).

Gowton’s bad faith claim was “based entirely on the difference between his repair estimate that he independently obtained and State Farm’s much lower repair estimate.”¹²²⁰ The court explained that “an insurer’s low but reasonable estimate of an insured’s losses” does not support a bad faith claim.¹²²¹ An insured “must demonstrate that the insurer’s estimate bore no reasonable relationship to the actual damage loss, either because the insurer ‘breached its duty of good faith through some motive of self-interest or ill-will’ or because the insurer failed to ‘conduct[] a review or investigation sufficiently thorough to yield a reasonable foundation for its action.’”¹²²² The court concluded that there were no facts pled in the complaint from which it could be concluded that State Farm acted unreasonably in calculating the value of the claim, so the complaint could not stand: “In the absence of any supporting facts from which it might be inferred that the company’s investigation was biased or unreasonable, this type of disagreement in an insurance case is ‘not unusual,’ and ‘cannot, without more, amount to bad faith.’”¹²²³

(2) *Hardy v. Erie Ins. Exch., No. 2012-2058 (Centre Co. Mar. 7, 2017) (Ruest, J.) (auto collision claim)*

Plaintiffs were injured in an auto accident, for which the other driver, insured with State Farm, was responsible. They submitted a collision claim to their defendant auto insurer, Erie. State Farm accepted liability for the accident and plaintiffs negotiated with that insurer to resolve the collision claim. When they could not resolve the claim with State Farm, plaintiffs turned again to Erie. Erie initially valued the claim at approximately \$14,000; after plaintiffs objected, Erie agreed that the amount was inaccurate and should be approximately \$19,500. Plaintiffs rejected that amount and demanded nearly \$23,000, which included loss of use, interest and rental costs. Erie denied that it was responsible for these additional amounts under the policy. Plaintiffs filed this breach of contract and bad faith suit. Erie filed a motion for summary judgment. Judge Ruest of the Centre County Court of Common Pleas granted the motion as to the bad faith count.

The court concluded that Erie had acted reasonably in handling the settlement discussions with respect to the collision claim: “After refusing State Farm’s offers, Plaintiffs opened another claim with Defendant [Erie] in January 2012, Defendant then presented an offer at the end of January based on the material claims adjuster’s investigation. When Plaintiffs rejected the offer, Defendant went back and reevaluated the value of the car, admitted errors, rectified those errors and offered a new amount plus an additional \$500 out of good faith. Defendant offered the value of the car which Plaintiffs rejected.”¹²²⁴

(3) *Murphy v. United Fin. Cas. Co., 2016 U.S. Dist. LEXIS 51390 (E.D. Pa. Apr. 18, 2016) (Dalzell, J.) (UIM claim)*

In this case, discussed in greater detail in §10:17, plaintiff Murphy was involved in an automobile accident and thereafter sought UIM benefits from his personal automobile insurer, defendant United. After a lengthy investigation, the adjuster valued the claim and made an offer at the low end of the \$83,000 - \$101,000 value range. Settlement negotiations continued, with Murphy’s attorney eventually requesting an offer in the full amount of the adjuster’s settlement authority in April 2015. The adjuster responded two weeks later by saying she had authority to make an \$87,000 offer, but she did not offer the full value of her \$101,000 authority. Murphy then filed this bad faith suit. After discovery, United filed a motion for summary judgment. Judge Dalzell of the Eastern District granted the motion.

Murphy argued that the settlement offers were unreasonably low and therefore in bad faith. The court noted that although offers that “bear no reasonable relationship to an insured’s actual losses can constitute bad faith,” some courts “have found that an insurer may not act in bad faith even when it offers a settlement amount at the lower end of the estimated settlement range.”¹²²⁵ The court concluded that the initial offer was reasonable, as it was at the low end of the range determined by the adjuster after investigation: “United’s initial offer to Murphy, presented after a thorough and reasonable investigation, was \$83,000. This was at the bottom of the range for the claim’s estimated value, which was \$83,000 to \$101,000, but it was within the range nonetheless. We cannot conclude that a reasonable jury could rely on this information to find in favor of Murphy on his bad faith claim.”¹²²⁶

Finally, Murphy contended that the adjuster’s failure to offer the full amount of her settlement authority was in bad faith and that the adjuster’s last offer was misleading because it implied that was the full extent of her authority. The court disagreed, finding first that there was “no authority to support his position that a claims adjuster is obligated to offer the full amount of her settlement authority. This rule, if it existed, would be absurd on its face and would foreclose any flexibility during negotiations between insurers and those making claims.”¹²²⁷ In addition, the court

^{1220.} *Gowton v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 29390, at *4 (W.D. Pa. Mar. 2, 2017).

^{1221.} *Gowton v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 29390, at *5 (W.D. Pa. Mar. 2, 2017) (internal citation omitted).

^{1222.} *Gowton v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 29390, at *5 (W.D. Pa. Mar. 2, 2017) (citation omitted).

^{1223.} *Gowton v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 29390, at *10 (W.D. Pa. Mar. 2, 2017) (citation omitted).

^{1224.} *Hardy v. Erie Ins. Exch.*, No. 2012-2058, slip. op. at 6 (Centre Co. Mar. 7, 2017).

^{1225.} *Murphy v. United Fin. Cas. Co.*, 2016 U.S. Dist. LEXIS 51390, at *9 (E.D. Pa. Apr. 18, 2016) (internal quotation and citation omitted).

^{1226.} *Murphy v. United Fin. Cas. Co.*, 2016 U.S. Dist. LEXIS 51390, at *10 (E.D. Pa. Apr. 18, 2016).

^{1227.} *Murphy v. United Fin. Cas. Co.*, 2016 U.S. Dist. LEXIS 51390, at *11 (E.D. Pa. Apr. 18, 2016).

concluded that the email with the \$87,000 offer did not represent that was the full extent of her authority, just that she was authorized to make such an offer, and therefore was not misleading. In sum, “United’s hardline negotiating position, which it later softened [after litigation], is not evidence that a reasonable jury could use to sustain Murphy’s bad faith claim.”¹²²⁸

(4) *Williams v. Progressive N. Ins. Co.*, 2015 U.S. Dist. LEXIS 162572 (M.D. Pa. Dec. 4, 2015) (Mannion, J.) (UIM claim)

Plaintiff was injured in an auto accident, and after resolution of the bodily injury claim with the other driver for \$65,000, plaintiff sought the \$100,000 UIM policy limits from his defendant auto carrier. When the parties could not resolve the claim, plaintiff filed this bad faith action, and defendant filed a motion for summary judgment on that count. Judge Mannion of the Middle District granted the motion.

Plaintiff claimed that defendant had acted in bad faith in valuing the claim. The court disagreed. The court noted that the plaintiff’s complaints had resolved within about a month, that his physician did not impose any restrictions, and that plaintiff returned to work without limitation about a month later. With this information, the adjuster had initially offered \$1,500, which was increased to \$15,000 after plaintiff provided some additional information. When plaintiff continued to demand the limits, defendant asked for more supporting information, but none was ever received prior to filing of suit. With this background, the court held:

[T]he plaintiffs have not established by clear and convincing evidence that the defendant was motivated by self-interest or ill will in handling Mr. Williams’s UIM claim. Instead, it would appear from what has been presented to the court that the instant case simply represents a disagreement among the parties as to the valuation of the UIM claim. This does not amount to bad faith.¹²²⁹

(5) *Hollingsworth v. State Farm Fire & Cas. Co.*, 2005 U.S. Dist. LEXIS 3694 (E.D. Pa. Mar. 9, 2005) (Padova, J.) (vandalism claim under rental policy)

This case is discussed in detail in §10:05. Plaintiffs sued their insurer, State Farm, for breach of a rental dwelling insurance contract and bad faith arising out of alleged vandalism that occurred on two occasions to the insured property. The insured’s public adjuster estimated the amount of the first vandalism loss as exceeding \$31,000. State Farm’s adjuster estimated the actual cash value of the loss at approximately \$1,200. The insurer sent numerous letters to the insured’s representative requesting additional information, and ultimately offered to pay approximately \$6,000 in compromise of the claim. The offer was not accepted. Although there were issues of material fact that prevented the entry of summary judgment on the breach of contract count, Judge Padova of the Eastern District granted State Farm’s motion for summary judgment on the bad faith count. The court rejected the plaintiffs’ argument that offering \$6,000 in the face of the \$31,000 demand was bad faith. The court held that the plaintiffs “cannot effectively argue that the offer was anything but a starting point for negotiation,” and therefore plaintiffs offered insufficient evidence that State Farm acted in bad faith.¹²³⁰

(6) *Segall v. Liberty Mut. Ins. Co.*, 2000 U.S. Dist. LEXIS 16382 (E.D. Pa. Nov. 9, 2000) (Buckwalter, J.) (addressing reserves, negotiations)

The facts of this case appear in §10:13. The plaintiff filed suit, alleging that the company acted in bad faith by failing to make a timely settlement offer, and failing to make an adequate settlement offer. Judge Buckwalter of the Eastern District ruled that the insurer’s continued investigation was justified given the ongoing nature of the plaintiff’s claim for pain and suffering.

With respect to the insurer’s initial offer of \$50,000 despite its setting a reserve of \$250,000, the court rejected that as an indicator of bad faith. According to the court, “The reserve is merely set aside in order to protect the insurance company from being incapable of paying the claimant.”¹²³¹ The court agreed with the *Williams v. Hartford* opinion that “it would be unwise to ‘fashion a rule requiring an insurer to make an offer reflecting the reserve as soon as it is set.’”¹²³²

The court further found that there was no bad faith in the company’s failure to increase its settlement offer, particularly given the plaintiff’s failure to respond to or even acknowledge the company’s offer. The court approved the testimony of the company’s claim representative who said, “What was I going to do, negotiate against myself. [sic] I didn’t even have a demand.”¹²³³

¹²²⁸ *Murphy v. United Fin. Cas. Co.*, 2016 U.S. Dist. LEXIS 51390, at *12 (E.D. Pa. Apr. 18, 2016).

¹²²⁹ *Williams v. Progressive N. Ins. Co.*, 2015 U.S. Dist. LEXIS 162572, at *22-23 (M.D. Pa. Dec. 4, 2015) (footnote omitted).

¹²³⁰ *Hollingsworth v. State Farm Fire & Cas. Co.*, 2005 U.S. Dist. LEXIS 3694, at *24 (E.D. Pa. Mar. 9, 2005) (citing *Segall v. Liberty Mut. Ins. Co.*, 2000 U.S. Dist. LEXIS 16382 (E.D. Pa. Nov. 9, 2000)).

¹²³¹ *Segall v. Liberty Mut. Ins. Co.*, 2000 U.S. Dist. LEXIS 16382, at *8 (E.D. Pa. Nov. 9, 2000).

¹²³² *Segall v. Liberty Mut. Ins. Co.*, 2000 U.S. Dist. LEXIS 16382, at *8 (E.D. Pa. Nov. 9, 2000) (citing *Hartford Ins. Co. v. Williams*, 83 F. Supp. 2d 567, 576 (E.D. Pa. 2000)).

¹²³³ *Segall v. Liberty Mut. Ins. Co.*, 2000 U.S. Dist. LEXIS 16382, at *9 (E.D. Pa. Nov. 9, 2000).

(7) *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267 (M.D. Pa. Apr. 10, 2017) (UIM claim)

This UIM case is discussed in detail in §10:17. In granting summary judgment to the insurer, Magistrate Judge Carlson of the Middle District of Pennsylvania addressed the attempted settlement negotiations between the parties, stating that although the attempts to resolve the UIM claim were unsuccessful, “that lack of success, standing alone, does not demonstrate clear and convincing evidence of bad faith.”¹²³⁴ Rather, the court noted, the significant demands “dictated a careful review of this claim, and it appears that State Farm undertook such a review.”¹²³⁵

(8) *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302 (W.D. Pa. Mar. 20, 2014) (Gibson, J.)

About three years after plaintiff was in an auto accident, and he settled with the tortfeasor for the \$15,000 bodily injury limits, he sought UIM benefits from his auto carrier, Nationwide, in May 2010. Nationwide requested additional records. Plaintiff gave an EUO in September 2010, and Nationwide sought an IME and a dermatologist’s review. The review was complete in January 2011. The IME was scheduled in early 2011, but was ultimately done in January 2012 due to plaintiff’s travel restrictions. Nationwide made a \$5000 offer shortly after the IME, and plaintiff rejected the offer in February 2012. Plaintiff then brought this breach of contract and statutory bad faith action, and the parties were eventually able to resolve the UIM claim following mediation. The parties filed cross motions for summary judgment. Judge Gibson of the Western District granted Nationwide’s motion and denied plaintiff’s.

Plaintiff alleged that Nationwide acted in bad faith by making a lowball offer. Nationwide based its offer on the results of the IME, which concluded that plaintiff had no limitations as a result of his soft tissue injuries, and the dermatologist review, which concluded that the accident did not cause an existing lipoma to increase in size. Further, Nationwide took into account that while plaintiff did not provide prior medicals, he testified he had pre-existing back pain for which he treated with a chiropractor, and the fact that he continued to perform the same activities as pre-accident, although with pain and stiffness at times. Post-accident treatment was minimal. The court reviewed this evidence and concluded that the offer was supported by the evidence and therefore was not in bad faith: “The foregoing evidence shows that Nationwide...had a reasonable basis for its offer on the UIM claim. Plaintiffs disagreed with Nationwide’s valuation of the UIM claim. However, Plaintiffs have failed to present any evidence to dispute Nationwide’s valuation.”¹²³⁶

(9) *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762 (W.D. Pa. Jan. 24, 2013) (Conti, J.)

Plaintiff was involved in a motor vehicle accident with an uninsured vehicle. Plaintiff filed a UM claim with his automobile insurer, defendant Geico. When the parties could not agree on the value of the claim, plaintiff filed this action alleging breach of contract seeking UM benefits; common law bad faith; and statutory bad faith under §8371. Defendant filed a motion for summary judgment on the bad faith claims. As also discussed in §§5:03 and 10:17, Judge Conti of the Western District granted the insurer’s motion as to the §8371 claim but denied the insurer’s motion as to the common law bad faith claim.

Plaintiff contended that his insurer acted in bad faith by unreasonably valuing his claim and making a low-ball offer as a result. Plaintiff alleged that his lost wages were \$17,000, and that because his insurer offered only \$7,000, such an offer was in bad faith. The court noted that the evidence presented showed that the insurer was unaware of the amount of lost wages, and concluded: “In light of the facts available to defendant at the time the offer was made, plaintiff identifies no relevant legal authority supporting his argument that a disagreement over the valuation of a claim is sufficient to constitute bad faith as a matter of law.”¹²³⁷

The court also rejected plaintiff’s argument that the offer was so low as to constitute bad faith. Citing *Smith v. State Farm Mut. Auto. Ins. Co.*, *Thomer v. Allstate Ins. Co.*, and *Hollingsworth v. State Farm Fire & Cas. Co.*, the court explained that low offers do not, without more, support a claim for bad faith. The court reviewed the evidence presented and found that “plaintiff offers nothing to rebut the record evidence indicating that the \$7,000 offer was merely an initial offer and thus a “starting point for negotiations.”¹²³⁸

As to the value of the claim for UM benefits, the court, citing *Kosierowski v. Allstate Ins. Co.*,¹²³⁹ noted that it was not bad faith for an insurer to offer at the low range of the settlement value range where the value of the claim was disputed. The court decided that there was ample evidence to support the insurer’s valuation of the claim, as the medical records did not bear out plaintiff’s claim of serious injury. The court also found notable that plaintiff did not have surgery, despite two doctor’s opinions indicating that it was an option and pointed to the insurer’s IME, which called into question the severity of plaintiff’s injuries. The court further pointed out that a subsequent accident called into question the extent of the injuries. The court concluded: “Given the lack of evidence supporting plaintiff’s claims about the seriousness of his injuries and the extent to which those injuries may or may not have required costly

¹²³⁴ *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *23 (M.D. Pa. Apr. 10, 2017).

¹²³⁵ *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 2017 U.S. Dist. LEXIS 54267, at *23 (M.D. Pa. Apr. 10, 2017).

¹²³⁶ *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302, at *41-42 (W.D. Pa. Mar. 20, 2014).

¹²³⁷ *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *21 (W.D. Pa. Jan. 24, 2013).

¹²³⁸ *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *26 (W.D. Pa. Jan. 24, 2013) (quoting *Hollingsworth*, 2005 WL 56314, at *8).

¹²³⁹ *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583 (E.D. Pa. 1999).

medical treatment, it was not unreasonable or bad faith for defendant to refuse to settle at plaintiff's demand of the policy limits."¹²⁴⁰ The court found that defendant did not act in bad faith in offering the low end of the settlement range it had calculated, where the value of plaintiff's injuries was legitimately in dispute.¹²⁴¹

The court then turned to plaintiff's claim that defendant acted in bad faith during negotiations at the parties' mediation. The court rejected plaintiff's argument that the refusal of defendant to raise its offer was in bad faith because the evidence showed that plaintiff refused to move off of his demand, so the mediation was adjourned, and that plaintiff had not provided any additional evidence to "bolster his negotiating position."¹²⁴²

(10) *Seto v. State Farm Ins. Co.*, 2012 U.S. Dist. LEXIS 3306 (W.D. Pa. Jan. 11, 2012) (McVerry, J.)

This case is discussed in greater detail in §10:13(b). Plaintiffs filed this breach of contract and bad faith action after they were unable to resolve their homeowner's claim, to their satisfaction, with State Farm following destruction of their house in a fire. State Farm filed a motion for partial summary judgment on the bad faith claim. Judge McVerry of the Western District granted the motion.

Plaintiffs maintained that State Farm acted in bad faith in submitting actual cash value payments that were less than the plaintiffs' own estimates. The court explained that "Generally, Pennsylvania law does not treat as bad faith an insurer's low but reasonable estimate of an insured's losses. . . . Nevertheless, low-ball offers which bear no reasonable relationship to an insured's actual losses can constitute bad faith within the meaning of §8371. . . . The insured must demonstrate that the insurer 'breached its duty of good faith through some motive of self-interest or ill-will.'"¹²⁴³ The court found that State Farm had "promptly" paid plaintiffs in accordance with its estimates after each fire, and had provided additional payments when it was able to review the second estimate obtained by plaintiffs. The court noted that plaintiffs provided no competent evidence to counter State Farm's:

Based on the summary judgment record evidence, the Court finds that State Farm has demonstrated that it conducted an investigation sufficiently thorough to yield a reasonable foundation for its action. On the other hand, Plaintiffs have not demonstrated by clear and convincing evidence that State Farm had no reasonable basis for the amounts of the payments it made to Plaintiffs. A low, but reasonable offer, is simply not evidence of bad faith. . . .

Further, Plaintiffs have adduced no evidence that establishes by clear and convincing evidence any indicia of self-interest, ill will or unreasonable behavior on the part of State Farm. Likewise, there is no evidence to suggest that State Farm's conduct in handling the Setos' claims was motivated by a dishonest or improper purpose. Accordingly, the Court finds that Plaintiffs have not proven by clear and convincing evidence that State Farm's estimates of loss were not reasonable.¹²⁴⁴

Plaintiffs also argued that State Farm failed to reimburse them for certain additional living expenses. State Farm had refused to pay those expenses because it had not been provided a copy of a signed lease and because it had not been provided with any proof that plaintiffs had paid the monthly lease payments. Rather, plaintiffs had provided a lease agreement that did not include a signature page and deposit slips that did not identify the payer. State Farm indicated that upon provision of adequate documentation, it would pay any additional benefits appropriate under the policy. The court found that State Farm had not acted in bad faith in requiring adequate documentation because "[a]n insurer is not obligated to pay an insured's claims 'on demand, no questions asked.'"¹²⁴⁵

(11) *Sypek v. State Farm Mut. Auto Ins. Co.*, 2012 U.S. Dist. LEXIS 83326 (M.D. Pa. June 15, 2012) (Caputo, J.)

Plaintiff was injured in an auto accident, and sought UIM benefits from her auto insurer, State Farm after she settled with the tortfeasor's insurer for the policy limits. State Farm offered \$5,000 to settle her claim. After plaintiff filed this bad faith suit, State Farm filed a motion to dismiss. Judge Caputo of the Middle District granted the motion as to the bad faith claim, as discussed in more detail in §10:17.

The court rejected plaintiff's claim that State Farm's offer was unreasonably low and in bad faith, explaining: "[E]ven if the offer was facially unreasonable, that does not prove that State Farm acted in bad faith—rather, it might have negligently failed to investigate and evaluate, leading to an unreasonable settlement offer."¹²⁴⁶

¹²⁴⁰. *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *24 (W.D. Pa. Jan. 24, 2013).

¹²⁴¹. *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *24 (W.D. Pa. Jan. 24, 2013).

¹²⁴². *Katta v. Geico Ins. Co.*, 2013 U.S. Dist. LEXIS 9762, at *29 (W.D. Pa. Jan. 24, 2013).

¹²⁴³. *Seto v. State Farm Ins. Co.*, 2012 U.S. Dist. LEXIS 3306, at *13 (W.D. Pa. Jan. 11, 2012) (citing and quoting *Brown v. Progressive Ins. Co.*, 860 A.2d 493, 501 (Pa. Super. Ct. 2004)).

¹²⁴⁴. *Seto v. State Farm Ins. Co.*, 2012 U.S. Dist. LEXIS 3306, at *13 (W.D. Pa. Jan. 11, 2012) (citing *O'Donnell v. Allstate Ins. Co.*, 734 A.2d 901, 910 (Pa. Super. 1999)).

¹²⁴⁵. *Seto v. State Farm Ins. Co.*, 2012 U.S. Dist. LEXIS 3306, at *13 (W.D. Pa. Jan. 11, 2012) (quoting *Condio v. Erie Ins. Exch.*, 899 A.2d 1136, 1145 (Pa. Super. 2006)).

¹²⁴⁶. *Sypek v. State Farm Mut. Auto Ins. Co.*, 2012 U.S. Dist. LEXIS 83326, at *8-9 (M.D. Pa. June 15, 2012).

(12) *Portside Investors, L.P. v. N. Ins. Co. of N.Y.*, 2011 Phila. Ct. Com. Pl. LEXIS 19 (Philadelphia Jan. 5, 2011) (Bernstein, J.)

This case is discussed in greater detail in §§10:07(b) and 10:13(b). Portside filed a claim with the property insurance carrier for it and its lessee after its pier collapsed. In the event of a covered collapse, the policy provided for payment of “replacement cost,” but if the pier were not replaced, the policy would only provide coverage for “actual cash value.” Based on its expert’s conclusions, and noting that Portside did not intend to rebuild, Northern determined that although the pier was worthless just prior to collapse, it would pay \$200,000 to settle that portion of the claim. Portside rejected that settlement offer.

Portside filed this suit, seeking recovery for bad faith. Judge Bernstein of the Philadelphia Court of Common Pleas after a non-jury trial found that Northern had not acted in bad faith. With respect to the settlement offer of \$200,000 actual cash value, where Northern estimated that value to be zero, the court found that Portside failed to prove the offer was in bad faith:

Bad faith however is not proven merely because the insurer makes a low but reasonable estimate of the insured’s losses, or where the insurer made a reasonable legal conclusion based on an area of the law that is uncertain or in flux. To constitute bad faith, it is not necessary that the insurer’s conduct be fraudulent. Neither, mere negligence nor bad judgment is bad faith.¹²⁴⁷

(13) *Smith v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 19373 (E.D. Pa. Feb. 16, 2012) (McLaughlin, J.)

Plaintiff was injured in an auto accident. After recovery of the policy limits from the other driver’s insurer, she sought UIM benefits, in the amount of the \$45,000 policy limits, from her own auto insurer, State Farm. Plaintiff had exhausted her first-party medical insurance, and had approximately \$28,000 in unpaid medical bills. State Farm requested, and received, plaintiff’s medical records from both before and after the accident, as well as information regarding expected future treatment. Plaintiff also provided an IME from a neurosurgeon. State Farm offered \$21,000 to settle the claim, and provided a check to plaintiff in this amount, later increasing the offer to \$32,000. Plaintiff continued to demand the balance of the policy limits, and filed this breach of contract and bad faith suit. State Farm filed a motion to dismiss the bad faith claim. Judge McLaughlin of the Eastern District of Pennsylvania, in her opinion also discussed in §§7:01 and 10:13(a), granted the motion.

Plaintiff Smith argued that State Farm had no reasonable basis to refuse settlement at the policy limits. The court held that there was a legitimate dispute over the appropriate amount of benefits:

The facts show a dispute over the amount of damages suffered by the plaintiff in her automobile accident, but do not demonstrate . . . frivolous refusal to pay the policy proceeds Nor did State Farm make a firm refusal to pay the remainder of the amount of coverage under the policy; McDonnell [claims representative] stated his willingness to engage in follow-up negotiations after State Farm’s offer was increased to \$32,225, and the plaintiff filed suit in response. Under these circumstances, Smith cannot state a claim for insurance bad faith under Section 8371.¹²⁴⁸

(14) *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360 (E.D. Pa. 2011) (Kelly, S.J.)

The facts of this UIM-related case are discussed in more detail in §§10:13(a) and 10:17. Allstate’s claims examiner, after reviewing the medical records, calculated the claim to be worth \$35,000-\$45,000, and, in late October 2005, offered to settle for \$30,000. Seven months later, in July 2006, Thomer responded to that offer by submitting more medical records and demanding the \$100,000 policy limits. The claims adjuster requested further medical records, and after review, requested an IME and authorizations for additional records. After another evaluation of the claim by the adjuster, the adjuster valued the upper limit of the claim to be \$65,000, and increased Allstate’s offer to \$50,000. Then, believing Thomer had reduced her demand to \$90,000, Allstate raised its offer to \$65,000. Thomer rejected both offers, continuing to demand the full policy limits. In late September 2008, Allstate offered \$75,000 and then in early October, \$85,000 and \$90,000. The offers were rejected. In November 2008, Allstate offered the \$100,000 policy limit and forwarded a proposed release, indicating that Thomer should notify it of proposed changes to the release. At the end of the year, not having received any proposed changes or a signed release, Allstate decided to issue the settlement check.

Thomer filed a bad faith suit. Allstate filed a motion for summary judgment, which was granted by Senior Judge Kelly of the Eastern District.

Thomer contended that Allstate acted in bad faith in negotiating settlement, evidenced by Allstate continually increasing its settlement offer without any new information to support such increases. Allstate contended that the increases stemmed either from analysis of new medical records or from new considerations, such as the imminence of arbitration or subpoena deadlines. Thomer cited to the court *Barry v. Ohio Casualty Group*,¹²⁴⁹ which held that an

¹²⁴⁷. *Portside Investors, L.P. v. Northern Ins. Co. of N.Y.*, 2011 Phila. Ct. Com. Pl. LEXIS 19, at *9 (Philadelphia Jan. 13, 2011) (footnote omitted).

¹²⁴⁸. *Smith v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 19373, at *9 (E.D. Pa. Feb. 16, 2012).

¹²⁴⁹. 2007 U.S. Dist. LEXIS 2684 (W.D. Pa. Jan. 12, 2007).

“unreasonably low” settlement offer can support a bad faith claim, and contended that Allstate’s actions were similar to those found to be in bad faith in that case. Allstate relied instead on *Brown v. Progressive Insurance Co.*,¹²⁵⁰ arguing that a low initial offer does not signal bad faith if the insurer reasonably believes that the claim is worth that amount.

The court, finding that Allstate had reason to proffer the settlement offers it did, did not act in bad faith. The medical records did not provide clear-cut evidence of injury or causation, so Allstate had reason to question both. That Allstate offered slightly less than its own internal valuation in its initial settlement offers was also not in bad faith because such was the nature of settlement negotiation: “It is well settled that negotiation of a claim does not qualify as bad faith.”¹²⁵¹ Further, the court found that Thomer’s continued treatment and increasing medical expenses justified many of the increases in settlement offers and that the impending arbitration and subpoena deadlines and threat of a bad faith claim justified the remaining offer increases.

(15) *Pfister v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 81324 (W.D. Pa. July 26, 2011), later proceeding at, 2011 U.S. Dist. LEXIS 92556 (W.D. Pa. Aug. 18, 2011) (Schwab, J.)

Plaintiffs’ home was damaged when a shower drain was blocked. State Farm, their homeowner’s carrier, valued the claim at just over \$16,000, and paid the claim. Plaintiffs contended that, based on several estimates, their claim should have been valued at more than \$152,000. They filed suit, alleging in part that their insurer acted in bad faith in refusing to settle the claim for its full worth. State Farm filed a motion to dismiss. Judge Schwab of the Western District granted the motion.

The court noted that in this bad faith claim, the insureds must show that the offer to settle was unreasonable, but that there were no factual allegations that might support such a conclusion. Even a large difference in valuation was insufficient to state a claim:

Plaintiffs have failed to allege facts that reasonably suggest a "frivolous or unfounded refusal to pay proceeds of a policy." . . . The Court notes that there is a large discrepancy between the amount Plaintiffs claim under the policy — over \$152,000 — and the \$16,169.48 offered to Plaintiffs by State Farm. . . . Yet this discrepancy alone is not evidence of bad faith; Pennsylvania law generally does not treat as bad faith an insurer's low but reasonable estimate of an insured's losses. *Brown*, 860 A.2d at 501. Based on the facts alleged, the Court has no reason to believe that State Farm's offer was unreasonable. Plaintiffs do not assert that State's Farm's failed to investigate their claim adequately, and it is not surprising that State Farm disagrees with Plaintiffs' loss estimate, which was computed by Plaintiff Brian Pfister himself. In short, the facts adduced in Plaintiffs' [sic] Amended Complaint do not suggest bad faith on the part of State Farm; at most, the Amended Complaint suggests an honest dispute between Plaintiffs and State Farm over the value of Plaintiffs' claim under the relevant homeowners' policy.¹²⁵²

The court recognized that bad faith plaintiffs “are often at a disadvantage in averring facts because the defendant insurer is usually ‘in exclusive possession of the information regarding its claims decision.’”¹²⁵³ Despite this disadvantage, plaintiffs remain tasked with the burden of alleging facts to support the cause of action.

(16) *Carcarey v. GEICO Gen. Ins. Co.*, 2011 U.S. Dist. LEXIS 123679 (E.D. Pa. Oct. 26, 2011) (McLaughlin, J.)

Plaintiff Carcarey filed suit on behalf of her son’s estate seeking UM benefits under a GEICO auto policy after her son was killed in an auto accident. It appeared that the UM limits were \$400,000. Following some negotiation, GEICO offered \$75,000 to settle the claim. Plaintiff then filed suit seeking recovery for breach of contract and bad faith; GEICO then offered \$100,000 to settle. GEICO filed a motion for summary judgment on the bad faith claim. Judge McLaughlin of the Eastern District granted the motion. Plaintiff contended that GEICO acted in bad faith when it offered such a low amount to settle. The court disagreed, pointing to several factors that GEICO legitimately took into account in calculating such a settlement figure, including the son’s limited income and questions about whether the son lived with his mother and thus was entitled to coverage at all.

(17) *Fitzmartin v. Allstate Prop. & Cas. Co.*, 2010 U.S. Dist. LEXIS 98299 (M.D. Pa. Sept. 20, 2010) (Blewitt, M.J.)

This case is discussed in greater detail in §10:07(b). Plaintiffs’ home was damaged by water when a pipe broke, and they sought coverage from their homeowner’s carrier, Allstate. Allstate paid part of the damages sought by plaintiffs, but not the full amount claimed, on the ground that plaintiffs had overvalued their damages. Plaintiffs filed suit for breach of contract and bad faith in violation of §8371. Allstate filed a motion for partial summary judgment on the bad faith claim, which Magistrate Judge Blewitt of the Middle District granted.

¹²⁵⁰ 860 A.2d 493 (Pa. Super. Ct. 2004).

¹²⁵¹ *Thomer v. Allstate Ins. Co.*, 790 F. Supp. 2d 360, 376 (E.D. Pa. 2011) (citing *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 592 (E.D. Pa. 1999)).

¹²⁵² *Pfister v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 81324, at *9-10 (W.D. Pa. July 26, 2011).

¹²⁵³ *Id.* at *10-11.

The facts reflected that plaintiffs obtained two estimates, one for \$147,000, and a second for just over \$73,000. Allstate ultimately paid approximately \$67,000. Plaintiffs claimed that the insurer's failure to pay the \$147,000 estimate was in bad faith because it ignored important elements of damage. The court rejected plaintiffs' argument that defendant acted in bad faith by "underpaying" the amount of damages actually incurred, instead finding that plaintiffs failed to create a genuine issue of material fact that defendant had acted in bad faith in valuing the claim. The court held that in order to avoid summary judgment on their bad faith claim, plaintiffs needed to provide some proof that Allstate had no reasonable basis to limit its offer to \$67,000. Quoting the insurer's brief, the court found that because one of plaintiffs' estimates was close in value to what the insurer eventually paid, Allstate's "evaluation of the claim was at least reasonable."¹²⁵⁴

(18) *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200 (E.D. Pa. Sept. 1, 2009) (Buckwalter, J.)

This case is discussed in greater detail in §10:17. Crawford was in an auto accident with another car, the driver of which was not insured. Crawford demanded the policy limits for both the uninsured motorist (\$100,000) and wage loss (\$5000) provisions and refused Allstate's offer of \$75,000. After a lengthy investigation, Allstate offered Crawford the policy limits on both provisions, and she accepted. Crawford alleged that Allstate acted in bad faith in addressing her claim for uninsured motorist and wage loss benefits. Allstate filed a motion for summary judgment, which was granted by Judge Buckwalter of the Eastern District.

To the extent that this claim attacked Allstate's early offer of less than the policy limits, the court found that "a low, but reasonable offer, is not evidence of bad faith."¹²⁵⁵ Allstate was not required to accept Crawford's claim at face value, without an investigation. Further, that the case ultimately settled for a higher amount was also not proof of bad faith because Crawford must prove by clear and convincing evidence "that Allstate's initial offer was unreasonable and that it knew the offer was such."¹²⁵⁶

(19) *Hered LLC v. Seneca Ins. Co., Inc.*, Docket No. 3:CV-06-0255 (M.D. Pa. Feb. 13, 2009) (Vanaskie, J.)

Plaintiff's building suffered damages in a fire, allegedly in excess of \$3.4 million. Defendant Seneca made two advance payments to plaintiff, totaling over \$95,000, but ultimately denied the claim, stating that it did not owe coverage because the plaintiff made misrepresentations regarding whether the sprinkler system in the building was functioning. Plaintiff sued, alleging breach of contract and bad faith. The insurer filed a counterclaim based in part on plaintiff's alleged misrepresentations and sought a declaration that it did not owe coverage. The parties filed cross motions for summary judgment. Magistrate Judge Blewitt recommended that the motions largely be denied and Judge Vanaskie subsequently adopted the report.

In the one aspect of Seneca's motion that was granted, Plaintiff had argued that Seneca acted in bad faith by failing to make additional advance payments. The magistrate judge recommended, and the court agreed, that failure to make advance payments could not provide the basis for a bad faith claim. Plaintiff did not object to this portion of the report, and the court granted Seneca's motion in that regard: ". . . Seneca is entitled to summary judgment to the extent that the bad faith claim is premised upon delay in making advance payments as there was no obligation to make any advance payments."¹²⁵⁷

(20) *Bottke v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 4203 (E.D. Pa. Jan. 22, 2009) (Schiller, J.)

In this case discussed in §10:07(b), the plaintiff submitted a property damage claim arising from a frozen pipe that burst. The insured's public adjuster estimated the plaintiff's loss at \$87,728.31. State Farm, relying upon a contractor's estimate, paid approximately \$44,000. Judge Schiller of the Eastern District granted summary judgment in favor of the insurer, finding that State Farm had a reasonable basis for its property loss estimate.

(21) *Ingraham v. GEICO Ins. Co.*, 2009 U.S. Dist. LEXIS 24467 (W.D. Pa. Mar. 24, 2009) (Conti, J.)

This case, also discussed in §§8:04, 10:11 and 10:13, arose from three automobile accidents on November 14, 2001, January 3, 2002, and March 11, 2003. The plaintiff was insured by GEICO Insurance Company and made various claims for first-party medical expense benefits as well as UM benefits. GEICO eventually settled some of the claims and denied others in whole or in part. The plaintiff filed a breach of contract and statutory bad faith action, arguing that the insurer delayed settlement and evaluation and made a low offer on his claims. Judge Flowers-Conti of the Western District granted the insurer's motion for summary judgment, rejecting the plaintiff's allegations of undue delay and unfair settlement:

Refusal to settle may constitute bad faith when the amount in question is clearly known to the insurer.

Delay in settlement may also be a relevant factor in determining whether an insurer has acted in bad

¹²⁵⁴ *Fitzmartin v. Allstate Prop. & Cas. Co.*, 2010 U.S. Dist. LEXIS 98299, at *30 (M.D. Pa. Sept. 20, 2010) (quoting defendant's brief in support of motion for summary judgment).

¹²⁵⁵ *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200, at *27 (E.D. Pa. Sept. 1, 2009).

¹²⁵⁶ *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200, at *30 (E.D. Pa. Sept. 1, 2009).

¹²⁵⁷ *Hered LLC v. Seneca Ins. Co.*, Docket No. 3:CV-06-0255 (M.D. Pa. Feb. 13, 2009), slip op. at 30 n.13 (citing *Zappile v. Amex Assur. Co.*, 928 A.2d 251, 256-57 (Pa. Super. 2007)).

faith. An extended period of time, however, between demand and settlement does not, on its own, constitute bad faith.¹²⁵⁸ After reviewing the comprehensive facts in the case, the court concluded:

Plaintiff did not provide evidence that would convince a reasonable jury that GEICO's settlement figures were not indicative of proper valuation and that the final offer did not include all GEICO's stated considerations and not just the value of his claim.¹²⁵⁹

(22) Littleton v. State Farm Fire & Cas. Co., 2008 U.S. Dist. LEXIS 73278 (M.D. Pa. Sept. 22, 2008) (Rambo, J.)

Plaintiff was insured under a homeowner's policy with State Farm. A fire destroyed plaintiff's home. The plaintiff filed a claim for damage to the dwelling and personal property, as well as a claim for additional living expenses (ALE). Payment was made by the insurer under each coverage, but plaintiff disputed the amount paid and the timeliness of the insurer's claims handling. Plaintiff filed suit alleging that the insurer acted in bad faith in adjusting the personal property and ALE claim, and in refusing to submit to the contractual appraisal process on the replacement cost of his dwelling. The insurer filed a motion for summary judgment. Judge Rambo of the Middle District granted summary judgment in favor of the insurer.

The court found no bad faith in the handling of the dwelling claim. The court found that the insurer's representative promptly surveyed the damaged property and created an estimate within two weeks of the fire. The court found that the delay in appointing an independent appraiser was attributable to the plaintiff, not the insurer. As to the settlement offer made by the insurer, the court cited with approval language in *Condio v. Erie Insurance Exchange*,¹²⁶⁰ that there is no bad faith "where the insurer makes a low but reasonable estimate of the insured's loss."¹²⁶¹

With respect to the personal property claim, the court found that the insurer promptly provided the inventory forms and kept in constant contact with the plaintiff regarding the completed forms. The court attributed a 15 month delay in resolving the personal property claim to the fact that the plaintiff did not submit the inventory forms in until that time.

Finally, the court rejected the plaintiff's claim that the insurer acted in bad faith in adjusting plaintiff's ALE claim. The court was particularly critical of a claim that plaintiff's daughter was entitled to \$105.00 per night to live in her basement, stating that such claim "is nonsense on stilts that turns plaintiff's tragedy into a farce as effortlessly and eloquently as the last two lines of Shakespeare's 100th sonnet. It is not a corollary of the prescription against defendant acting in bad faith that defendant satisfied plaintiff's every demand no matter how outlandish."¹²⁶²

(23) DeWalt v. Ohio Cas. Ins. Co., 513 F. Supp. 2d 287 (Pa. 2007) (McLaughlin, J.)

In this case discussed in §§3:04 and 10:07, involving multiple claimants, the court held that the insurer did not unreasonably delay its investigation into the other claims. The court noted that if the insurer had prematurely offered settlement of the policy limits to claimant DeWalt, it would have exposed its insured, Guffey, to liability to the other claimants, which itself could be an act of bad faith. According to the court, "Pennsylvania law does not require Ohio Casualty to risk acting in bad faith with respect to the [other claimants] in order to avoid being accused of acting in bad faith with respect to Mr. De Walt."¹²⁶³

(24) Borden v. Amica Mut. Ins. Co., 2006 U.S. Dist. LEXIS 75069 (E.D. Pa. Sept. 30, 2006) (McLaughlin, J.)

Amica issued a homeowner's policy to plaintiffs. In February 2003 a fire occurred at the home. Amica's adjuster estimated the cost of repair to be approximately \$328,000, which included cleaning and smoke remediation in those parts of the home suffering minor damage. Plaintiffs' public adjuster estimated the damages in excess of \$680,000, which involved "gutting" the house. In March 2003 Amica sent a check representing the undisputed actual cash value of the building, and in May 2003 requested appraisal, as provided under the policy, to resolve the differences in value. The building claim ultimately resolved for approximately \$555,000 in August 2003.

The plaintiffs brought an action alleging bad faith. After a bench trial, Judge McLaughlin of the Western District concluded that there was no bad faith. According to the court:

This case does not involve a denial of benefits or unreasonable delay in the payment of benefits. . . .

We find that the Bordens' bad faith claim fails because Amica had never adopted a final and intractable position relative to the [plaintiffs'] estimate in general and the appropriateness of smoker remediation as opposed to gutting and rebuilding in particular.¹²⁶⁴

¹²⁵⁸ *Ingraham v. GEICO Ins. Co.*, 2009 U.S. Dist. LEXIS 24467, at *29-30 (W.D. Pa. Mar. 24, 2009).

¹²⁵⁹ *Ingraham v. GEICO Ins. Co.*, 2009 U.S. Dist. LEXIS 24467, at *36 (W.D. Pa. Mar. 24, 2009).

¹²⁶⁰ *Condio v. Erie Ins. Exch.*, 899 A.2d 1136, 1143 (Pa. Super. 2006).

¹²⁶¹ *Littleton v. State Farm Fire & Cas. Co.*, 2008 U.S. Dist. LEXIS 73278, at *23 (M.D. Pa. Sept. 22, 2008).

¹²⁶² *Littleton v. State Farm Fire & Cas. Co.*, 2008 U.S. Dist. LEXIS 73278, at *24-25 (M.D. Pa. Sept. 22, 2008).

¹²⁶³ *DeWalt v. Ohio Cas. Ins. Co.*, 513 F. Supp. 2d 287, 299 (Pa. 2007).

¹²⁶⁴ *Borden v. Amica Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 75069, at *16-17 (E.D. Pa. Sept. 30, 2006).

(25) *Kubrick v. Allstate Ins. Co.*, 2004 U.S. Dist. LEXIS 358 (E.D. Pa. Jan. 7, 2004) (Rufe, J.), *aff'd*, 121 F. App'x. 447 (3d Cir. 2005) (Fisher, J.)

In this case, the insurer, Allstate, had issued an automobile policy with stated UIM limits of \$15,000. However, when the company was unable to locate the appropriate “sign-down” form required under Pennsylvania law, the company conceded that its policy provided \$900,000 in UIM coverage. The company’s investigation revealed that there were questions about the deceased claimant’s residency and whether he was the driver of the car in question. During extensive and lengthy settlement negotiations, Allstate ultimately offered \$600,000 to settle the claim, \$300,000 less than the coverage limit, which was accepted by the plaintiff. In a later bad faith claim, the plaintiff argued that the company acted in bad faith in not offering the full amount.

Finding that there were substantial unresolved factual and legal questions as to the insurer’s liability, Judge Rufe of the Eastern District denied plaintiff’s arguments and granted summary judgment in favor of Allstate:

Where, as here, there are substantial unresolved questions as to the insurer’s liability, making an offer for less than the policy limits cannot constitute bad faith. . . . [In this claim] the residency and driver issues were certainly open to debate. Both parties had the option of risking an arbitrator’s decision as to these issues. It is a common and prudent practice for litigants to seek the comfort of a certain settlement in favor of the cost and uncertainty attended to the adversary process. Settlements often involve compromise, and plaintiffs have offered no evidence that Allstate’s offer was unreasonable or that it was for an improper or frivolous purpose.¹²⁶⁵

The district court’s decision was upheld by the Third Circuit.

(26) *Ravindran v. Harleysville Mut. Ins. Co.*, 65 Pa. D. & C.4th 338 (Phila. 2002) (DiBona, J.), *aff'd*, Memorandum Opinion, 839 A.2d 1170, *petition for allowance of appeal denied*, 790 A.2d 1018) (Pa. Super. Oct. 29, 2003) (Memorandum Decision; Todd, J. concurring)

This case is discussed in depth in §10:17. The plaintiff filed a claim for bad faith under §8371 against Harleysville alleging, *inter alia*, that the company failed to attempt to settle the UIM claim in good faith before proceeding to arbitration. The case was tried before Judge DiBona of the Philadelphia Court of Common Pleas, who entered a verdict in favor of the insurer on all counts.

The court held that the insurer properly considered all information regarding the nature and extent of the plaintiff’s injuries and wage loss claim and made reasonable settlement offers:

Based on the evidence presented, this Court finds that there existed a reasonable basis for Harleysville’s settlement offers and that in light of the disparity between the demands and the settlement offers, the defendant’s decision to exercise its contractual right to arbitrate the case was reasonable.¹²⁶⁶

In an unpublished Memorandum Opinion, the Superior Court affirmed the decision of the trial court.

(27) *Monarch, Inc. v. St. Paul Prop. & Liab. Ins. Co.*, 2004 U.S. Dist. LEXIS 14803 (E.D. Pa. July 29, 2004) (Kauffman, J.)

The plaintiff, owner of a commercial property, submitted a claim for property damage, loss of rents and code upgrades to its property insurer due to a fire. The plaintiff argued that the insurers were obligated to pay replacement costs and the amount of the code upgrades prior to the repair or replacement of the damaged building being made. The Eastern District, by Judge Kauffman, rejected this argument and held that, under the policy language, until the insured actually repaired or replaced the building, the insurers were under no contractual obligation to pay.

Among other arguments, the plaintiff contended that the insurers acted in bad faith by failing to offer the full amount held in reserve on the claim as evidence of bad faith. The court rejected this argument:

Setting aside reserves does not amount to an admission of liability.” *Fidelity & Deposit Company of Maryland v. McCullough*, 168 F.R.D. 516, 525 (E.D. Pa. 1996). Accordingly, even if Plaintiff could prove that Defendant’s settlement offers fell short of their reserves, this would not be clear and convincing evidence of bad faith.¹²⁶⁷

The plaintiff also argued that the insurer acted in bad faith by making it impossible for plaintiff to comply with the contract provisions, because the plaintiff had insufficient money to begin making repairs. However, because the policy placed no obligation on the insurers to pay before the upgrades were completed, the court rejected this basis of liability. In addition, the court noted that, “To the extent that the parties continue to disagree about the value of the claim, their disagreement has a reasonable basis.”¹²⁶⁸

¹²⁶⁵ *Kubrick v. Allstate Ins. Co.*, 2004 U.S. Dist. LEXIS 358, at *46-47 (E.D. Pa. Jan. 7, 2004).

¹²⁶⁶ *Ravindran v. Harleysville Mut. Ins. Co.*, 65 Pa. D. & C.4th 338, 345 (Phila. 2002).

¹²⁶⁷ *Monarch, Inc. v. St. Paul Property & Liability Ins. Co.*, 2004 U.S. Dist. LEXIS 14803, at *20 (E.D. Pa. July 9, 2004) (citations omitted).

¹²⁶⁸ *Monarch, Inc. v. St. Paul Property & Liability Ins. Co.*, 2004 U.S. Dist. LEXIS 14803, at *23 (E.D. Pa. July 9, 2004).

(28) *Dougherty v. State Farm Mut. Auto. Ins. Co.*, 2002 U.S. Dist. LEXIS 4691 (E.D. Pa. Feb. 7, 2002) (McGirr Kelly, J.)

The facts of this case are discussed in §15:03. The case concerned payments by the insurance company of first party medical benefits under an automobile insurance policy. In the bad faith action, the plaintiff-insured filed a motion seeking to preclude the insurer from introducing evidence of post-complaint payment for medical expenses for treatment rendered before the filing of the complaint, and proposed payment for additional treatment. The late Judge James McGirr Kelly denied the plaintiff's motion, stating that "if a plaintiff can use post-complaint conduct evidence to prove bad faith, a defendant could also use it to rebut charges of bad faith."¹²⁶⁹

(29) *Schoffstall v. Nationwide Ins. Co.*, 58 Pa. D. & C.4th 14 (York June 28, 2002) (Thompson, J.)

Plaintiff Schoffstall was insured under an automobile policy issued by Nationwide. Schoffstall was sued by another party as a result of an automobile accident. Schoffstall's policy carried a \$100,000 limit per claim. Mrs. Hannigan, one of the plaintiffs in the underlying action, had offered to settle her case for Schoffstall's policy limit of \$100,000. Nationwide's trial attorney rejected that offer, but had offered \$45,000 prior to trial to settle the case, which was rejected. The matter went to trial and resulted in a verdict for Mrs. Hannigan in the amount of \$119,522.79, exceeding Schoffstall's coverage by over \$19,000.

Schoffstall filed a §8371 action against Nationwide challenging the company's handling, through its staff counsel, of settlement negotiations. The insurer responded that its decision not to settle the underlying claim was a good faith decision. Judge Thompson of York County agreed, ruling that the plaintiff would not be able to establish bad faith as a matter of law:

Here, examining the record in a light most favorable to Mr. Schoffstall, it may be that [Nationwide's staff counsel] and Nationwide misevaluated the case, but it cannot be said that this fact would amount to bad faith. . . . The court is not prepared to say that the "misevaluation" of a case would prima facie give rise to a bad faith claim against the insurance company. [T]here are no facts that even hint, much less establish, a factual question that Nationwide did anything but engage in good faith negotiations as indicated by the increases in Nationwide's offers before trial.¹²⁷⁰

(30) *Albert v. Nationwide Ins. Co.*, 2001 U.S. Dist. LEXIS 16435 (M.D. Pa. May 22, 2001) (Caputo, J.)

In this property insurance case discussed in §10:05, Judge Caputo of the Middle District granted summary judgment in favor of the insurer on the bad faith claim, holding, "[E]ven though there is a dispute as to the amount of the loss, there is no evidence that [the insurer's] estimates were unreasonable or that they knew that the amount of the loss was clear."¹²⁷¹

The court cited with approval the *Kosierowski, Williams v. Hartford*, and *Perschau* cases, and held that negotiating by offering a figure at the low end of a settlement range did not necessarily constitute bad faith, and that under the circumstances the insurer was not obligated to make advanced partial payment on the claim.

(31) *Perschau v. USF Ins. Co.*, 1999 U.S. Dist. LEXIS 3334 (E.D. Pa. Mar. 22, 1999) (Reed, J.)

In this case, the insurer, USF, issued an all-risk commercial fire insurance policy. One of the theories of bad faith alleged by the policyholder was that USF had failed to pay the "undisputed" minimum amount of the property loss in a timely manner. Judge Reed of the Eastern District denied the policyholder's bad faith claim, holding that an advance or partial payment on disputed commercial claims was not required under Pennsylvania law. The court distinguished this from the *PolSELLI*¹²⁷² case, which dealt with a personal home-owners' policy, finding that the dire condition of the plaintiff in that case did not apply to the insured in *Perschau*. According to the court, §1171.5 of the UIPA ". . . does not require that claims, *in whole or in part*, be paid once liability is reasonably clear. To require an advance or partial payment on all claims would add an unwarranted judicial gloss to the otherwise clear statutory language."¹²⁷³

(32) *Schifino v. GEICO General Ins. Co.*, 2013 U.S. Dist. LEXIS 174574 (W.D. Pa. Dec. 13, 2013) (McVerry, J.)

Plaintiff was injured in an auto accident. Following settlement of his personal injury claim with the tortfeasor for the bodily injury limits of \$50,000, plaintiff sought UIM benefits from his auto insurer, GEICO. Plaintiff provided some records to GEICO in support of his claim, but the parties were unable to agree on the value of the claim, so plaintiff filed this breach of contract and bad faith suit. Earlier decisions in this case are discussed at §§5:05(c), 8:07 and 9:05(a). The matter proceeded to a bench trial. Judge McVerry of the Western District entered a verdict on the bad

¹²⁶⁹ *Dougherty*, 2002 U.S. Dist. LEXIS 4691, at *20.

¹²⁷⁰ *Schoffstall*, 58 Pa. D. & C.4th 14.

¹²⁷¹ *Albert*, 2001 U.S. Dist. LEXIS 16435, at *32.

¹²⁷² *PolSELLI v. Nationwide Fire Ins. Co.*, 1995 U.S. Dist. LEXIS 10173 (E.D. Pa. July 20, 1995), discussed in Chapter 9.

¹²⁷³ *Perschau*, 1999 U.S. Dist. LEXIS 3334, at 84 n.6 (emphasis in original).

faith count in favor of GEICO. This decision is also discussed in §§10:07(a), 10:11, 10:25, and in great detail at §10:17.

In returning a verdict for plaintiff on the UIM claim, the court concluded that plaintiff's injuries had a value greater than the tortfeasor's limits—\$105,000, which molded to reflect the bodily injury limits left a net verdict of \$55,000. It disagreed, however, that GEICO's low settlement offers were made in bad faith. During the course of claims handling, plaintiff, through counsel, never moved off of the initial demand for the \$300,000 policy limits, until on the eve of trial. GEICO, after its initial review of materials, offered \$10,000, which was later increased to \$13,000 after plaintiff provided notice of a lien for nearly \$3,000. The offer was later raised to \$20,000. The court explained that there questions of causation for one surgery and questions relating to whether many of the claimed damages pre-existed the accident. The court also rejected plaintiffs' argument that the offers were made in bad faith because they did not reach the amount of reserves set by the insurer. The court noted that plaintiff failed to show that GEICO was required to offer the amount of reserves. Even as GEICO received information that provided information that the surgery was related to the accident, and that surgery entailed nearly \$35,000 in out of pocket expenses, the court found that the failure to increase the offer was not in bad faith: "[T]here is no evidence that it was motivated by self-interest or ill will to support a conclusion that it knew or recklessly disregarded its lack of reasonable basis."¹²⁷⁴ Rather, the court found that the offer "bore a reasonable relationship to the loss sustained by Plaintiff."¹²⁷⁵

(33) *Stanford v. Nat'l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323 (E.D. Pa. Nov. 3, 2014) (Tucker, C.J.)

This factually complicated UM/UIM case spanned a period of 17 years, and the facts are discussed in detail in §10:17. Following arbitration, plaintiff filed a complaint against NGM among others and alleging bad faith. NGM filed a motion for summary judgment after discovery concluded. Judge Tucker of the Eastern District granted the insurer's motion.

Plaintiff contended that NGM's \$10,000 pre-arbitration settlement offer was inadequate and made in bad faith. The court rejected this argument because NGM believed that the sum was reasonable and that Delaware law would apply to the claim, and thus limiting benefits to a maximum of \$25,000:

Stanford's argument that NGM's \$10,000 pre-arbitration settlement offer was made in bad faith also fails because NGM had reasonable grounds for limiting its demand to \$10,000. At the time of the accident, Stanford had a Delaware residence and driver's license. As a result, NGM believed that Stanford's UM/UIM claim would be governed by Delaware law. Under Delaware law, the stacking of UM and UIM benefits is prohibited.... Accordingly, if Delaware law applied to the arbitration proceeding, Stanford would have been entitled to a maximum of \$25,000 in UM/UIM benefits, not \$50,000.¹²⁷⁶

(34) *Insetta v. First Liberty Ins. Corp.*, 2015 U.S. Dist. LEXIS 34798 (E.D. Pa. Mar. 20, 2015) (Kelly, J.)

Plaintiff husband was injured in an auto accident, and after settlement with the tortfeasor, submitted a UIM claim to his defendant auto insurer demanding the full policy limits of \$100,000. Defendant offered \$34,000 in response, which was rejected; plaintiffs then filed this bad faith suit. Defendant filed a motion for partial summary judgment. Judge Kelly of the Eastern District granted the motion, as discussed in more detail in §10:17.

Plaintiffs contended that the defendant's offer was so low as to be bad faith. The court found that a low offer, that is a reasonable one, cannot be the basis for a bad faith claim and that plaintiffs failed to show that the valuation was unreasonable. Pointing to the defendant's medical review, which called several diagnoses into question, the court found sufficient basis for the defendant's offer.

(35) *NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos.*, 2009 U.S. Dist. LEXIS 92991 (E.D. Pa. Oct. 1, 2009) (Baylson, J.)

This case is discussed in greater detail in §§3:10 and 10:07(a). Defendant Empire, an auto liability insurer, exhausted its policy limits in settling two claims against the plaintiff-insureds, then denied coverage for a third claim because the limits had been exhausted. Plaintiffs contended that the earlier settlements were completed in bad faith, leaving them open to personal liability. Judge Baylson of the Eastern District rejected plaintiffs' claims.

The court first reviewed the applicable law concerning a liability insurer's obligations when confronted with multiple claims against an insured. The court accepted the insurer's argument that under Pennsylvania law it was valid for an insurer to settle liability claims piecemeal, even though this might reduce or exhaust the policy limit.¹²⁷⁷ The court noted that plaintiffs "have not pointed to a single case where an insurer settling 'too early' has been found to be

¹²⁷⁴. *Schifino v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 174574, at *65 (W.D. Pa. Dec. 13, 2013).

¹²⁷⁵. *Schifino v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 174574, at *66.

¹²⁷⁶. *Stanford v. Nat'l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323, at *18 (E.D. Pa. Nov. 3, 2014).

¹²⁷⁷. *NIA Learning Ctr., Inc. v. Empire Fire & Marine Ins. Cos.*, 2009 U.S. Dist. LEXIS 92991, at *33 (E.D. Pa. Oct. 1, 2009). The court relied upon the decisions in *Maguire v. Ohio Cas. Co.*, 602 A.2d 893, 895 (Pa. Super. 1992), *appeal denied*, 615 A.2d 1312 (Pa. 1992) and *Anglo-Am. Ins. Co. v. Molin*, 670 A.2d 194, 197 (Pa. Commw. Ct. 1995).

in breach of good faith.”¹²⁷⁸ Instead, the court ruled, “an insurer is under no obligation to wait to settle a claim until all possible claims have been filed.”¹²⁷⁹ The court granted the insurer’s motion for judgment on the pleadings, stating:

Plaintiffs have failed to make any showing of bad faith conduct on the part of Defendant. The claim files demonstrate that Defendant Empire conducted a reasonable and good faith investigation into the liability regarding the accident in question and that, based on the investigation’s results, Defendant Empire acted in good faith when entering into the settlements that exhausted Plaintiffs’ policy limits. Therefore, without any evidence of bad faith conduct by Defendant in handling these claims, this Court will find for Defendant.¹²⁸⁰

§10:20 Conduct by Insurer or Its Counsel After Institution of Litigation

§10:21 — Cases

(1) *Watson v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 83065 (E.D. Pa. June 14, 2012) (Surrick, J.) (UM claim)

Judge Surrick of the Eastern District granted defendant Nationwide’s motion for summary judgment in this UM case, discussed in more detail in §10:17.

Plaintiffs argued in part that Nationwide acted in bad faith by using multiple attorneys, making communications more confusing and depositions more lengthy. The court disagreed, concluding that any resulting confusion was “hardly probative of Defendant’s evasion of its responsibilities.”¹²⁸¹

Plaintiffs contended that Nationwide improperly refused to turn over policy manuals related to the claims, an argument the court dismissed on the grounds that plaintiffs had not demonstrated that the manuals either existed or were discoverable. The court explained that plaintiffs had not filed a motion to compel production of the documents because, according to plaintiffs, they believed they could prove their bad faith claim without the manuals. This demonstrated to the court that “even if the manuals did exist, and were discoverable, Defendant’s failure to provide them was not egregious and cannot alone sustain Plaintiffs’ claim of bad faith during litigation.”¹²⁸²

The court rejected plaintiffs’ argument that Nationwide was delaying discovery in bad faith, noting that the court’s own scheduling order was governing the timing of events in the case and to the extent Nationwide’s counsel was engaged in inappropriate conduct, plaintiffs had not addressed such matters to the court outside the context of their response to the summary judgment motion.¹²⁸³

Plaintiffs also argued that Nationwide’s settlement offers after litigation commenced were made in bad faith because they were so low. The court disagreed, finding no evidence of record from which it could infer bad faith and noting that Nationwide was not obligated to make any settlement offers at all in the context of litigation: “[T]he parties are not obligated to make any settlement offers, let alone attractive ones. There is no reason to suspect that Defendant lacked ‘any reasonable basis’ for its settlement offer. This offer would have covered Plaintiff’s out-of-pocket medical expenses and provided for pain and suffering. It does not qualify as an act of bad faith.”¹²⁸⁴

(2) *Dougherty v. State Farm Mut.Auto. Ins. Co.*, 2002 U.S. Dist. LEXIS 4691 (E.D. Pa. Feb. 7, 2002) (McGirr Kelly, J.) (first party medical benefits claim)

The facts of this case are discussed in §15:03. The case concerned payments by the insurance company of first party medical benefits under an automobile insurance policy. In the bad faith action, the plaintiff-insured filed a motion seeking to preclude the insurer from introducing evidence of post-complaint payment for medical expenses for treatment rendered before the filing of the complaint, and proposed payment for additional treatment. Judge McGirr Kelly denied plaintiff’s motion, stating that “if a plaintiff can use post-complaint conduct evidence to prove bad faith, a defendant could also use it to rebut charges of bad faith.”¹²⁸⁵ The court ruled that neither the post-complaint payments of medical expenses for treatment nor the insurer’s proposal to pay additional treatment would be excluded from evidence.

(3) *Spisak v. Margolis, Edelstein*, 45 Pa. D. & C.4th 365 (Allegheny 2000), *aff’d*, 768 A.2d 874 (Pa. Super. 2001) (Cercone, J.) (addressing alleged discovery violations)

Plaintiff brought a bad faith action against his insurer, Penn National Insurance Company. The jury awarded the plaintiff \$750,000 in punitive damages and \$62,400 in interest. After the bad faith litigation was concluded, the plaintiff sued Penn National and the law firm that represented it in the bad faith litigation. The plaintiff contended that

¹²⁷⁸ *NIA Learning Ctr.*, 2009 U.S. Dist. LEXIS 92991, at *31.

¹²⁷⁹ *NIA Learning Ctr.*, 2009 U.S. Dist. LEXIS 92991, at *33 (citing *Anglo-Am. Ins. Co. v. Molin*, 670 A.2d 194, 198 (Pa. Commw. Ct. 1995)).

¹²⁸⁰ *NIA Learning Ctr.*, 2009 U.S. Dist. LEXIS 92991, at *33.

¹²⁸¹ *Watson v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 83065, at *33 (E.D. Pa. June 14, 2012).

¹²⁸² *Watson v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 83065, at *34 n.14 (E.D. Pa. June 14, 2012).

¹²⁸³ *Watson v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 83065, at *33-35 (E.D. Pa. June 14, 2012).

¹²⁸⁴ *Watson v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 83065, at *32 (E.D. Pa. June 14, 2012).

¹²⁸⁵ *Watson v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 83065, at *32 (E.D. Pa. June 14, 2012).

the law firm's actions during the bad faith litigation in redacting certain Penn National documents was improper and caused a reduction in the amount of the bad faith verdict award. The plaintiff alleged that the law firm had acted with "conscious bad faith" and that compensatory and punitive damages were justified.

The Superior Court affirmed the dismissal of the plaintiff's action by the lower court. In its reasoning, the court reiterated the view expressed in *O'Donnell* that alleged improper discovery tactics are more properly handled under the Rules of Civil Procedure, rather than in a separate action alleging bad faith:

We are at any rate loathe to sanction the approach Spisak [plaintiff] has chosen here. In essence he is attempting to redress in these collateral proceedings a discovery matter from a suit which has been finally concluded, but which he believes was poorly handled. The proper context for addressing discovery disputes is in a case in which they arise according to the rules of civil procedure and the appellate process. To sanction the approach taken here would open the door to a litany of collateral lawsuits against counsel and their clients based on a litigant's later dissatisfaction with the resolution of discovery matter from a suit long concluded. This we refuse to do.¹²⁸⁶

(4) *J.P. Jenks, Inc. v. Commerce & Indus. Ins. Co.*, 2017 U.S. Dist. LEXIS 21663 (W.D. Pa. Feb. 16, 2017) (Rothstein, J.)

Plaintiffs trucking and warehousing company and parent corporation were self-insured for worker's compensation in Ohio, but had a worker's compensation policy with defendant insurer in Pennsylvania. An employee filed a worker's compensation claim in Ohio, where plaintiffs paid over \$250,000 on the claim. That employee subsequently filed a claim for the same incident in Pennsylvania; defendant paid benefits for that claim. Plaintiffs then sought reimbursement for costs incurred during the worker's compensation proceeding in Ohio, but defendant declined to make such payments. Plaintiffs filed this bad faith suit; the parties filed summary judgment motions after discovery. Judge Rothstein of the Western District granted the motion as to the bad faith claim.

At an earlier stage of the litigation, the court had ruled on the defendant's motion to dismiss and plaintiff's motion for judgment on the pleadings and in its decisions had made certain determinations about the defendant's obligations relating to the costs incurred in the Ohio proceedings. Plaintiffs contended that defendant acted in bad faith by conducting discovery on contract issues after those court orders. After setting forth the two-prong test applicable to bad faith claims, the court concluded in short order that plaintiffs had failed to meet their burden: "Plaintiffs have not established that Defendant's deposition requests in the course of discovery were bad faith attempts to avoid paying the proceeds of its policy."¹²⁸⁷

(5) *Duda v. Standard Ins. Co.*, 2015 U.S. Dist. LEXIS 56606 (E.D. Pa. Apr. 30, 2015) (Pratter, J.), *aff'd*, 2016 U.S. App. LEXIS 8602 (3d Cir. May 10, 2016) (Jordan, J.) (disability policy claims)

Plaintiff had two personal disability policies with defendant Lincoln National Life. After he had accidents in 2000 and 2007, he applied for total disability benefits, but they were denied. Plaintiff appealed that decision, and the decision was upheld. Plaintiff then filed this breach of contract and bad faith suit. All parties filed motions for summary judgment, which included Lincoln's motion for summary judgment on the bad faith count. Judge Pratter of the Eastern District granted Lincoln's motion as to the bad faith claim, as is also discussed in §§7:11(a) and 10:07(c). The Third Circuit, in an opinion authored by Judge Jordan, affirmed.

Plaintiff contended that Lincoln acted in bad faith during the discovery process once litigation commenced. The court explained that "discovery misconduct cannot, as a matter of law, establish bad faith."¹²⁸⁸ The court rejected plaintiff's argument that *Hollock* permitted such a claim because *Hollock* addressed alleged bad faith during trial, not discovery, where the courts have mechanisms to address such conduct: "Where, as here, the Federal Rules of Civil Procedure provide an adequate means of punishing alleged bad faith via claims for sanctions and the like, it would be improper to permit alleged discovery misconduct to serve as a toehold for a claim under §8371."¹²⁸⁹ The Third Circuit did not address this issue.

(6) *Racioppi v. Progressive Ins. Co.*, 2015 Phila. Ct. Com. Pl. LEXIS 415 (Philadelphia Dec. 14, 2015) (Shreeves-Johns, J.), *aff'd*, 2016 Pa. Super. Unpub. LEXIS 1624 (Pa. Super. May 11, 2016) (Ford Elliott, J.)

Plaintiff was involved in an automobile accident, and after resolving the case against the tortfeasor, sought UIM benefits from defendant insurers, which denied coverage on the grounds that her policy was no longer in effect. Plaintiff then filed this bad faith suit, and defendants filed a motion for summary judgment. Judge Shreeves-Johns of the Philadelphia Court of Common Pleas granted the motion, for reasons set forth in a 1925 opinion. The Superior Court affirmed, in a decision written by Judge Ford Elliott.

¹²⁸⁶ *Spisak v. Edelstein*, 2001 Pa. Super. 39, at *10-11 (Pa. Super. Ct. 2000).

¹²⁸⁷ *J.P. Jenks, Inc. v. Commerce & Indus. Ins. Co.*, 2017 U.S. Dist. LEXIS 21663, at *13-14 (W.D. Pa. Feb. 16, 2017).

¹²⁸⁸ *Duda v. Standard Ins. Co.*, 2015 U.S. Dist. LEXIS 56606, at *79 (E.D. Pa. Apr. 30, 2015).

¹²⁸⁹ *Duda v. Standard Ins. Co.*, 2015 U.S. Dist. LEXIS 56606, at *79-80 (E.D. Pa. Apr. 30, 2015).

The courts rejected plaintiffs' argument that defendants' earlier removal of the action to federal court was in bad faith. The court noted that a different defendant was initially named in the complaint, and the proper defendants not added until after removal, when plaintiff amended his complaint.¹²⁹⁰ The Superior Court concluded: "[T]here is no evidence that Progressive acted in bad faith by removing the suit to federal court; in fact the federal district court denied appellant's [plaintiff's] motion for attorney's fees. Progressive's removal to federal court was a litigation tactic that had nothing to do with its denial of UIM benefits under the insurance contract."¹²⁹¹

(7) *Fugah v. State Farm Fire & Cas. Co.*, 2016 U.S. Dist. LEXIS 47009 (E.D. Pa. Apr. 7, 2016) (Dalzell, J.)

Plaintiff Fugah brought this breach of contract action when his claim with his homeowner's carrier, defendant State Farm, was denied. The details of the claim were not outlined in the opinion. After arbitration, plaintiff filed a motion for leave to amend to add a bad faith claim. Judge Dalzell of the Eastern District denied the motion.

The court rejected plaintiff's argument that State Farm acted in bad faith by researching whether he had an insurable interest in the home during the litigation, and refused to allow amendment because it would be futile. The court explained that this litigation conduct could not support a bad faith claim: ". . . State Farm's allegedly deficient research into whether Fugah had an insurable interest in the home is not a proper basis for a bad faith claim under Section 8371 because it is in the nature of litigation conduct as a legal adversary, not as Fugah's insurer."¹²⁹²

(8) *Morrissey v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 174998 (E.D. Pa. Dec. 18, 2014) (Stengel, J.)

Plaintiffs' home was damaged by fire in December 2012, so they filed a claim with their homeowner's carrier, defendant State Farm. After an investigation, including two statements under oath, State Farm sent plaintiffs a check made out to them and to the mortgagee who held the mortgage at the time of loss in December 2013. Plaintiffs notified State Farm that the mortgage had been assigned to another bank during the pendency of the claim, so the bank to whom the check was made refused to endorse the check; plaintiffs requested that the check be reissued with the new bank as payee. After initially refusing to issue a new check, a new check was issued in April 2014. Plaintiffs filed this bad faith action just before the second check was issued. State Farm filed a motion to dismiss. Judge Stengel of the Eastern District granted the motion, primarily for failure to include sufficient factual allegations, as discussed in §7:01(a).

One of plaintiffs' allegations of bad faith included averments that defendant filed boilerplate objections to pre-complaint discovery that were designed only to give it an advantage in the lawsuit. The court explained that a bad faith claim can relate to actions taken after litigation is filed: "Bad faith may extend to the misconduct of the insurer during the pendency of litigation."¹²⁹³ In this case, however, the objections were reasonable and the allegation that defendant was using such objections merely to gain tactical advantage were conclusory and therefore unable to support such a claim.

(9) *American Collision & Auto. Ctr., Inc. v. Windsor-Mt. Joy Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 139490 (E.D. Pa. Sept. 27, 2012) (Gardner, J.)

In this case, discussed in greater detail in §7:09, Judge Gardner of the Eastern District granted the defendant insurer's motion to dismiss on statute of limitations grounds. In the context of that discussion, the court noted that several of the alleged acts of bad faith related to actions taken by counsel for the insurer in prior litigation with one alleged insured. The court explained: "'[D]iscovery violations by an insurer do not give rise to an independent bad faith claim.... Additionally, conduct by an insurer that is 'calculated not toward prolonging an investigation into an insured's claim, but rather toward winning a lawsuit' does not constitute distinct bad faith conduct."¹²⁹⁴

(10) *Hayden v. Westfield Ins. Co.*, 586 F. App'x 835 (3d Cir. 2014) (Krause, J.)

Plaintiffs, the Haydens, submitted a homeowner's claim to Westfield in connection with damage to plaintiffs' home following a storm. When the parties could not agree on the value of the claim, plaintiffs filed this bad faith action. Westfield filed a motion for summary judgment. Judge Hornak of the Western District of Pennsylvania granted Westfield's motion in an opinion discussed in detail in §10:13(b). Plaintiffs then appealed to the Third Circuit on different grounds, relating primarily to an attempt to add as a new defendant the disaster recovery company, DRS, sent out following the post-litigation inspection. The Third Circuit, in an opinion by Judge Krause, affirmed the district court's earlier orders.

¹²⁹⁰ *Racioppi v. Progressive Ins. Co.*, 2015 Phila. Ct. Com. Pl. LEXIS 415, at *10-11 (Philadelphia Dec. 14, 2015).

¹²⁹¹ *Racioppi v. Progressive Ins. Co.*, 2016 Pa. Super. Unpub. LEXIS 1624, at *14 (Pa. Super. May 11, 2016).

¹²⁹² *Fugah v. State Farm Fire & Cas. Co.*, 2016 U.S. Dist. LEXIS 47009, at *11 (E.D. Pa. Apr. 7, 2016).

¹²⁹³ *Morrissey v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 174998, at *12 (E.D. Pa. Dec. 18, 2014).

¹²⁹⁴ *American Collision & Auto. Ctr., Inc. v. Windsor-Mt. Joy Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 139490, at *22 (E.D. Pa. Sept. 27, 2012) (quoting *CRS Auto Parts, Inc. v. Nat'l Grange Mut. Ins. Co.*, 645 F. Supp. 2d 354, 373 (2009)).

Plaintiffs contended in part that allowing the addition of this defendant would assist it in proving Westfield's alleged bad faith in hiring this company after the institution of litigation. The court found that these allegations could not provide the basis for a bad faith claim:

Plaintiffs' reliance on *W.V. Realty* is misplaced. *W.V. Realty* recognized certain circumstances where courts have permitted bad faith claims to survive motions to dismiss based on conduct that occurred after the insured filed suit, including where insurers made misrepresentations to the court, filed baseless or abusive motions, or engaged in other conduct "beyond a discovery violation[] suggesting that the conduct was intended to evade the insurer's obligations under the insurance contract." . . . Neither the Haydens' Motion to Amend nor their proposed Second Amended Complaint alleged sufficient facts to illustrate how Westfield's conduct in hiring DRS to replace the tarp on the Haydens' roof constituted continuing bad faith. Rather, the Haydens simply alleged that DRS was negligent in replacing the tarp and that Westfield was responsible.¹²⁹⁵

(11) *Hudgins v. Travelers Home & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 107775 (E.D. Pa. July 31, 2013) (Yohn, J.)

The facts of this case are discussed in detail in §9:03(b). In a bad faith action filed by plaintiff against her homeowner's carrier, Travelers, the insurer filed a motion for summary judgment on the bad faith claims. Judge Yohn of the Eastern District of Pennsylvania granted the motion in part and denied it in part, as discussed in greater detail in §§9:21 and 10:04(b).

Plaintiff contended that Travelers had acted in bad faith in failing to produce a full copy of the claim file and a copy of the examination under oath (EUO) transcript in the course of discovery in earlier litigation. The court noted that although conduct during litigation could provide the basis for a bad faith claim, the statute "clearly does not contemplate actions for bad faith based upon [an] allegation of discovery violations."¹²⁹⁶ Rather, in order to provide a basis for a bad faith claim, post-litigation conduct "must be something more than a violation of the operative rules governing litigation. In other words, the conduct must at least be capable of giving rise to an inference that the insurer's action was part of a calculated undertaking to evade the insurer's obligations under the insurance contract."¹²⁹⁷ The court found that plaintiff failed to produce any evidence indicating that counsel representing Travelers in that litigation had advised payment of the claim, or any other evidence from which it could conclude that Travelers was motivated by improper motive and thus granted summary judgment.

(12) *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2013 U.S. Dist. LEXIS 97226 (W.D. Pa. July 12, 2013) (Ambrose, J.)

Defendant was sued in an Iowa state court action, and plaintiff insurers provided a defense and indemnification under its E&O policy, but denied coverage under its CGL and umbrella policies. The judge returned a verdict for defendant in that action. Plaintiff insurers then filed a declaratory judgment action. Defendant counterclaimed, seeking recovery for breach of contract and common law and statutory bad faith. Plaintiffs filed a motion for summary judgment. Judge Ambrose of the Western District of Pennsylvania granted the motion in part and denied it in part, as is also discussed in §§9:19, 10:04(c), 10:25, and 12:02.

The court rejected defendant's argument that plaintiffs acted in bad faith by filing the declaratory judgment action and in seeking summary judgment on the "occurrence" issue, and then later reconsideration of the court's decision. The court stated: "The relatively ambiguous and complicated nature of the underlying complaint, and the applicable case law, has been thoroughly discussed in my Opinions in this case—and the fact that I ultimately rejected Plaintiffs' arguments does not render those arguments unreasonable."¹²⁹⁸

(13) *Gold v. State Farm Fire & Cas. Co.*, 880 F. Supp. 2d 587 (E.D. Pa. 2012) (McLaughlin, J.)

Following two separate instances of water damage to their home, the Golds sought coverage under their homeowner's policy with defendant State Farm. After State Farm denied their second claim, plaintiffs brought this breach of contract and bad faith action. State Farm moved for summary judgment. Judge McLaughlin of the Eastern District granted the motion in part and denied it in part.

Plaintiffs contended that State Farm acted in bad faith by refusing to renew their policy following filing of their complaint, evidenced by State Farm's refusal to provide discovery relating to its decision. The court rejected plaintiffs' argument:

Although some litigation behavior may serve as the basis for a finding of bad faith, it is not bad faith for an insurer to "take a stand and protect its interests in the normal court of litigation. . . ."

¹²⁹⁵ *Hayden v. Westfield Ins. Co.*, 586 F. App'x 835, 842 n.7 (3d Cir. 2014).

¹²⁹⁶ *Hudgins v. Travelers Home & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 107775, at *39 (E.D. Pa. July 31, 2013) (quoting *O'Donnell ex rel. Mitro v. Allstate Ins. Co.*, 734 A.2d 901, 908 (Pa. Super. 1999)).

¹²⁹⁷ *Hudgins v. Travelers Home & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 107775, at *40 (E.D. Pa. July 31, 2013) (internal quotation omitted) (quoting *Mine Safety Appliances Co. v. N. River Ins. Co.*, 2012 U.S. Dist. LEXIS 132896, at *1 (W.D. Pa. Sept. 18, 2012)).

¹²⁹⁸ *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2013 U.S. Dist. LEXIS 97226, at *11 (W.D. Pa. July 12, 2013).

. . . Section 8371 “clearly does not contemplate actions for bad faith premised upon allegations of discovery violations.”¹²⁹⁹

(14) *United States Fire Ins. Co. v. Kelman Bottles*, 2012 U.S. Dist. LEXIS 48684 (W.D. Pa. Apr. 5, 2012) (Schwab, J.)

This opinion is discussed in detail in §§5:04(c), 10:03(b), and 10:07(b). Judge Schwab of the Western District granted the U.S. Fire’s motion for summary judgment. Kelman argued in part that U.S. Fire acted in bad faith by “forc[ing] the policyholder to exhaust its limited financial resources with its litigation conduct, including raising the ‘kitchen sink’ defense to coverage, including raising defenses upon which it did not deny coverage in its denial letter, and upon which it has no expert testimony.”¹³⁰⁰ The court found that this was not “a valid basis upon which a bad faith claim may rest, and Kelman cites no law in support of its . . . proposition.”¹³⁰¹

(15) *Fabrikant v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 67017 (M.D. Pa. May 14, 2012) (Conaboy, J.)

The details of this dispute over liability for alleged breach of contract and bad faith revolving around a homeowner’s insurance claim are discussed in more detail in §10:07(b). After plaintiff filed his praecipe for writ of summons in the Court of Commons Pleas, counsel for State Farm filed a praecipe for rule to file complaint. The prothonotary entered the rule a week later. After discovery, State Farm filed a motion for summary judgment. Judge Conaboy of the Middle District granted the motion.

Plaintiff claimed in part that State Farm acted in bad faith in serving the rule to file complaint because State Farm was forcing him to litigate his claim in order to recover on it. State Farm argued that it had a procedural right to serve the rule and was entitled to know what plaintiff’s claims were; thus, it contended, its actions were not in bad faith. The court explained “that exercising a procedural right would not necessarily insulate a defendant from bad faith liability if the plaintiff could show by clear and convincing evidence that the insurer’s conduct ‘import[ed] a dishonest purpose’ or exhibited a breach of its duty of good faith ‘through some motive of self-interest or ill will.’”¹³⁰² However, in this case, the court found no evidentiary proofs to support the claim.

The court explained that State Farm could legitimately want to know the allegations against it, particularly any allegations that were not related to the coverage decision before it, such as the bad faith and UTPCPL claims included in the complaint. The court also pointed to the fact that State Farm had different attorneys handling the investigation and the litigation, and there was no evidence of any collusion between the two or any improper purpose for filing the rule. Although the investigation was close to complete, any bad judgment shown in serving the rule was simply that, and the court noted, bad judgment was insufficient to prove bad faith, particularly in light of “Plaintiff’s consistently dilatory conduct.”¹³⁰³

(16) *Carcarey v. GEICO Gen. Ins. Co.*, 2011 U.S. Dist. LEXIS 123679 (E.D. Pa. Oct. 26, 2011) (McLaughlin, J.)

GEICO filed a motion for summary judgment on the bad faith claim arising out of a dispute over UM coverage. Judge McLaughlin of the Eastern District granted the motion in an opinion addressed more fully in §10:17.

Plaintiff claimed that GEICO acted in bad faith in speaking with her former attorney, knowing that a new attorney had taken over the case. The court found these allegations could not withstand summary judgment because plaintiff had not provided evidence of a clear and convincing nature to support her claim. Rather, the court noted that the evidence showed that GEICO contacted both attorneys simply to resolve confusion about representation: “The record suggests that the defendant was acting conscientiously in ascertaining the plaintiff’s representation and did not seek out information from the plaintiff’s former legal counsel.”¹³⁰⁴

Plaintiff also claimed that GEICO acted in bad faith in talking to the son’s girlfriend, who was with the son when he was killed, without counsel present. The court explained that this claim could not withstand summary judgment because the evidence showed that there was confusion about whether the girlfriend wanted or had sought counsel. The court stated: “No reasonable jury could conclude that Mr. Moring’s [GEICO’s counsel’s] decision to determine if Ms. Caserta [girlfriend] wanted representation before delaying the deposition was an act of bad faith. Neither counsel had been informed by Ms. Caserta or her legal counsel that she was represented when Mr. Moring spoke with her. In addition, there is no evidence that Mr. Moring engaged in improper communication with Caserta during their conversation.”¹³⁰⁵

¹²⁹⁹ *Gold v. State Farm Fire & Cas. Co.*, 880 F. Supp. 2d 587, 2012 U.S. Dist. LEXIS 102470, at *33 (E.D. Pa. 2012) (citation to *Condio* omitted).

¹³⁰⁰ *United States Fire Ins. Co. v. Kelman Bottles*, 2012 U.S. Dist. LEXIS 48684, at *51 (W.D. Pa. Apr. 5, 2012) (citation to record omitted).

¹³⁰¹ *United States Fire Ins. Co. v. Kelman Bottles*, 2012 U.S. Dist. LEXIS 48684, at *51 (W.D. Pa. Apr. 5, 2012) (citation to record omitted).

¹³⁰² *Fabrikant v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 67017, at *38 (M.D. Pa. May 14, 2012).

¹³⁰³ *Fabrikant v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 67017, at *42 n.2 (M.D. Pa. May 14, 2012).

¹³⁰⁴ *Carcarey v. GEICO Gen. Ins. Co.*, 2011 U.S. Dist. LEXIS 123679, at *7-8 (E.D. Pa. Oct. 26, 2011).

¹³⁰⁵ *Carcarey v. GEICO Gen. Ins. Co.*, 2011 U.S. Dist. LEXIS 123679, at *9 (E.D. Pa. Oct. 26, 2011).

(17) *Rock-Epstein v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 76042 (E.D. Pa. Sept. 29, 2008) (Schiller, J.)

In this case, discussed in §10:07(b), the court denied the plaintiff's motion for leave to amend her complaint to add a claim for alleged bad faith conduct during the actual litigation. The plaintiff's proposed amended complaint alleged that the insurer, Allstate, misrepresented material facts and the law to the court, presented false evidence, and refused to negotiate in good faith. However, the court would not entertain this argument, stating, "This Court will not allow Plaintiff to throw out baseless accusations of fraud and bad faith, particularly at this late stage in the proceedings."¹³⁰⁶

(18) *H.L. Libby Corp. v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 50433 (W.D. Pa. July 24, 2006) (Cercone, J.)

The insured argued that the defendant insurer engaged in misconduct during litigation, specifically when a company deponent allegedly testified evasively. Judge Cercone of the Western District held that such allegations, even if true, did not warrant a finding of bad faith:

Under Pennsylvania law, bad faith is actionable regardless of whether it occurs before, during or after litigation. . . . However, this does not mean that insureds may recover under Pennsylvania's bad faith statute "for discovery abuses by an insurer or its lawyer in defending a claim predicated on its alleged prior bad faith handling of an insurance claim." . . . In cases involving nothing more than alleged discovery violations, the courts have declined to find bad faith

In reviewing Kathleen Reilly's deposition testimony in a light most favorable to Plaintiffs, it can possibly be viewed as evasive. . . . The record, however, fails to supply the clear and convincing evidence of discovery violations, let alone discovery violations that rise to the level of insurance bad faith.¹³⁰⁷

(19) *Monarch, Inc. v. St. Paul Prop. & Liab. Ins. Co.*, 2004 U.S. Dist. LEXIS 14803 (E.D. Pa. July 9, 2004) (Kauffman, J.)

In this case arising out of a commercial insurance claim,¹³⁰⁸ the plaintiff first argued that the insurers acted in bad faith by asserting in their answer to the complaint the two-year limitations period on a code upgrades claim after the insurers allegedly previously indicated that it would not be enforced. However, the court held that the uncontested evidence indicated that the insurers sent two letters to the plaintiff expressly reserving all "rights and privileges under the terms of the policy and the law, none of which are to be deemed waived, modified or relinquished in any way." According to the court, plaintiff produced no evidence to contradict the insurers' assertion that they intended to reserve all rights. Therefore, according to the court, the insurer's decision to assert the two-year limitation in its answer to the complaint "did not constitute bad faith even though they may not ultimately prevail on that interpretation."¹³⁰⁹

(20) *Ravindran v. Harleysville Mut. Ins. Co.*, 65 Pa. D. & C.4th 338 (Philadelphia 2002) (DiBona, J.), *aff'd*, Memorandum Opinion, 839 A.2d 1170, (Pa. Super. Oct. 29, 2003) (Memorandum Decision; Todd, J. concurring), *petition for allowance of appeal denied*, 790 A.2d 1018 (Pa. 2004)

This UIM alleged bad faith case is discussed in detail in §10:17. The case was tried before Judge DiBona of the Philadelphia Court of Common Pleas, who entered a verdict in favor of the insurer on all counts.

The evidence established that after the arbitration hearing and before the arbitration award was entered, counsel for the insurer engaged in several private conversations with the defense arbitrator regarding the merits of the plaintiff's claim and the progress of the deliberations which were ongoing. There was no evidence that Harleysville knew or should have known that the *ex parte* communications with the defense arbitrator were taking place, or that the company instructed counsel to engage in the *ex parte* communications.

The court rejected the plaintiff's claim that the post-arbitration conduct on the part of the insurer's counsel constituted bad faith under §8371. In so deciding, the court noted that, as a general rule, "an attorney acts as an independent contractor when hired by the insurance company and, therefore, any conduct by the attorney cannot be imputed to the client."¹³¹⁰ The court stated that §8371 was designed to provide "a remedy for bad faith conduct by an insurer in its capacity as an insurer and not as a legal advisory in a lawsuit filed against it by an insured."¹³¹¹ The court ruled that the alleged inappropriate communication with a defense arbitrator, together with other alleged improper litigation conduct, was not sufficient to prove that the company itself acted in bad faith.

¹³⁰⁶ *Rock-Epstein v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 76042, at *22-23 (E.D. Pa. Sept. 29, 2008) (internal citations to the record omitted).

¹³⁰⁷ *H.L. Libby Corp. v. Fireman's Fund Ins. Co.*, 2006 U.S. Dist. LEXIS 50433, at *21-22 (W.D. Pa. July 24, 2006) (citations omitted).

¹³⁰⁸ This case is discussed in §10:19.

¹³⁰⁹ *Monarch, Inc. v. St. Paul Property & Liability Ins. Co.*, 2004 U.S. Dist. LEXIS 14803, at *18 (E.D. Pa. July 9, 2004).

¹³¹⁰ *Ravindran v. Harleysville Mut. Ins. Co.*, 65 Pa. D. & C.4th 338, 351-52 (Phila. 2002) (citing *Ingersoll-Rand Equip. Corp. v. Transp. Ins. Co.*, 963 F. Supp. 452, 455 (M.D. Pa. 1997)).

¹³¹¹ *Ravindran v. Harleysville Mut. Ins. Co.*, 65 Pa. D. & C.4th 338, 351-52 (Phila. 2002) (citing *O'Donnell v. Allstate Ins. Co.*, 734 A.2d 901, 909 (Pa. Super. 1999)).

In a non-published Memorandum Opinion, the Superior Court affirmed the decision of the trial court. The court rejected plaintiff's argument that Harleysville's counsel's *ex parte* contacts with the defense arbitrator were illegal, reasoning that parties who select party-appointed arbitrators expect them to serve as non-neutrals.

Concurring, Judge Todd disagreed with the decision inasmuch as it appeared to sanction *ex parte* communications between a party and its non-neutral arbitrator. She agreed, however, that the bad faith claim was properly rejected.

(21) *Cooper v. Nationwide Mut. Ins. Co.*, 2002 U.S. Dist. LEXIS 21552 (E.D. Pa. Nov. 2, 2002) (Dalzell, J.)

In this case, Judge Dalzell of the Eastern District dismissed part of the bad faith allegations which referenced the insurer's conduct after the discontinuance of a prior suit, stating, "It is now well-settled that an insurer's duty to act in good faith does not end with the initiation of litigation, but the statute does not impose liability for an insurer's discovery abuses in defending a suit that an insured brings for the bad faith handling of a claim."¹³¹² According to the court, the alleged bad faith conduct after the discontinuance amounted only to allegations of discovery abuses.

(22) *Sanders v. State Farm Ins. Co.*, 47 Pa. D. & C.4th 129 (Delaware 2000) (Bradley, J.), *aff'd without opinion*, 777 A.2d 516 (Pa. Super. 2001)

The insured instituted a breach of contract and bad faith action against the insurer stemming from the handling of an automobile theft claim. The insurer retained counsel to handle the defense of the suit, and its counsel retained an independent investigation firm which questioned several witnesses concerning the circumstances of the theft and the repairs to the subject vehicle. The insured then brought a second lawsuit for defamation, slander, and ongoing bad faith on the part of the insurer. In the second suit, the plaintiff alleged that the insurer, through its counsel, had filed multiple and duplicative pleadings and motions in the first action which amounted to bad faith. In addition, the plaintiff alleged that the insurer's investigators allegedly insinuated to the witnesses that the plaintiff was somehow involved in the theft of his own car.

Citing *O'Donnell v. Allstate* and *Slater v. Liberty Mutual*, Judge Bradley of the Delaware County Court of Common Pleas granted the insurer's motion for summary judgment as to both actions. With respect to the second lawsuit, the court held:

. . . Section 8371 does not contemplate actions for bad faith for discovery violations. Filing of motions and pleadings is akin to discovery practice, and therefore we believe plaintiff has no cause of action for bad faith based on defendant's filing of motions and pleadings in the underlying bad faith action.¹³¹³

The alleged acts on the part of the investigators also did not constitute bad faith, according to the court.

This type of discovery abuse has nothing to do with the parties' insured-insurer relationship. Indeed, the plaintiff's claim had already been paid. It arises from the adversarial nature of their relationship as litigants. If the plaintiff was aggrieved by defendant's actions during discovery, his remedy was under the Pennsylvania Rules of Civil Procedure and not Section 8371.¹³¹⁴

The court further ruled that the company could not be held vicariously liable for any alleged harm caused by the acts of independent investigators. The decision was affirmed without opinion by the Superior Court.

(23) *Hyde Athletic Industries, Inc. v. Continental Casualty Co.*, 969 F. Supp. 289 (E.D. Pa. 1997) (Cahn, J.)

This case involved claims for coverage stemming from an environmental action. The plaintiffs asserted that the insurance companies' conduct throughout the litigation provided evidence of bad faith. Former Chief Judge Cahn of the Eastern District found in favor of the insurers with respect to the coverage issue. Further, the court dismissed the plaintiff's allegations of bad faith during the litigation process as follows: "This case has been aggressively litigated by all sides, but there is no evidence that the discovery and other disputes which have arisen in the course of the litigation were caused by the ill will or recklessness of either insurers or insured."¹³¹⁵

(24) *Jung v. Nationwide*, 949 F. Supp. 353 (E.D. Pa. 1997) (Cahn, J.)

This case, also discussed in §10:15, involved a claim for benefits under a homeowner's insurance policy. The plaintiff asserted the insurers' "handling of the claim throughout [the] controversy has been in such a manner as to constitute bad faith ..."¹³¹⁶ Former Chief Judge Cahn held that the insurer had reasonably rescinded the policy of homeowners' insurance on the basis of material misrepresentations in the application. As such, the court held that the insurer's conduct was not in bad faith. The court stated that "the crux of a bad faith claim under §8371 is the denial of coverage by an insurer when it has no good reason to do so."¹³¹⁷ The court stated that while the frivolous denial of coverage is actionable, "an aggressive defense of the insurer's interest is not bad faith."¹³¹⁸

¹³¹² *Cooper v. Nationwide Mut. Ins. Co.*, 2002 U.S. Dist. LEXIS 21552, at *14 (E.D. Pa. Nov. 2, 2002).

¹³¹³ *Id.* at 145.

¹³¹⁴ *Id.* at 146.

¹³¹⁵ *Hyde Athletic Indus. v. Cont'l Cas. Co.*, 969 F. Supp. at 309 (citing *Jung v. Nationwide*, 949 F. Supp. 353 (E.D. Pa. 1997)).

¹³¹⁶ *Jung v. Nationwide*, 949 F. Supp. 353, 359 (E.D. Pa. 1997).

¹³¹⁷ *Jung v. Nationwide*, 949 F. Supp. 353, 359 (E.D. Pa. 1997).

¹³¹⁸ *Jung v. Nationwide*, 949 F. Supp. 353, 359 (E.D. Pa. 1997).

(25) *Byars v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 3524 (E.D. Pa. Jan. 12, 2015) (Dalzell, J.)

In this case discussed in §10:17, Plaintiff sought to add a bad faith claim alleging bad faith in the process of discovery and in refusing to provide UM coverage after he got a default judgment against the tortfeasor in the underlying litigation. The court explained that because “Section 8371 is intended to provide redress to an insured for an insurer’s bad faith conduct in its capacity as an insurer, not as a legal adversary in a lawsuit initiated by the insured, discovery violations do not fall within the statute’s ambit.”¹³¹⁹ Therefore, allegations that counsel’s objections during the deposition of the State Farm representative and State Farm’s redactions in production of its files could not support a bad faith claim, and amendment would be futile.

(26) *Clemens v. N.Y. Central Mut. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 77180 (M.D. Pa. June 15, 2015) (Conaboy, J.)

In this UIM and bad faith case, at issue was the ability of the plaintiff insureds to introduce evidence at trial outside the relevant time frame. Before the court were various motions in limine. Judge Conaboy of the Middle District granted some motions and denied others, as discussed in §§8:07, 4:03, 14:11, 14:13.

Defendant contended that the time frame relevant to the parties’ dispute was from the date of notification that plaintiffs had been offered the policy limits by the tortfeasor’s carrier and ended on the date plaintiffs filed their bad faith suit. Plaintiffs contended that the time frame should begin with first notification of a possible UIM suit and extended through the bad faith litigation. The court found that notification of a possible claim was “insufficient to trigger any duty to act on Defendant’s part.”¹³²⁰ The court noted that an insurer’s actions in litigation can provide the basis for a bad faith claim, but that “such evidence of bad faith cannot be provided simply by an insurer’s action of mounting an aggressive legal defense.”¹³²¹ Because there was nothing more in this case, the court ruled, the bad faith time frame would end with the filing of the bad faith suit.

(27) *Kakule v. Progressive Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 35178 (E.D. Pa. Apr. 30, 2008) (Kelly, R., J.)

Kakule filed an action asserting claims for statutory bad faith under §8371 and for breach of contract, alleging that Progressive handled his claim in bad faith by forcing him to engage in arbitration with respect to his UIM claim. During the deposition of a Progressive employee, counsel for Kakule asked the following question: “After you learned of the evaluation by the UM panel, did you take any action to go back and review the actions you took in respect to this claim?” Counsel for Progressive instructed the witness not to answer the question, and subsequently filed a Motion for a Protective Order Concerning Inquiry Into Subsequent Remedial Measures Constituting a Self-Critical Analysis.

Progressive argued that Kakule’s inquiries regarding its post-arbitration activity had no bearing on how it handled Kakule’s insurance claim prior to paying him benefits, and was further protected by a privilege for self-critical analysis. Kakule countered that his counsel’s questions were designed to provide relevant evidence pertaining to the issue of punitive damages, and further that Pennsylvania courts do not recognize a self-critical analysis privilege. Judge Robert Kelly of the Eastern District granted the insurer’s motion for protective order. According to the court:

Since a bad faith cause of action, and any attendant punitive damages claim, only applies to a denial or refusal to pay benefits under an insurance policy, only Progressive’s conduct prior to the arbitration panel is relevant to Kakule’s claims.... Progressive’s post-arbitration activities and any review that they may or may not have engaged in after the arbitration are not relevant to these bad faith and punitive damages claims under Pennsylvania law.¹³²²

In addition, according to the court, “Kakule would also be precluded from introducing this evidence to establish bad faith or punitive damages under Fed. R. Evid. 407 because this information would concern subsequent repairs.”¹³²³ The court did not think that there was a reasonable likelihood that inquiry into the post-arbitration actions of Progressive would lead to admissible impeachment evidence against the witness.

The court did not express its view regarding the claimed self-critical analysis privilege:

Progressive’s final argument is that it is entitled to a self-critical analysis privilege, and this privilege also provides a basis on which this Court can grant a protective order. The self-critical analysis privilege protects parties from disclosing documents reflecting candid self-examinations under the theory that to allow these documents in discovery would deter parties from conducting self-critical analyses in the first place. Numerous cases have questioned the validity of this privilege. [citations

¹³¹⁹ *Byars v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 3524, at *24 (E.D. Pa. Jan. 12, 2015).

¹³²⁰ *Clemens v. N.Y. Central Mut. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 77180, at *6 (M.D. Pa. June 15, 2015).

¹³²¹ *Clemens v. N.Y. Central Mut. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 77180, at *6-7 (M.D. Pa. June 15, 2015).

¹³²² *Kakule v. Progressive Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 35178, at *7 (E.D. Pa. Apr. 30, 2008).

¹³²³ *Kakule v. Progressive Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 35178, at *9.

omitted] As a determination on this issue is unnecessary to the resolution of the present Motion, this Court will not delve into an analysis of this argument.¹³²⁴

§10:22 Releases

§10:23 — Cases

(1) *Johnson v. State Farm Life Ins. Co.*, 695 F. Supp. 2d 201 (W.D. Pa. 2010) (Hay, M.J.), adopted by 695 F. Supp. 2d 201 (W.D. Pa. 2010) (McVerry, J.)

In 1989, Plaintiff's decedent obtained a \$10,000 whole life insurance policy through State Farm, naming plaintiff the beneficiary. On February 10, 2007, plaintiff's decedent visited State Farm's insurance agent, Confer, who was also a friend, intending to cancel the policy because he did not want plaintiff to receive the proceeds. State Farm's agent apparently convinced plaintiff's decedent to maintain the policy and simply change the beneficiary. On February 14, 2007, plaintiff's decedent returned to the office and reinstated plaintiff as beneficiary. On February 19, 2007, plaintiff's decedent returned to the office yet again in order to cancel the policy. The agent, Confer, instead purchased the policy for \$100. On February 22, 2007, plaintiff's decedent turned himself in to the police following his violation of a restraining order plaintiff had on him. On February 23, 2007, Confer received a call from plaintiff inquiring about the policy and he apparently notified plaintiff of the transaction. Plaintiff's decedent died in prison on February 24, 2007. Plaintiff subsequently called to make a claim on the policy. State Farm paid out all of the proceeds but, according to plaintiff, conditioned payment upon a release of all claims against State Farm. Plaintiff filed suit, alleging, among other things, statutory bad faith, common law bad faith, breach of duty of good faith and fair dealing, and violation of UIPA.

State Farm filed a motion to dismiss which was heard by Magistrate Judge Hay of the Western District, who issued a report and recommendation. Magistrate Judge Hay granted most of the insurer's motion, so that only the breach of contract action stood following the ruling. District Judge McVerry adopted the report and recommendation.¹³²⁵

In support of the statutory bad faith claim, the plaintiff contended that defendant's agent (Confer) handled the claim in bad faith prior to the alleged conversion of the policy. The court disagreed, stating, "No claim had been made, however, before Confer allegedly converted the assets, thereby precluding a finding that her claim of bad faith revolves around how her claim was handled."¹³²⁶ The court reasoned that it was not possible for State Farm's agent to handle a claim in bad faith prior to any claim even being made. The court also rejected plaintiff's attempt to impute bad faith to State Farm where it sought a release of all claims against it. According to the court, plaintiff relied on no case law to support her argument, and State Farm had paid the policy proceeds in full, with interest:

It is unclear to the Court how conditioning the payment of the full proceeds on her release of any claims against State Farm constitutes bad faith where the value of the claim was established by the face of the Policy and was tendered in full.¹³²⁷

(2) *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200 (E.D. Pa. Sept. 1, 2009) (Buckwalter, J.)

Crawford alleged that Allstate acted in bad faith in addressing her claim for uninsured motorist and wage loss benefits. Allstate filed a motion for summary judgment, which was granted by Judge Buckwalter of the Eastern District.

After the parties settled, Allstate sent a release to Crawford that would have released it from "all claims," including first party wage loss and the bad faith claims, instead of releasing just the UM claims. When Crawford's counsel received this release, he changed it to reflect the verbal agreement and returned it to Allstate's attorney, who was on vacation when it arrived in his office. Upon his return, Allstate's counsel approved of the revised release, and arranged for the settlement check to be issued. The check arrived a week after Crawford's counsel finally provided his taxpayer I.D. number.¹³²⁸ The court found no basis for concluding that Allstate acted in bad faith in this regard.

(3) *Bitler v. Nationwide Mutual Ins. Co.*, 2001 U.S. Dist. LEXIS 5442 (E.D. Pa. Mar. 13, 2001) (Weiner, J.)

The insured filed a breach of contract and bad faith claim against the insurer, claiming that he was confused by the information provided to him by the company representative, and further that he signed a release under duress because he was under financial pressure with respect to medical bills. Judge Weiner of the Eastern District granted the insurer's motion for summary judgment on the issue of duress. The court held that, while duress will void a release, "duress is not found where there is simple financial pressure. Rather, a party claiming a release was signed under

¹³²⁴. *Kakule v. Progressive Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 35178, at *12.

¹³²⁵. *Johnson v. State Farm Life Ins. Co.*, 695 F. Supp. 2d 201, 203-04 (W.D. Pa. 2010).

¹³²⁶. *Johnson v. State Farm Life Ins. Co.*, 695 F. Supp. 2d 201, 215 (W.D. Pa. 2010).

¹³²⁷. *Id.* at 215 (W.D. Pa. 2010).

¹³²⁸. *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200, at *44-49 (E.D. Pa. Sept. 1, 2009).

duress must allege threats of physical harm.”¹³²⁹ The court found that there was no suggestion in the record that the insured was under threat of physical harm and granted the insurer’s motion.

(4) *Brown v. Liberty Mutual Ins. Group*, 2001 U.S. Dist. LEXIS 781 (E.D. Pa. Jan. 20, 2001) (Buckwalter, J.)

This case arose out of the insurer’s handling of an automobile theft claim. Originally referring the matter to its Special Investigative Unit because of red flags in the investigation, the company ultimately decided to pay the claim. The company forwarded the insured a check with a standard general release. The plaintiff objected to the release, informed the company that she would not sign it, and refused to deposit the check. The company sent her a letter authorizing the deposit without compromising her bad faith claim.

The plaintiff filed a lawsuit, alleging that the company breached its contract and acted in bad faith by forwarding the standard release prior to making payment. Judge Buckwalter of the Eastern District rejected this argument and granted summary judgment to the insurer on both counts. According to the court, there was no clause in the insurance policy that was violated by the request for the release. Moreover, the court noted that the insurer ultimately made payment without requiring the release, and therefore the company did not act in bad faith.¹³³⁰

(5) *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583 (E.D. Pa. 1999), *aff’d without opinion*, 2000 U.S. App. LEXIS 25588 (3d Cir. 2000) (Katz, J.)

In this case, discussed elsewhere,¹³³¹ the plaintiff maintained that Allstate committed bad faith in attempting to obtain a release of plaintiff’s UIM claim and bad faith claim. Judge Katz of the Eastern District held that it was not inappropriate for Allstate to attempt to resolve all claims with one settlement, particularly where there was no indication of an attempt to mislead. In this case, Allstate’s attorney made it clear that Allstate was seeking a release of all claims, including the bad faith claim; this proposal was ultimately rejected by the plaintiff.

(6) *Bowersox Truck Sales & Service, Inc. v. Harco National Ins. Co.*, 209 F.3d 273 (3d Cir. 2000) (McKee, J.)

Insurer Harco and its insured Bowersox Truck Sales (BTS) entered into a Release and Settlement Agreement that provided as follows: “We . . . release . . . Harco National Insurance Company . . . of and from any and all past, present and future actions . . . including claims or suits based upon negligence, breach of contract, bad faith, and any claims (except for business interruption as described below) seeking recovery for any sums of money under [the applicable] commercial property insurance policy. . . .”¹³³² The release further addressed potential bad faith claims as follows:

We the releasors do further release Harco from any and all claims that we may have for the manner in which all claims under the aforementioned policy have been handled, adjusted, negotiated or settled, including, but not limited to, claims based on . . . Pennsylvania Bad Faith Insurance Law, or any other law applicable to insurance practices. . . . We additionally release Harco for any claims we have under any theory of bad faith or unfair claims handling practices.¹³³³

BTS later filed suit, asserting, inter alia, bad faith claims handling. In a motion for summary judgment, the insurer argued that the plaintiff’s bad faith claim was barred by the express language of the release. The lower court agreed with Harco, but the Third Circuit reversed, holding that the release language applied only to the insurer’s past conduct and did not apply to future bad faith claims handling. The Third Circuit held that the words of a release will not be construed so as to bar enforcement of the claim which has not accrued at the time the release is entered into. The court stated that the parties did not agree that BTS was “releasing any such claims that it may now have, or may have had at any time in the future.”¹³³⁴ The court further noted that only the present tense appeared in the relevant portions of the release, and the court refused to “reword the release and insert the future tense that is now absent.”¹³³⁵

(7) *Noyes v. General American Life Ins. Co.*, 1998 U.S. Dist. LEXIS 514 (E.D. Pa. Jan. 16, 1998) (Van Antwerpen, J.)

In this case, release language releasing “all claims, demands and causes of action” was held sufficient to bar a bad faith claim. The plaintiff brought an action to void the agreement, alleging that it was a product of economic duress. The court rejected the plaintiff’s duress argument, finding that the plaintiff had ample opportunity to consult with an attorney. The plaintiff further argued that the bad faith claims should survive because bad faith was a distinct cause of action created by statute. The court rejected this argument as well, holding that the language of the agreement was clear and noting that it would be difficult to draft more generally encompassing language.

¹³²⁹ *Bitler v. Nationwide*, 2001 U.S. Dist. LEXIS 5442, at *6.

¹³³⁰ *Brown v. Liberty Mutual* is discussed in greater detail in Section 10:13.

¹³³¹ *Kosierowski* is discussed in greater detail in §10:11 and §10:17.

¹³³² *Bowersox Truck Sales*, 2000 U.S. App. LEXIS 6268, at *3-4.

¹³³³ *Id.* at *5.

¹³³⁴ *Id.* at *19.

¹³³⁵ *Id.*

(8) *Palucis v. Continental Ins. Co.*, 1998 U.S. Dist. LEXIS 11811 (E.D. Pa. July 16, 1998) (Kauffman, J.)

In settlement of a UIM claim, Continental issued a check in the amount of \$200,000 with the following typed notation: “Full and final settlement of any and all claims.” Although the plaintiff accepted and deposited the check without protest, she later commenced a bad faith action against Continental, alleging that it failed to effectuate prompt, fair and equitable settlement. The Eastern District dismissed plaintiff’s claim because the plain language of the claim settlement agreement stated that Continental was paying \$200,000 “in full satisfaction of the company’s obligations.” This language “makes clear that Palucis intended to release in full her potential claims under her underinsured motorist coverage.”¹³³⁶ Therefore, there was no longer a predicate action under an insurance policy upon which a bad faith claim could be based. The court further noted that the notation on Continental’s check that it was in “full and final settlement of any and all claims” constituted an accord and satisfaction.

(9) *Stanford v. Nat’l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323 (E.D. Pa. Nov. 3, 2014) (Tucker, C.J.)

This factually complicated UM/UIM case spanned a period of 17 years, and the facts are discussed in detail in §10:17. Following arbitration, plaintiff filed a complaint against NGM among others, alleging bad faith. NGM filed a motion for summary judgment after discovery concluded. Judge Tucker of the Eastern District granted the insurer’s motion.

Plaintiff contended that NGM acted in bad faith by conditioning the payment of the arbitration award on plaintiff signing a release and waiver of claims arising from the accident. The court rejected this argument as well, finding that once plaintiff Stanford objected to the release and check, NGM reissued the check and did not require signing of a release. The court stated:

Stanford’s remaining argument—that NGM acted in bad faith by conditioning the payment of the arbitration award on Stanford signing a release—also fails. When NGM originally issued the check and release to Stanford, the cover letter indicated that Stanford could not use the check unless Stanford also signed the release. After Stanford objected to this condition, NGM promptly reissued a check and eliminated any requirement that Stanford sign a release. [NGM’s counsel] testified that providing a release and settlement check was standard practice in Delaware.... NGM had a reasonable ground for initially conditioning the arbitration award on Stanford signing a release since it relied on this practice. Stanford failed to provide any evidence that this was not Delaware practice.¹³³⁷

§10:24 Miscellaneous Allegations Held Not to Constitute Bad Faith

§10:25 — Cases

(1) *United States Fire Ins. Co. v. Kelman Bottles*, 2014 U.S. Dist. LEXIS 71220 (W.D. Pa. May 23, 2014) (Schwab, J.), reconsideration denied, 2014 U.S. Dist. LEXIS 88256 (W.D. Pa. June 27, 2014) (Fisher, J.)

Defendant Kelman was a company that manufactured glass, and as part of the business, had a glass melting furnace that leaked, causing damage. Kelman sought coverage under two policies: an all risk policy with plaintiff US Fire; and an equipment breakdown policy with third-party defendant CNA. When the claims were denied, US Fire brought this declaratory judgment action and Kelman filed a bad faith counterclaim. The court granted summary judgment to US Fire on the bad faith claim, and the Third Circuit affirmed, as discussed in §10:04(b). After remand, Kelman was granted leave to amend to include a bad faith claim against CNA, and CNA brought a motion for summary judgment on the issue. Judge Schwab of the Western District of Pennsylvania granted the motion, and reconsideration was later denied by Judge Fisher.

Kelman contended that the denial letter was in bad faith because the letter was unclear and intentionally vague. The court concluded that, under the first prong of the *Terletsky* test, plaintiff failed to proffer clear and convincing evidence that CNA lacked a reasonable basis to deny coverage. The court, upon review of the letter, found it clear and detailed: “Given the detailed content of this letter and the step-by-step analysis set forth in the letter, the letter fails to provide Kelman with the requisite ‘clear and convincing evidence’ that CNA was either intentionally vague or unclear as to its reasons for a denial.”¹³³⁸

Kelman also argued that CNA’s internal investigators concluded that the incident was “sudden and accidental,” and thus was a covered event. The court explained that a claim note documenting a conversation between CNA’s adjuster and engineer in which the adjuster wrote that the occurrence was sudden and accidental was not sufficient proof to support a bad faith claim. The engineering report, to the contrary, concluded that the leaks had happened previously and were not uncommon in such furnaces. The court found that this contradiction was irrelevant to the bad faith claim:

Although the Court acknowledges that Kelman may be technically correct that [the adjuster’s] claim note referenced above contradicts CNA’s position that the breakdown was not sudden and accidental, this “contradiction” is of no moment for the following reasons: (1) the claim note was [the adjuster’s]

¹³³⁶. 1998 U.S. Dist. LEXIS 11811, at *7.

¹³³⁷. *Stanford v. Nat’l Grange Ins. Co.*, 2014 U.S. Dist. LEXIS 155323, at *20-21 (E.D. Pa. Nov. 3, 2014).

¹³³⁸. *United States Fire Ins. Co. v. Kelman Bottles*, 2014 U.S. Dist. LEXIS 71220, at *26 (W.D. Pa. May 23, 2014).

interpretation/characterization of what [the engineer] told him orally during a telephone conversation, (2) [the engineer's] testimony that he would not have used the terms "sudden and accidental" during that conversation, and (3) the statements and conclusions set forth in [the engineer's] written report clearly contradict a "sudden and accidental" finding. Accordingly, [the adjuster's] singular claim note does not provide clear and convincing evidence that CNA engaged in bad faith with respect to Kelman's March 15, 2011 claim.¹³³⁹

The court denied Kelman's motion for reconsideration, as simply reiterating arguments it had already made.

(2) *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302 (W.D. Pa. Mar. 20, 2014) (Gibson, J.)

After plaintiff was in an auto accident, he sought property damage benefits from his auto carrier, Nationwide. While Nationwide was evaluating the claim, it stored the vehicle at a salvage yard. After Nationwide made its offer, and plaintiff rejected it, the car remained at the yard for a year, and suffered more damage. Eventually, Nationwide sent a letter stating that if plaintiffs did not reclaim the car, it would be abandoned. Plaintiff brought this action, alleging statutory bad faith. The parties filed cross motions for summary judgment. Judge Gibson of the Western District granted Nationwide's motion and denied plaintiff's.

The court rejected plaintiff's claim that the notification of abandonment was in bad faith, as Nationwide had attempted to resolve the claim and had communicated regularly with plaintiff. The court also reviewed the letter Nationwide sent regarding abandonment if plaintiff did not claim the car, and found that plaintiff wrongly contended that the letter was a threat of abandonment if plaintiff refused to take the property damage offer. The court also rejected plaintiff's contention that post-accident damage to the car at the salvage yard was in bad faith.

Last, plaintiff contended that because he had to file suit to recover under his claim, such was evidence of Nationwide's bad faith. The court disagreed, finding that because Nationwide's offer was reasonable, plaintiff was not forced to file suit: "[B]ecause Nationwide had a reasonable basis for its offer, and because Plaintiffs could have accepted that offer, Plaintiffs [sic] contention that they 'had to sue Nationwide' is without merit and is not evidence of bad faith."¹³⁴⁰

(3) *Scott v. GEICO General Ins. Co.*, 2013 U.S. Dist. LEXIS 162642 (M.D. Pa. Nov. 15, 2013) (Mannion, J.)

Plaintiffs were injured in an auto accident, and eventually settled with the tortfeasor for just under the policy limits. They then sought UIM benefits from their auto insurer, defendant GEICO. The parties were unable to agree on the value of the claim, so plaintiffs filed this bad faith action. As the case neared trial, defendant filed a motion in limine to prevent introduction of evidence relating to the arbitration award and a post-arbitration memo drafted by defendant. Judge Mannion of the Middle District granted the motion in part and denied it in part, as discussed in §9:13(a).

Plaintiffs maintained that the memo was an admission that defendant undervalued the claim in bad faith and the amount of the award demonstrated the value. The court disagreed, with the exception of one sentence of the memo, which it allowed to be introduced. The court concluded that the amount of the award was not evidence of bad faith because plaintiff "must show the defendant did not have a 'sufficient basis...to offer what was reasonably due.' As such, the prejudicial nature of the award amount far outweighs the probative value."¹³⁴¹ The court also found that the memo was largely a recitation of the panel's findings and introduction of that "would usurp the role of the jury" and would not be relevant to defendant's claims handling or knowledge of the claim.¹³⁴²

(4) *Dameshek v. Encompass Ins. Co. of Am.*, 2012 U.S. Dist. LEXIS 87570 (M.D. Pa. June 25, 2012) (Kane, C.J.)

In this case, also discussed in §10:03(b), plaintiffs disputed with their homeowner's insurer whether they were entitled to additional living expenses ("ALE") beyond the one-year limitation for such benefits in the policy. Defendant insurer filed a motion for summary judgment, which was granted by Chief Judge Kane of the Middle District, as is also discussed in §10:03(b).

Plaintiffs contended in part that defendant insurer acted in bad faith by negotiating for a reduced price for the construction work to their fire-damaged home and by telling Plaintiffs that the contractor would provide free housing for them, a point disputed by the contractor. The court concluded that: "[T]hese allegations are not sufficient to support a bad faith claim. Plaintiffs have failed 'to make a showing sufficient to establish the existence of an element essential to [their] case.' Namely, that Defendant denied them benefits without a reasonable basis."¹³⁴³

¹³³⁹ *Id.* at *31-32.

¹³⁴⁰ *Rowe v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 36302, at *28 (W.D. Pa. Mar. 20, 2014).

¹³⁴¹ *Scott v. GEICO General Ins. Co.*, 2013 U.S. Dist. LEXIS 162642, at *18 (M.D. Pa. Nov. 15, 2013) (quoting *Klinger*, 115 F.3d at 234-35).

¹³⁴² *Id.* at *18.

¹³⁴³ *Dameshek v. Encompass Ins. Co. of Am.*, 2012 U.S. Dist. LEXIS 87570, at *13 (M.D. Pa. June 25, 2012) (citation omitted).

(5) *Neshaminy Constructors, Inc. v. Federal Ins. Co.*, 2012 U.S. Dist. LEXIS 86079 (E.D. Pa. June 21, 2012) (Savage, J.)

Plaintiff contracted with a governmental agency to reconstruct a bridge, which required repairs after plaintiff used defective concrete forms during the project. Plaintiff filed a claim with its inland marine insurance policy with defendant Federal, which denied the claim. Following the denial, plaintiff filed this breach of contract and bad faith suit. The parties filed cross motions for summary judgment. Judge Savage of the Eastern District granted the insurer's motion and denied plaintiff's motion.

Plaintiff argued in part that because Federal had placed the subcontractor on notice of a subrogation claim, but then later denied plaintiff's claim, Federal had acted in bad faith. The court disagreed: "The policy language, not the insurer's initial reaction to a claim before an investigation is concluded, controls. By sending a prophylactic subrogation letter to a third party, Federal did not waive its rights under the policy. Nor did it reform the contract."¹³⁴⁴

(6) *Timothy v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 119698 (W.D. Pa. Aug. 23, 2012) (McVerry, J.)

After plaintiffs' home was damaged in a storm, they filed a claim with their homeowner's insurer, defendant State Farm. When the parties could not agree on the value of the damage, plaintiff filed this action, alleging both common law and statutory bad faith. Defendant filed a motion to dismiss these claims. Judge McVerry of the Western District granted the motion, which is also discussed in §5:03.

The court concluded that plaintiffs' allegation that defendant acted deceptively by having its adjusters sign letters indicating that they were independent adjusters when, in fact, they were employees. The court "finds that this single factual allegation is insufficient to establish a claim of bad faith under §8371."¹³⁴⁵ Finally, the court concluded that plaintiffs' allegation that the defendant State Farm's adjusters "falsely claimed" that the damage to the home was caused by stones being thrown out from a lawn mower "is not sufficient to allow Plaintiffs' statutory bad faith claim under §8371 to survive. This issue may warrant further factual development as to the breach of contract claim, but does not establish that State Farm acted in bad faith."¹³⁴⁶

(7) *Sicherman v. Nationwide Life Ins. Co.*, 2012 U.S. Dist. LEXIS 47630 (E.D. Pa. Apr. 4, 2012) (McLaughlin, J.)

The details of this case are discussed in more detail in §10:07(c). After plaintiff's decedent died in December 2010, plaintiff sought benefits under his life insurance policy with Nationwide. Nationwide refused to pay benefits on the grounds that the policy had lapsed, following its refusal to accept a partial payment of an increased premium. In June 2011, plaintiff, through counsel, requested that the denial be reversed and benefits issued. Nationwide paid out the benefits in September 2011. Plaintiff filed suit alleging bad faith. Nationwide filed a motion to dismiss. Judge McLaughlin of the Eastern District of Pennsylvania granted the motion. The court rejected plaintiff's allegations that Nationwide's billing practices and refusal to accept the erroneous payment as partial payment could state a claim for bad faith. The policy clearly stated that if premiums were not paid, the policy would lapse and the letter Nationwide had sent clearly indicated that only full payment would be accepted. Thus, "[t]hese allegations do not rise to the intentionally dilatory or obstructive behavior required to state a claim for bad faith."¹³⁴⁷

(8) *Zenith Ins. Co. v. Wells Fargo Ins. Servs. of Pennsylvania*, 2011 U.S. Dist. LEXIS 143501 (E.D. Pa. Dec. 13, 2011), later proceeding at, 2012 U.S. Dist. LEXIS 79183 (E.D. Pa. June 7, 2012) (Bartle, J.)

In this case, discussed in detail in §9:19, additional defendants Granger and Glasbern sought leave to amend their bad faith counterclaim against their worker's compensation carrier, Zenith. They wished to include allegations that an attorney from the firm representing Zenith (not an attorney representing Zenith in this particular case) had made disparaging comments about counsel for Glasbern and Granger, Mr. Speaker, to another attorney at Speaker's firm and a client of Speaker's firm. They intended to allege that the comments were made in bad faith to intimidate Glasbern's and Granger's attorney in their handling of the case. Judge Bartle of the Eastern District denied the motion, in part on the grounds that it was futile because there was no showing that Zenith knew of or directed the remarks:

. . . Glasbern and Granger seek to amend based on comments made by Jacob Cohn, an attorney with the law firm of Cozen O'Connor. Cohn does not represent Zenith in this action but merely is employed by the same firm as Zenith's counsel. Glasbern and Granger have failed to set forth any facts which suggest that Zenith authorized or directed Cohn to make such comments or that Zenith had any knowledge of the remarks. Simply put, Cohn did not act on behalf of Zenith and thus his comments cannot be characterized as bad faith conduct by the "insurer," as required by §8371.¹³⁴⁸

¹³⁴⁴ *Neshaminy Constructors, Inc. v. Federal Ins. Co.*, 2012 U.S. Dist. LEXIS 86079, at *11 (E.D. Pa. June 21, 2012).

¹³⁴⁵ *Timothy v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 119698, at *18 (W.D. Pa. Aug. 23, 2012).

¹³⁴⁶ *Id.* at *19.

¹³⁴⁷ *Sicherman v. Nationwide Life Ins. Co.*, 2012 U.S. Dist. LEXIS 47630, at *15 n.4 (E.D. Pa. Apr. 4, 2012).

¹³⁴⁸ *Zenith Ins. Co. v. Wells Fargo Ins. Servs. of Pennsylvania*, 2011 U.S. Dist. LEXIS 143501, at *5 (E.D. Pa. Dec. 13, 2011).

Glasbern and Granger subsequently sought leave to amend to include nearly the same allegations. The court again denied leave to amend, in part on the grounds that amendment would be futile. The court stated: “Glasbern and Granger have failed to set forth any facts which suggest that Zenith authorized or directed Cohn to make such comments or that Zenith had any knowledge of the remarks. Simply put, Cohn did not act on behalf of Zenith and thus his comments cannot be characterized as bad faith conduct by the ‘insurer’ as required by §8371.”¹³⁴⁹

(9) *Collins v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 60436 (E.D. Pa. June 17, 2010) (Yohn, J.)

A storm damaged Collins’s house, including the roof and adjacent portions of the interior. Allstate, which provided the homeowner’s policy, covered the part of the claim relating to the interior damage but denied coverage for any exterior repair beyond the damaged section of the roof. Collins filed suit, claiming a breach of contract for not replacing the entire roof where the slate tiles could not be matched, and bad faith in rendering that decision. Allstate filed a motion for summary judgment. Judge Yohn of the Eastern District granted the insurer’s motion.

In reaching its decision (also discussed in §§10:03(b) and 10:07(b)), the court rejected Collins’s argument that the Allstate adjuster had a financial incentive to refuse to replace the entire roof and thus had acted in bad faith in rendering its decision:

Collins’s argument that Duddy [adjuster] had a personal financial incentive to limit coverage of Collins’s claim inappropriately is also unavailing. The only evidence of such an incentive is that Duddy has some Allstate stock in his 401k retirement plan. Duddy testified, however, that his participation in this 401k retirement plan “doesn’t even enter into adjusting the claim.” Collins submits no evidence to the contrary. Duddy also testified that he does not have “direct knowledge” of “whether the amount of money that Allstate pays out on claims affects their overall profitability for the purposes of affecting their stock value.” Collins submits no evidence that Allstate’s stock value would have risen or fallen significantly as a result of Duddy’s decisions concerning claims. The impact on Duddy’s 401k retirement plan of Duddy’s decisions concerning claims is obviously *de minimus*. It is ludicrous to suggest that Duddy’s adjustment of this claim, amounting to a dispute of \$22,000, could affect the value of the Allstate stock held in Duddy’s 401k retirement plan. Duddy’s financial interest in Allstate’s success based on his 401k retirement plan is of little difference from the kind of general financial interest that all employees have in a company’s success. To ascribe bad faith to a company based only on such a weak motive goes too far. No reasonable juror could do anything other than reject such an argument.

Duddy further testified that he did not recall ever being told that Allstate was changing the method by which it would pay claims, was paying too much money on claims, or had to become more profitable. He also testified that he was never told that he needed to become more aggressive in how he adjusted claims, that he needed to scrutinize certain claims more closely, that certain types of claims should be handled differently from others, or that he should target claims under a certain value and adjust them differently.¹³⁵⁰

(10) *Alfano v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 84927 (M.D. Pa. Sept. 17, 2009) (Munley, J.)

Plaintiffs had a homeowner’s insurance policy with State Farm. After an explosion destroyed their home and all of its contents, State Farm tendered the policy limits of approximately \$450,000. Plaintiffs filed suit against the utility company (PP&L), seeking additional recovery they claimed they were due in order to make them whole. Thereafter, State Farm filed a subrogation action in the same court against PP&L, which the parties settled for \$250,000 and for an assignment of the subrogation claim, without input from or the knowledge of plaintiffs. Plaintiffs then filed suit against State Farm companies claiming that the assignment of the subrogation claim was done in bad faith and should be voided.

State Farm filed a motion to dismiss, arguing that plaintiffs did not state a claim under §8371 because it had paid out the policy limits and the assignment of subrogation rights cannot form the basis of a bad faith claim. Plaintiffs claimed that the assignment was in bad faith because they were entitled to be fully compensated for their injury before any right of subrogation could arise. Judge Munley of the Middle District sided with the insurer and dismissed the complaint.

According to the court, the insurer’s right to seek subrogation was entirely separate from its claims decision:

Defendants are not attempting to enforce subrogation rights against the plaintiffs, they have rather assigned those rights to another entity. Plaintiffs have cited no case law, and our research has uncovered none, that indicates that such an assignment can be interpreted as bad faith or that a defendant must wait until a plaintiff has been made whole to assign subrogation rights to a third party.

¹³⁴⁹. *Zenith Ins. Co. v. Wells Fargo Ins. Servs. of Pennsylvania*, 2012 U.S. Dist. LEXIS 79183, at *5 (E.D. Pa. June 7, 2012).

¹³⁵⁰. *Collins v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 60436, at *28-30 (E.D. Pa. June 17, 2010) (citations to record and footnote omitted).

Plaintiffs' complaint asserts that the assignment of the subrogation rights to PP&L placed PP&L in a superior position to them in the underlying state court action. We are unconvinced. The plaintiffs remain entitled to the same amount of damages that they would have been if the subrogation assignment not occurred.¹³⁵¹

(11) *Principal Life Ins. Co. v. Weiss*, 2009 U.S. Dist. LEXIS 131300 (E.D. Pa. July 30, 2009) (Davis, J.)

Plaintiff Principal Life brought this declaratory judgment action, while the insured was still living, seeking a declaration that the life insurance policies at issue were STOLI (stranger-owned life insurance) schemes and thus void. Defendant trustee brought several counterclaims, including counterclaims for bad faith and breach of the duty of good faith and fair dealing. Plaintiff insurer brought a motion to dismiss the counterclaims. Judge Davis of the Eastern District of Pennsylvania granted the motion on these counterclaims, in an opinion also discussed in §5:05(b).

Defendant alleged that the insurer acted in bad faith in bringing the declaratory judgment action seeking to avoid its contractual obligations. The court disagreed, noting that the first prong of the *Terletsky* test required that the insurer deny benefits unreasonably. Because plaintiff insurer had not denied benefits, it could not have acted in bad faith:

The essential act which Defendant alleges caused him harm is Plaintiff's filing of its declaratory judgment action. . . . He identifies no other conduct by Plaintiff in asserting his bad faith counterclaim. His allegation therefore fails to satisfy the first prong of the test, which requires that the insurer have no reasonable basis for denying a claim. There has been no denial of benefits; in fact, no benefits claim for Plaintiff to deny or otherwise handle has been made under the Policies as the insured, S. Weiss, is still living.¹³⁵²

The court also rejected defendant's argument that plaintiff insurer acted in bad faith because defendant's insurance agent was involved in a company that was involved in litigation with plaintiff insurer. Even if defendant could show that plaintiff insurer thus was motivated in bad faith, defendant still failed to demonstrate that the bad faith was related to a claims denial:

The fact that Plaintiff has a pending legal dispute with DVFG does not logically result in the conclusion that it has a "bad faith motivation" in bringing a declaratory judgment action against a different party. Regardless, Defendant's counterclaim still fails to state a claim for bad faith under section 8371 because "bad faith motivation" is not a separate element of the test, but merely probative of the second element identified, namely that "the insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim."¹³⁵³

(12) *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200 (E.D. Pa. Sept. 1, 2009) (Buckwalter, J.)

This case is discussed in greater detail in §10:17. Crawford alleged that Allstate acted in bad faith in addressing her claim for UIM and wage loss benefits. Crawford alleged numerous instances of bad faith, including the allegation that Allstate's attorney had misrepresented the contents of Crawford's records and that Allstate used an unfair doctor and arbitrator on the UIM claim. Allstate filed a motion for summary judgment, which was granted by Judge Buckwalter of the Eastern District.

As to the alleged misrepresentation of the records, Crawford claimed that Allstate's attorney stated that prior medical records showed that to some extent, her injuries could be attributed to an earlier accident. The court rejected Crawford's reasoning. Similarly, the court found no basis in the record supporting the claim that Allstate had used a biased physician to perform the IME and a biased arbitrator. According to the court, the physician's IME addressed points both favorable to and unfavorable to Crawford's position. Lastly, the claim of unfair selection of the arbitrator was moot, the court held, because the arbitration never happened.¹³⁵⁴

(13) *Principal Life Ins. Co. v. Minder*, 2009 U.S. Dist. LEXIS 56568 (E.D. Pa. July 1, 2009) (Bartle, C.J.)

Principal Life Insurance Company filed an action against Minder (as a trustee of a family trust) seeking to have its life insurance policy with Minder's still-living father declared void based on alleged misrepresentations in the application. The trust was the record owner and beneficiary of the policy. Minder filed an answer and a counterclaim alleging statutory bad faith based on Minder's contention that Principal had no reasonable legal or factual basis for seeking a declaration that the policy was void or voidable. Principal filed a motion to dismiss the counterclaim.

Relying upon *Toy v. Metropolitan Life Ins. Company*,¹³⁵⁵ Chief Judge Bartle of the Eastern District court granted Principal's motion to dismiss, finding that Minder had not stated a viable cause of action because his claim was not based on the failure to perform a contractual obligation. According to the court:

No claim for benefits has been made under the Policy. As stated above, Joseph Minder, the insured, is alive. It is therefore impossible for Minder to state a claim under §8371 because there is no allegation that Principal Life has acted in bad faith in the handling of a claim or in the denial of benefits. Filing a declaratory judgment action concerning the parties' rights and obligations under an insurance policy prior to the time a claim becomes ripe is not

¹³⁵¹. *Alfano v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 84927, at *8 (M.D. Pa. Sept. 17, 2009).

¹³⁵². *Principal Life Ins. Co. v. Weiss*, 2009 U.S. Dist. LEXIS 131300, at *11-12 (E.D. Pa. July 30, 2009).

¹³⁵³. *Id.* at *16 n.4 (quoting *Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 233 (3d Cir. 1997)).

¹³⁵⁴. *Crawford v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 79200, at *50-52 (E.D. Pa. Sept. 1, 2009).

¹³⁵⁵. 928 A.2d 186, 195-201 (Pa. 2007).

tantamount to the denial or mishandling of a claim. At this time, Principal Life has not been called upon to perform any contractual obligations.¹³⁵⁶

(14) *Employers Mutual Casualty Co. v. Loos*, 476 F. Supp. 2d 478 (W.D. Pa. 2007) (Flowers-Conti, J.)

In this case, discussed in §10:05, the insured argued in part that the insurer acted in bad faith by challenging coverage and filing a declaratory judgment action. On the parties' cross motions for summary judgment, Judge Flowers-Conti of the Western District found no bad faith, stating, "[I]n order to establish a claim under §8371, defendants must do more than show that plaintiff acted to clarify its perceived limits to the scope of coverage after being presented with a seemingly questionable UIM claim."¹³⁵⁷

(15) *U.S. Bank, N.A. v. First American Title Ins. Co.*, 2013 U.S. Dist. LEXIS 65751 (E.D. Pa. May 8, 2013) (Yohn, J.), *aff'd on other grounds*, 2014 U.S. App. LEXIS 11652 (3d Cir. June 20, 2014)

Plaintiff U.S. Bank was the trustee of a securitized mortgage with respect to which defendant First American provided title insurance. When a claim arose out of a mortgage and title problem, the parties could not resolve the claim. U.S. Bank then filed this bad faith suit. The parties filed cross motions for summary judgment. Judge Yohn of the Eastern District granted the insurer's motion, which is also discussed in §10:07(d).

The court explained that U.S. Bank had never presented a claim to its insurer outside of this suit, and therefore, First American could not have acted in bad faith with respect to a nonexistent claim: "In this case, U.S. Bank never submitted a claim, and First American never denied it benefits until this lawsuit was filed. Accordingly, there is no genuine issue of material fact to put a bad faith claim in play."¹³⁵⁸

U.S. Bank contended that First American acted in bad faith by initiating and prolonging litigation in its declaratory judgment action it had filed earlier against JP Morgan Chase, the party First American originally believed to be the trustee of the mortgage. The court rejected that argument, finding that there was no evidence to support a finding that First American filed that suit in an attempt to evade its contractual obligations with respect to U.S. Bank. The court found that where an insurer uses litigation to avoid its responsibilities, it could provide a basis for a bad faith suit, there was no such evidence here:

Here, U.S. Bank does not provide evidence, and certainly not clear and convincing evidence, that the purpose of the declaratory judgment litigation was to evade obligations under the policy. The complaint in that action stated that its purpose was to determine the rights and obligations of all parties to the litigation under the title insurance policy.... That is [] a valid issue to bring before a court.¹³⁵⁹

The court also noted that the declaratory judgment action was resolved in favor of First American, which weighed against a finding that the action was evidence of bad faith:

[T]he Washington County Court of Common Pleas eventually ruled in favor of First American and against JP Morgan, and the judgment was upheld by the Superior Court of Pennsylvania. While this favorable ruling lends further credibility to First American's argument that it did not bring the suit for the purpose of delaying an obligation under the policy, it also weighs in favor of a finding that, should First American have denied a claim, it had a reasonable basis in doing so, as JP Morgan was never a party in interest.¹³⁶⁰

The parties did not raise the bad faith issue on appeal.

(16) *Goddard v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 5974 (E.D. Pa. Jan. 16, 2014) (O'Neill, J.)

Plaintiff was in an auto accident in 1998 when he was struck by an underinsured driver. It is not clear when the UIM claim was made, but the parties agreed to arbitration upon the completion of an independent medical examination (IME). Plaintiff refused to attend an IME, and defendant thereafter denied the claim, closing the file in 2007. Plaintiff filed this bad faith action in 2011. Defendant filed a motion for summary judgment. Judge O'Neill of the Eastern District of Pennsylvania granted the motion.

State Farm maintained that it could not be liable for bad faith because plaintiff's breach of the policy's cooperation clause prejudiced its investigation. The court agreed. Noting that a prejudicial breach of the cooperation clause results in the insurer being released from its own obligations under the contract, the court found that plaintiff had failed to meet his obligations under the contract by refusing to submit to an IME, despite at least 6 requests to do so. It further concluded that the breach prejudiced defendant because defendant was unable to evaluate plaintiff's injuries at the time of the claim.

¹³⁵⁶ *Principal Life Ins. Co. v. Minder*, 2009 U.S. Dist. LEXIS 56568, *9-10 (E.D. Pa. July 1, 2009).

¹³⁵⁷ *Id.* at 494.

¹³⁵⁸ *U.S. Bank, N.A. v. First Am. Title Ins. Co.*, 2013 U.S. Dist. LEXIS 65751, at *44 (E.D. Pa. May 8, 2013).

¹³⁵⁹ *U.S. Bank, N.A. v. First Am. Title Ins. Co.*, 2013 U.S. Dist. LEXIS 65751, at *46.

¹³⁶⁰ *U.S. Bank, N.A. v. First Am. Title Ins. Co.*, 2013 U.S. Dist. LEXIS 65751, at *46-47.

(17) *Lites v. Trumbull Ins. Co.*, 2013 U.S. Dist. LEXIS 153346 (E.D. Pa. Oct. 25, 2013) (Restrepo, J.)

Plaintiffs had an auto policy with defendant Trumbull with limited tort coverage. About a month before the end of the policy period, plaintiffs contacted defendant to change their policy to include full tort coverage. Plaintiff wife was involved in an auto accident before the policy period ended. When the parties could not agree whether the change to full tort occurred as of the date of the telephone call or with the start of the next policy period, plaintiffs filed this reformation and bad faith action. After discovery, defendant filed a motion for summary judgment. Judge Restrepo of the Eastern District of Pennsylvania granted the motion.

Plaintiffs contended that Trumbull failed to effectuate the change immediately in bad faith. The court noted that the transcript from the call to the defendant insurer indicated that the employee told plaintiffs the change would be made with the start of the new policy period and that plaintiffs never indicated that they wanted the change made sooner. Thus, the court found, plaintiffs failed to present evidence to support the first prong of the *Terletsky* test because the decision was reasonable: “Defendant’s conclusion that plaintiffs agreed to an effective date of August 6, 2010 for the change in coverage was a reasonable basis for denying payment to plaintiffs.”¹³⁶¹

Plaintiffs also contended that the insurer fraudulently told them that they would need to sign forms before the change could be made; however, the court noted that the employee had corrected herself during that same conversation and had told them the effective date of the change. Under the circumstances, this evidence failed to create a genuine issue of material fact on bad faith: “Even if a misrepresentation or an incorrect analysis of the law was sufficient to constitute bad faith, which it is not per *Jung*, plaintiffs conceded to the change taking effect upon the renewal date.”¹³⁶²

(18) *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2013 U.S. Dist. LEXIS 97226 (W.D. Pa. July 12, 2013) (Ambrose, J.)

Defendant was sued in an Iowa state court action, and plaintiff insurers provided a defense and indemnification under its E&O policy, but denied coverage under its CGL and umbrella policies. The judge returned a verdict for defendant in that action. Plaintiff insurers then filed a declaratory judgment action. Defendant counterclaimed, seeking recovery for breach of contract and common law and statutory bad faith. Plaintiffs filed a motion for summary judgment. Judge Ambrose of the Western District of Pennsylvania granted the motion in part and denied it in part, as is also discussed in §§9:19, 10:04(c), 10:21, and 12:02.

In an earlier decision in the case, the court had concluded that there may have been an “occurrence” under the E&O and CGL policies. Following this decision, plaintiffs split defense costs between the E&O and CGL policies; defendant claimed this was in bad faith, a position the court rejected: “[A] reasonable jury could not conclude that the 50/50 allocation decision itself constituted bad faith conduct. As Plaintiffs’ point out, Defendant sought coverage under both policies; an even distribution of defense costs cannot be considered an unreasonable response, under applicable standards and the surrounding circumstances.”¹³⁶³

Chapter 12: DAMAGES RECOVERABLE: COMPENSATORY DAMAGES

§12:02 Cases

(1) *Ferguson v. Kemper*, 2013 U.S. Dist. LEXIS 21055 (M.D. Pa. Feb. 15, 2013) (Jones, J.) (homeowners’ policy claim)

Plaintiff insured had a homeowner’s policy with defendant Kemper and sought coverage under the policy after the home flooded in March 2011. Kemper’s adjuster authorized repairs and paid the insured over \$4,000 for those repairs to the basement. In June 2011, the home was damaged by another flood. The adjuster performed his inspection 4 days after the flood, after the insured had cleaned up the water. The adjuster found that he could not verify that flooding had caused the damage and denied the claim. In September 2011, the home was damaged again in flooding caused by Hurricane Irene. The adjuster arrived many days later to inspect and sent out a clean-up company to remediate some of the damage. Kemper ultimately denied coverage, and the clean-up company began collection actions against the insured. The insured filed this bad faith action. Kemper filed a motion to dismiss. The insured failed to oppose the motion. Judge Jones of the Middle District granted the motion as it related to a damages request in the bad faith claim. Plaintiff sought compensatory, consequential, treble and exemplary damages in the ad damnum clause in the bad faith count. The court agreed with the insurer that the bad faith statute did not provide for such damages, and struck that request.¹³⁶⁴

^{1361.} *Lites v. Trumbull Ins. Co.*, 2013 U.S. Dist. LEXIS 153346, at *17 (E.D. Pa. Oct. 25, 2013).

^{1362.} *Lites v. Trumbull Ins. Co.*, 2013 U.S. Dist. LEXIS 153346, at *18.

^{1363.} *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2013 U.S. Dist. LEXIS 97226, at *11 (W.D. Pa. July 12, 2013).

^{1364.} *Ferguson v. Kemper*, 2013 U.S. Dist. LEXIS 21055, at *18-19 (M.D. Pa. Feb. 15, 2013).

(2) *Shafer v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 31815 (W.D. Pa. Mar. 9, 2012) (Gibson, J.) (UIM claim)

Plaintiff, a pedestrian, was injured in an auto accident. After receiving the policy limits from the driver, she sought UIM benefits from her parents' auto policy with State Farm. Plaintiffs filed this bad faith action. State Farm filed a motion to strike the demand for compensatory damages in the bad faith count. Judge Gibson of the Western District granted the motion in this respect. The court stated: "While Section 8371 does not prohibit the award of compensatory damages for common law contract claims, such damages are not recoverable in a claim predicated on Section 8371. . . . Because Count II of the instant Complaint is based on a violation of Section 8371, the Court will strike Plaintiffs' demand for compensatory damages from that count."¹³⁶⁵

(3) *Smalanskas v. Indian Harbor Ins. Co.*, 2008 Pa. Dist. & Cnty. Dec. LEXIS 233 (Lackawanna Feb. 15, 2008) (Nealon, J.), *aff'd without opinion*, 970 A.2d 490 (Pa. Super. Feb. 10, 2009) (liability claim)

In this case, discussed in more detail in §10:07(d), Judge Nealon of Lackawanna County held that Indian Harbor acted in good faith in defending its insured in a liability action subject to a reservation of rights, but ultimately denying coverage. The insured had sought compensatory damages. In denying that such damages were recoverable under §8371 even if the statute applied, the court observed, "The Supreme Court has clearly held that an insured may not recover compensatory damages based on 42 Pa. C.S. §8371."¹³⁶⁶

(4) *Hatchigian v. Hartford Ins. Co.*, 2003 U.S. Dist. LEXIS 15666 (E.D. Pa. Aug. 13, 2003) (Buckwalter, J.) (denial of emotional distress damages in wage loss claim)

In this case, discussed in detail in §7:09, Judge Buckwalter of the Eastern District rejected the insurer's argument that plaintiffs could not seek damages for intentional infliction of emotional distress arising out of the denial of a wage loss claim under an automobile policy, stating that "Section 8371 added the remedy of punitive damages for bad faith conduct by an insurer, but it did not preclude an injured party from bringing other claims which he may have suffered as a result of the insurer's bad faith."¹³⁶⁷ The court denied the insurer's motion to dismiss.

(5) *Harlan v. Erie Ins. Grp.*, 80 Pa. D. & C.4th 61 (Lawrence 2006) (Motto, P.J.) (denial of bad faith claim seeking emotional distress damages)

Plaintiffs filed a multi-count complaint including a claim for breach of contract, breach of the covenant of good faith and fair dealing, and bad faith under §8371. The insurer demurred to the count alleging breach of the covenant of good faith and fair dealing. Judge Motto of Lawrence County denied the demurrer. According to the court, in Pennsylvania there is not a private cause of action in tort for alleged breaches of the duty of good faith and fair dealing, but held there was a contractual right to file such an action. Citing *Birth Center*, the court stated:

. . . *Birth Center* expressly held that when an insurer breaches its insurance contract by a bad faith refusal to settle a case, it is appropriate to require it to pay other compensatory damages that it knew or should have known the insured would incur because of the bad faith conduct. . . . Furthermore, such contract right of action is wholly independent from the statutory bad faith action, 42 Pa. C.S.A. §8371 as the bad faith statute is not inconsistent with the common law and the statute merely authorizes additional damages beyond the common law compensatory damages.¹³⁶⁸

Relatedly, the insurer had also filed a motion to strike plaintiff's claim for emotional distress. The court granted that motion. According to the court, "plaintiffs may only seek damages that are available to them pursuant to contract theories of recovery."¹³⁶⁹ Citing the Restatement of Contract Section 3:14, the court concluded, "[I]t is apparent that plaintiffs are precluded from recovering emotional distress damages arising from defendant's alleged breach of contract for bad faith. Plaintiffs do not allege that they suffered bodily harm, nor can it be inferred from the facts alleged that defendant had reason to know that at the time the contract was entered into, a breach of that contract in the manner alleged would cause mental suffering for reasons other than pecuniary loss."¹³⁷⁰

(6) *Viola v. Provident Life & Accident Ins. Co.*, Civil Action No. 00-1656 (E.D. Pa. July 17, 2000) (Padova, J.) (denial of emotional distress claim)

Judge Gawthrop's opinion was followed by Judge Padova of the Eastern District. In *Viola*, which also involved a claim for benefits pursuant to a policy of disability insurance, the defendant insurer moved to dismiss the plaintiff's claim for relief regarding emotional distress and physical injuries. The court granted the motion, holding that such a claim was inappropriate because the Pennsylvania legislature did not intend under §8371 to provide for emotional

¹³⁶⁵ *Shafer v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 31815, at *6 (W.D. Pa. Mar. 9, 2012) (footnote omitted).

¹³⁶⁶ *Smalanskas v. Indian Harbor Ins. Co.*, 2008 Pa. Dist. & Cnty. Dec. LEXIS 233, at *20 (Lackawanna Feb. 15, 2008), *aff'd without opinion*, 970 A.2d 490 (Pa. Super. Feb. 10, 2009).

¹³⁶⁷ *Hatchigian v. Hartford Ins. Co.*, 2003 U.S. Dist. LEXIS 15666, at *14 (E.D. Pa. Aug. 13, 2003).

¹³⁶⁸ *Harlan v. Erie Ins. Grp.*, 80 Pa. D. & C.4th 61, 65 (Lawrence 2006).

¹³⁶⁹ *Harlan v. Erie Ins. Grp.*, 80 Pa. D. & C.4th 61, 67 (Lawrence 2006).

¹³⁷⁰ *Harlan v. Erie Ins. Grp.*, 80 Pa. D. & C.4th 61, 68 (Lawrence 2006).

distress damages for bad faith conduct in connection with an insurance claim Citing *Duffy*, and noting that where there is a clear and adequate statutory remedy, that remedy is exclusive, the court held that plaintiff's emotional distress claim should be dismissed.

(7) *LaPlante v. Provident Life & Accident Ins. Co.*, Civil Action No. 3:00-cv-1580 (M.D. Pa. Jan. 11, 2001) (Vanaskie, J.) (denial of emotional distress claim)

Judge Vanaskie of the Middle District has held that, absent exceptional circumstances, a policyholder may not recover emotional distress damages in a breach of contract/bad faith case:

The allegations of the Complaint in the instant case do not warrant recovery for emotional distress under the exception to the general presumption against such damages carved out by the Supreme Court in *D'Ambrosio*. . . . Laplante's allegation that Provident mishandled her claim, and nothing more, does not rise to the level of outrageous conduct required to support a finding of foreseeable likelihood of "serious emotional disturbance." Indeed, to hold otherwise would support the existence of a cause of action for emotional distress whenever an insured asserts a breach of contract action against an insurer arising out of the insurer's handling of a policy claim. The exception would swallow the general rule.¹³⁷¹

In *LaPlante*, the court concluded: "Succinctly stated, bad faith conduct alone cannot serve as the premise for a claim for emotional distress damages."¹³⁷²

(8) *Porter v. Safeco Ins. Co. of Ill.*, 2016 U.S. Dist. LEXIS 15877 (M.D. Pa. Feb. 9, 2016) (Mariani, J.) (holding compensatory damages claim limited to common law bad faith)

Plaintiff's home was damaged in a fire, following which he sought coverage from his defendant homeowner's carrier. The home had originally been two separate units, combined at some point in the past. When the carrier maintained that the coverage applied only to half of the combined home, plaintiff filed this bad faith action. Defendant filed a motion to dismiss. Judge Mariani of the Middle District granted the motion in part. A subsequent decision in this case is discussed in §§7:18(a), 10:03(b), 10:07(b), and 10:13(b).

The court disagreed with defendant's argument that common law bad faith claims applied only to third party insurance claims: "[T]his Court joins other federal courts in recognizing that the operative language of the Pennsylvania Supreme Court decision [in *Birth Center*] does not distinguish between first and third party insurance and in applying that decision's holding to first party insurance claims."¹³⁷³ The court concluded that a common law bad faith claim merged with the breach of contract claim, and thus deemed such allegations as part of the already-pled contract count.

The court also explained that plaintiff was entitled to compensatory damages under the common law theory: "It is clear to the Court that there is no basis for compensatory damages under §8371, but it is equally clear to the Court that, under a claim for a breach of the implied covenant of good faith and fair dealing, compensatory damages are available."¹³⁷⁴

(9) *Novick v. UnumProvident Corp.*, 2001 U.S. Dist. LEXIS 9735 (E.D. Pa. July 10, 2001) (Ludwig, J.) (denying emotional distress claim)

The plaintiff-insured filed a bad faith action against his disability insurer. In addition to specified damages under §8371, the plaintiff requested emotional distress damages. Judge Ludwig of the Eastern District granted the insurer's motion to dismiss the claim for emotional distress damages. Citing *Duffy* and *LaPlante* above, the court held that the pleaded facts were insufficient to allow a recovery for emotional distress damages.

(10) *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2013 U.S. Dist. LEXIS 97226 (W.D. Pa. July 12, 2013) (Ambrose, J.) (claim under E&O policy)

Defendant was sued in an Iowa state court action, and plaintiff insurers provided a defense and indemnification under its E&O policy, but denied coverage under its CGL and umbrella policies. The judge returned a verdict for defendant in that action. Plaintiff insurers then filed a declaratory judgment action. Defendant counterclaimed, seeking recovery for breach of contract and common law and statutory bad faith. Plaintiffs filed a motion for summary judgment. Judge Ambrose of the Western District of Pennsylvania granted the motion in part and denied it in part, as is also discussed in §§9:19, 10:04(c), 10:21, and 10:25.

Plaintiff insurers asserted that because defendant received a defense and indemnity was no longer at issue, it suffered no damages, so the bad faith claim could no longer stand: "In so arguing, [the insurers] rely on language from various cases to the effect that the statutory remedies are 'additional,' and thus actual damages should be deemed a

¹³⁷¹. *LaPlante v. Provident*, slip op. at 6-7.

¹³⁷². *LaPlante v. Provident*, slip op. at 6-7. For a similar holding by Judge Vanaskie, see also *Krisa v. Equitable Life Assurance Soc'y*, 109 F. Supp. 2d 316, 323 (M.D. Pa. 2000).

¹³⁷³. *Porter v. Safeco Ins. Co. of Ill.*, 2016 U.S. Dist. LEXIS 15877, at *15 (M.D. Pa. Feb. 9, 2016).

¹³⁷⁴. *Porter v. Safeco Ins. Co. of Ill.*, 2016 U.S. Dist. LEXIS 15877, at *23-24 (M.D. Pa. Feb. 9, 2016).

prerequisite to such remedies.”¹³⁷⁵ The court rejected this claim, finding it did not comport with the statute or case law because it “would render Section 8371 meaningless in many cases, such as when an insurer pays policy limits, but does so after a bad faith delay. . . . It would also be incompatible with the purpose of fees and costs under Section 8371, which are intended to make a plaintiff whole.”¹³⁷⁶

(11) *Bare v. State Auto Group*, 2013 U.S. Dist. LEXIS 105335 (E.D. Pa. July 26, 2013) (McLaughlin, J.)

Plaintiff filed this UIM and bad faith suit against defendant auto insurers. The insurers filed a motion to dismiss. Judge McLaughlin of the Eastern District of Pennsylvania granted the motion. The insurers argued that the remedies for an §8371 claim were limited to those enunciated in the statute, and the other remedies plaintiff sought in the bad faith count—actual damages and consequential damages—should be dismissed. The court agreed, limiting plaintiff’s potential recovery to interest, punitive damages, costs and fees, and dismissing the remaining requests.

(12) *Getz v. State Farm Ins. Co.*, 2012 U.S. Dist. LEXIS 152774 (W.D. Pa. Oct. 24, 2012) (Gibson, J.)

In this UIM-related claim, plaintiff filed a complaint setting out a statutory bad faith claim, under which he sought, inter alia, compensatory damages. The insurer filed a motion to strike this request. Judge Gibson of the Western District granted the motion. The court, citing *Ash v. Continental*, explained that the bad faith statute did not permit recovery of compensatory damages: “While Section 8371 does not prohibit the award of compensatory damages for common law contract claims, such damages are not recoverable in a claim predicated on Section 8371.”¹³⁷⁷

(13) *OneBeacon Am. Ins. Co. v. UBICS, Inc.*, 2010 U.S. Dist. LEXIS 136801 (W.D. Pa. Dec. 28, 2010) (Standish, J.)

Plaintiff OneBeacon filed this declaratory judgment action seeking a declaration that it did not owe defendant UBICS employee theft coverage under its business insurance policy. UBICS filed counterclaims for breach of contract, common law bad faith, and statutory bad faith under §8371. The *ad damnum* clause for the statutory bad faith counter-claim included a request for consequential and compensatory damages. OneBeacon filed a motion to dismiss the demand for remedies not specifically permitted under §8371.

Judge Standish of the Western District denied the insurer’s motion without prejudice. The court agreed that §8371 permitted only certain remedies—interest, punitive damages and costs and fees—in statutory bad faith claims. Citing *Standard Steel LLC v. Nautilus Ins. Co.*,¹³⁷⁸ the court noted that the statute did not affect an insured’s rights to recover common law remedies under a breach of contract count. Although the court found the pleading in the complaint to be confusing, he found that the parties’ pleadings evinced an understanding that the breach of contract count could, with proof, support recovery of compensatory damages and that the statutory bad faith count could, with proof, “supplement those remedies,” supporting recovery of interest, punitive damages and costs and fees.¹³⁷⁹

(14) *Schmitt v. State Farm Ins. Co.*, 2010 U.S. Dist. LEXIS 45451 (W.D. Pa. Apr. 16, 2010) (Lenihan, M.J.)

Plaintiffs purchased a homeowner’s policy from defendant State Farm. During the policy term, their family room flooded, so plaintiffs made a claim under their policy. State Farm paid out for the initial claims of damage. Plaintiffs later discovered additional damages allegedly stemming from the flooding and sought reimbursement for those claims. State Farm denied the latter claim. As a result of that denial, plaintiffs filed suit alleging breach of contract, breach of the duty of good faith and fair dealing, and §8371 bad faith.

State Farm filed a motion to dismiss the request for compensatory damages in the §8371 claim, arguing that the statute did not permit such recovery. Plaintiffs countered that they could seek compensatory damages because, in addition to the §8371 claim, they were claiming that defendant acted in bad faith in breaching its duty of good faith and fair dealing.

Magistrate Judge Lenihan of the Western District noted that plaintiffs, notwithstanding their argument to the contrary, did explicitly seek compensatory damages pursuant to §8371. According to the court, §8371 explicitly permitted only certain types of damages, but did not include compensatory damages, so no award of those types of damages were permissible to the extent that the bad faith claim was set out under the statute.

The court also recommended that the breach of the implied duty of good faith and fair dealing be subsumed into the breach of contract claim. Thus, no damages could be separately claimed for breach of the implied duty:

While Plaintiffs are correct in asserting that compensatory damages may be awarded for a breach of the implied covenant, they nonetheless may not receive compensatory damages for their bad faith count. With regard to an insurance contract, the implied covenant of good faith and fair dealing acts as a term of the contract, and arises from the contract itself. . . . Therefore, Plaintiffs’ breach of the

¹³⁷⁵. *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2013 U.S. Dist. LEXIS 97226, at *18 (W.D. Pa. July 12, 2013).

¹³⁷⁶. *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2013 U.S. Dist. LEXIS 97226, at *19 (W.D. Pa. July 12, 2013).

¹³⁷⁷. *Getz v. State Farm Ins. Co.*, 2012 U.S. Dist. LEXIS 152774, at *5-6 (W.D. Pa. Oct. 24, 2012).

¹³⁷⁸. 2008 U.S. Dist. LEXIS 71487, at *14 (W.D. Pa. Sept. 17, 2008).

¹³⁷⁹. *OneBeacon Am. Ins. Co. v. UBICS, Inc.*, 2010 U.S. Dist. LEXIS 136801, at *15-16 (W.D. Pa. Dec. 28, 2010).

implied covenant of good faith and fair dealing claim merges with Plaintiffs' claim for breach of contract, leaving compensatory damages available only for the breach of contract claim.¹³⁸⁰

(15) *Zaloga v. Provident Life & Accident Ins. Co. of Am.*, 671 F. Supp. 2d 623 (M.D. Pa. 2009) (Kosik, J.)

In this case, the insured sued its disability carrier and included a claim alleging breach of the implied duty of good faith and fair dealing. The insured sought compensatory damages. The insurer filed a motion to dismiss that count and the attendant compensatory damages request. Judge Kosik of the Eastern District denied the motion and allowed both the count and damages request to proceed to discovery:

A cause of action for a breach of the implied covenant of good faith and fair dealing may allow for compensatory damages that go beyond the damages provided by a traditional breach of contract action or a section 8371 claim. . . .

. . . Based on our review of insurance law in Pennsylvania, we hold that the breach of the covenant of good faith and fair dealing exists in Pennsylvania as a breach of contract and allows for the award of compensatory damages. *See Gray v. Nationwide Mut. Ins. Co.*, 422 Pa. 500, 223 A.2d 8 (Pa. 1966).¹³⁸¹

(16) *Standard Steel, LLC v. Nautilus Ins. Co.*, 2008 U.S. Dist. LEXIS 71487 (W.D. Pa. Sept. 17, 2008) (Mitchell, M.J.)

This third party bad faith case is discussed in §3:12. The liability insurer moved to dismiss the bad faith claim in its entirety or, in the alternative, moved to strike plaintiff's demands for consequential damages and expert fees. Magistrate Judge Mitchell of the Western District denied the motion to dismiss the bad faith claim, but granted the motion to strike plaintiff's demand for consequential damages and expert fees. According to the court, plaintiff's claim for consequential damages and expert fees, not being authorized by §8371, were not permissible.

(17) *Echevarria v. UNITRIN Direct Ins. Co.*, 2003 U.S. Dist. LEXIS 4680 (E.D. Pa. Mar. 17, 2003) (O'Neill, J.)

This case, discussed in §5:05(b), arose out of the theft of the insured's automobile. The insured's wife also sued the insurer, alleging a loss of consortium claim stemming from the injuries allegedly suffered by her husband as a result of the insurer's conduct. The court denied the insurer's motion to dismiss the loss of consortium claim, holding that it survived "as a derivative claim to the remaining §8371 bad faith claim."¹³⁸² The court suggested that the husband's bad faith claim sounded in tort, and therefore the wife's claim was entitled to go forward.

Chapter 13: DAMAGES RECOVERABLE: PUNITIVE DAMAGES

§13:06 Pennsylvania Bad Faith Cases Discussing the Extent of and Limits on Punitive Awards

(1) *Colyer v. National Grange Mut. Ins. Co.*, Slip Op. No. 2000-0527 (C.P. Centre Nov. 15, 2000) (Grine, J.), *post-verdict motions denied*, Slip Op. (C.P. Centre May 4, 2001) (Grine, J.), *aff'd memorandum opinion*, No. 929-MDA-2001 (Pa. Super. Apr. 24, 2002)

The facts of this case are discussed in detail elsewhere.¹³⁸³ Ebac Systems, Inc. (Ebac) was insured under a liability policy with National Grange Mutual Insurance Company (NGM). Colyer sued Ebac in an underlying suit and later brought a bad faith action against the insurer as assignee/subrogee of Ebac.

Judge Grine of the Centre County Court of Common Pleas held that the company's behavior was outrageous and recklessly indifferent toward its insured, constituting bad faith under §8371.

The court awarded plaintiff \$130,000 as reimbursement for the underlying settlement, \$62,245 as reimbursement for the counsel fees incurred, and \$142,763 in interest in the underlying matter pursuant to §8371. More significantly, the court awarded punitive damages in the amount of \$3,350,000 — ten times the amount of compensatory damages. The court ruled that the amount of punitive damages, when considered in relation to the insurer's net worth, was not excessive and would not hinder its ability to operate effectively and serve its other policyholders.

The insurer challenged the bench ruling via post-trial motions, which were denied by Judge Grine. The court upheld its determination of punitive damages as consistent with the law and not shocking to the judicial conscience. According to the court, the award of punitive damages "was approximately 1.25 percent of NGM's net worth as of December 31, 1999, a figure representing just over two (2) months of investment income."¹³⁸⁴

¹³⁸⁰. *Schmitt v. State Farm Ins. Co.*, 2010 U.S. Dist. LEXIS 45451, at *8 (W.D. Pa. Apr. 16, 2010) (citations omitted).

¹³⁸¹. *Zaloga v. Provident Life & Accident Ins. Co. of Am.*, 671 F. Supp. 2d 623, 629 (M.D. Pa. 2009) (citing *Ash v. Cont'l Ins. Co.*, 932 A.2d 877, 884 (Pa. 2007) and *Birth Ctr. v. St. Paul Cos., Inc.*, 787 A.2d 376, 385 (Pa. 2001)).

¹³⁸². *Echevarria v. Unitrin*, 2003 U.S. Dist. LEXIS 4680, at *11.

¹³⁸³. *Colyer*, May 4, 2001 slip op. at 8.

¹³⁸⁴. Superior Court slip op. at 4-5.

The insurer appealed the decisions of the trial court to the Superior Court, which, in a memorandum opinion, affirmed the decisions of the trial court. The Superior Court held that the award of punitive damages did not shock its conscience and upheld the award as a proper use of discretion by the trial judge:

While the punitive damages may seem somewhat high, this is a matter in the discretion of the trial court. It does not shock the conscience and it is not appropriate for an appellate court that does not have the benefit of assessing the credibility of witnesses, to second-guess the decision of the trial judge. Whether the punitive damages were awarded by a judge or by a jury, there is sufficient evidence in the record to sustain the award in this amount.¹³⁸⁵

(2) *Lefever v. Penn Treaty Network America Ins. Co.*, 138 Montg. Co. L.R., Part II 109 (C.P. Montg. Co. 2001) (Lowe, J.)

The defendant insurer, Penn Treaty, issued a policy of long-term care insurance, providing a benefit of \$2,000 per month up to a \$24,000 maximum if the insured was obligated to enter a nursing home. The 87-year-old policyholder applied for insurance when he became unable to continue independent living because of incontinence and senile dementia. The policy excluded certain pre-existing conditions which were defined in the policy to include “a condition for which medical advice or treatment was recommended by a Physician or received from a Physician within a five-year . . . period immediately preceding the policy’s effective date.”

Five months after a claim was submitted, the insurer denied the claim on the basis of pre-existing condition, although the company did not specify the alleged condition. The policyholder passed away, but his estate instituted a bad faith action. During litigation, the company sought to justify its denial of coverage on the basis of pre-existing conditions of senile dementia and bladder instability. The court ruled that there was a legitimate issue of fact as to whether there was in fact a pre-existing bladder instability, but the court ruled as a matter of law that the company did not establish that senile dementia was a pre-existing condition.

The case was tried to a jury in Montgomery County. The jury found that the insurer acted in bad faith and awarded punitive damages in the amount of \$2 million. The court added an attorneys’ fee award of \$33,150 and \$15,256 in interest together with \$24,000 in contractual damages.

In post-verdict motions, the trial court denied the defendant’s motion for judgment N.O.V. According to the court, the evidence supported the jury verdict, given that the company had sold an 87-year-old man the policy and “seized on a plainly inapplicable ground to deny coverage.”¹³⁸⁶ However, the trial court remitted the punitive damages award to \$1 million, finding that the jury award of damages “both shocked our sense of justice and would violate defendant’s rights to due process.” *Id.*

In addressing the magnitude of the punitive damages verdict, the trial court in *Lefever* applied both Pennsylvania law and *BMW v. Gore*. In reducing the punitive award by half, the court held:

[T]here was no evidence offered that Penn Treaty engaged in similar conduct toward other policy holders. Two million (\$2 million) dollars is approximately 28 times his total damage figure.

Under the Pennsylvania Unfair Insurance Practices Act, a civil penalty of up to \$5,000 could be imposed. . . . The same statute . . . authorizes the Insurance Commissioner to impose the drastic sanction of revoking Penn Treaty’s license, but there is no evidence that any such action was undertaken.

Although Penn Treaty’s initial basis for refusing coverage was clearly unsupported, there was at least some factual basis for asserting a pre-existing condition exclusion based on references to intermittent urinary dribbling and the prescription of medication for it. An award of \$2 million would be 1.26% of Penn Treaty’s net worth. The \$1 million figure to which we reduced the award is 0.6% of its net worth, a sum we believe has all the necessary punitive and deterrent effect.

Both parties appealed the trial court’s decision on the post-verdict motion, but the case was ultimately settled.

(3) *Collins v. Allstate Ins. Co.*, 1997 U.S. Dist. LEXIS 17047 (E.D. Pa. Oct. 31, 1997) (Waldman, J.)

This case involved a claim for underinsured motorist benefits. The policyholder’s benefit limit was \$25,000. The insurer offered only \$10,000. A panel of arbitrators unanimously awarded the plaintiff \$165,000. Thereafter, the plaintiff brought an action for bad faith. In entering an award for punitive damages in the amount of \$35,000, Judge Waldman of the Eastern District discussed some factors to be considered in determining the size of a punitive damages award:

. . . [T]he character of a defendant’s conduct, the nature and extent of the harm intended or caused to the plaintiff, and the wealth of the defendant.¹³⁸⁷

^{1385.} 1997 U.S. Dist. LEXIS 17047, at *15-16.

^{1386.} See §9:17.

^{1387.} Restatement (Second) of Torts, §908(2); see *Thomas v. State Farm Ins. Co.*, 1999 U.S. Dist. LEXIS 17384 (E.D. Pa. Nov. 5, 1999).

In denying the plaintiff's request for a much more substantial punitive damage award, the court held that depriving a corporation of "a significant portion of its wealth" was not the only means to deter bad faith conduct. While Pennsylvania law does not require "proportionality between actual and exemplary damages," the court stated that there is no prohibition upon having some measure of proportionality. In making its punitive damages award, the court reasoned that the resulting harm to the plaintiff was not severe or extensive and was only pecuniary in nature. The court also found that there was no evidence that the delay in receiving the full amount of the policy forced the plaintiff to forgo any needed medical treatment or otherwise interfered with his daily living.

(4) *Wood v. Allstate Ins. Co.*, 1997 U.S. Dist. LEXIS 14663 (E.D. Pa. Sept. 19, 1997) (Padova, J.)

In *Wood v. Allstate*, the plaintiff alleged that the defendant insurer acted in bad faith in handling her UIM claim. Although the plaintiff settled her claim for \$15,000 prior to trial, a jury returned a verdict in favor of the plaintiff and assessed \$150,000 in punitive damages. Following trial, the defendant moved for remittitur, asserting that the facts of the case warranted a finding of no more than \$15,000 in punitive damages. The court rejected this request, noting that "the jury's verdict was just ten times the amount of plaintiff's claim," and was far less than one percent of the defendant insurer's \$13.2 billion net worth.¹³⁸⁸ The court also found that the verdict was appropriate under the principles enunciated in *BMW v. Gore*.

CHAPTER 14 DISCOVERY IN BAD FAITH LITIGATION

§14:04 Attorney Communications and Work Product

§14:05(a) — Cases, State Court

(1) *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259 (Pa. Super. 2007) (McCaffery, J.), *aff'd by equally divided court*, 992 A.2d 65 (Pa. 2010) (Eakin, J.)

Plaintiff-appellants, companies affiliated with Nationwide, filed suit for breach of contract and intentional interference with contractual relations against several former agents and the insurance agencies for which they began working after leaving Nationwide's employ. Nationwide claimed that the agents improperly took confidential information about insureds when they left, and used that information when they began their new employment. The defendant-appellees, the agents, filed a bad faith counterclaim against Nationwide contending that the information was not proprietary.

This case presented a question about the applicability of the attorney-client privilege to a document, designated "Document 529," that the appellees sought in discovery. Document 529 was a memorandum written by a member of Nationwide's general counsel's office sent to 15 Nationwide officers, managers, or attorneys, under the subject line, "Agent Defections." Nationwide had asserted that this document was protected by attorney-client privilege, and therefore had redacted the entire substantive text, although the author, recipient list, date, and subject line of the memorandum were disclosed. Appellees moved the court to review the document *in camera* and determine if it had been properly classified as protected under attorney-client privilege.

Nationwide produced in discovery two documents (numbers 314 and 395) that addressed similar subject matter to Document 529, and which were authored by an in-house attorney. In light of this production, the appellees argued that Nationwide had waived the privilege as to Document 529, and the Butler County trial court agreed. Nationwide appealed, and the Superior Court affirmed, but on grounds different from that in the trial court.

In a panel opinion authored by Judge (later Justice) McCaffrey, the Superior Court held that the attorney-client privilege statute, 42 Pa.C.S.A. §5928, established a four-part test for determining whether a document is protected by the attorney-client privilege:

- 1) The asserted holder of the privilege is or sought to become a client.
- 2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
- 3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
- 4) The privilege has been claimed and is not waived by the client.¹³⁸⁹

According to the Superior Court,

[U]nder our statutory and decisional law, attorney-client privilege protects from disclosure *only* those communications *made by a client* to his or her attorney which are confidential and made in connection with the providing of legal services or advice.

¹³⁸⁸. *Lefever v. Penn Treaty*, 138 Montg. Co. L.R. Part II at 111.

¹³⁸⁹. *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, *P11 (Pa. Super. 2007).

The privilege extends to communications *from an attorney* to his or her client *if and only if* the communications fall within the general statutory definition. Under Section 5928, counsel cannot testify as to confidential communications made to him or her by the client, unless the client has waived the privilege.¹³⁹⁰

The Superior Court analyzed the documents in question and found that Document 529 neither revealed nor contained any confidential communications from the corporate client to its in-house counsel, so the privilege did not apply: “Communications *from* counsel to a client may be protected under Section 5928, but *only* to the extent that they reveal confidential communications previously made by the client to counsel for the purpose of obtaining legal advice.”¹³⁹¹ The court determined that Document 529 was a summary of methods being used to handle agent defections and an opinion regarding the likelihood of success of their litigation efforts in that regard. Without applicable privilege, Document 529 was discoverable.

The Superior Court rejected the trial court’s reasoning with regard to subject matter waiver. The Superior Court analyzed the two documents appellants did disclose in this case, and concluded that both were routine business communications. Because the documents were not privileged, “neither can form the basis for subject matter waiver of attorney-client privilege with respect to Document 529.”¹³⁹²

Nationwide was granted leave to appeal to the Supreme Court. Only four Justices were available to hear the case on appeal, and they split 2-2. Justice Eakin authored an Opinion in Support of Affirmance; Justice Saylor authored an Opinion in Support of Reversal. Both opinions implied that the documents at issue in the Nationwide case did in fact fall within the purview of 42 Pa.C.S.A. §5928 and were protected by attorney-client privilege, which was contrary to the Superior Court’s holding that no privilege existed. However, the four Justices could not come to an agreement as to whether or not that privilege had been waived, and therefore left the Superior Court’s holding intact.

Justice Eakin, writing in favor of affirmance, relied primarily on two cases,¹³⁹³ also relied upon by the trial court, in rendering the opinion that Nationwide had waived the privilege by releasing the two similar documents.¹³⁹⁴ Justice Eakin found significant the facts that the disclosure of the two documents was intentional and that no privilege was claimed (Nationwide asserted that they were not privileged because they were business communications), and that Document 529 pertained to the same subject matter and was authored by an in-house attorney. Justice Eakin’s concern was that the attorney-client privilege was improperly being used as both a sword and a shield:

. . . [The Nationwide] appellants claim Documents 314 and 395 are business communications which do not contain confidential communications made in connection with providing legal services or advice. Read together, however, Documents 314, 395, and 529 contain the same subject matter—appellants’ response to agent defections. . . .

Thus, the disclosure of Documents 314 and 395 form the basis of subject matter waiver of the attorney-client privilege regarding Document 529, the scope of which extends to Document 529 because it contains the same subject matter. What distinguishes Document 529 from Documents 314 and 395 is counsel’s unflattering concessions regarding the litigation’s purpose and prospect of succeeding. As in *Murray*, appellants seem to have produced only the documents beneficial to their case by disclosing Documents 314 and 395, and withholding Document 529 based on its privileged nature. I believe appellants waived the attorney-client privilege with respect to the subject of agent defections upon disclosing Documents 314 and 395, and cannot claim the privilege applies to a document containing the same subject matter, as well as potentially damaging admissions.¹³⁹⁵

Justice Saylor, writing in favor of reversal, agreed that the subject matter waiver issue was dispositive and an issue of first impression in Pennsylvania, but disagreed that subject matter should be defined as broadly as the Superior Court had suggested. Viewing the subject matter of the documents in question more narrowly, Justice Saylor found important distinctions between the subject matter in Document 529 and the other two. Justice Saylor found that Document 529 discussed legal actions and strategies relating to agent defections, whereas the other two documents discussed business practices relating to how to handle agent defections—very different matters in his opinion.¹³⁹⁶

Justice Saylor expressed concern that under the Superior Court rationale, companies and their in-house counsel would face great uncertainty about when documents might be considered privileged, which would chill the attorney-client relationship and the uninhibited exchange of opinions that forms the justification for the privilege.¹³⁹⁷ Quoting

¹³⁹⁰ *Id.* at *P12 (emphasis in original).

¹³⁹¹ *Id.* at *P27 (emphasis in original).

¹³⁹² *Id.* at *P24.

¹³⁹³ *Miniatronics Corp. v. Buchanan Ingersoll, P.C.*, 23 Pa. D. & C.4th 1 (Allegheny 1995) and *Murray v. Gemplus Int’l*, 217 F.R.D. 362 (E.D. Pa. 2003), both waiver cases.

¹³⁹⁴ *Nationwide Mut. Ins. Co. v. Fleming*, 992 A.2d 65, 69-70 (Pa. 2010) (Eakin, J., Opinion in Favor of Affirmance).

¹³⁹⁵ *Id.*

¹³⁹⁶ *Nationwide Mut. Ins. Co. v. Fleming*, 992 A.2d 65, 71-72 (Pa. 2010) (Saylor, J., Opinion in Favor of Reversal).

¹³⁹⁷ *Id.*

from an amicus brief, Justice Saylor set forth the complexity involved in the attorney-client relationship within a corporation:

“The Superior Court’s holding is based on a narrow, formalistic view of attorney/client communications that is unrealistic. It fails to account for the full panoply of responsibilities lawyers—particularly “in-house” lawyers—have to counsel their corporate clients about an increasingly broad array of ever-changing legal requirements. The Superior Court’s holding, if not reversed, is likely to create unnecessary impediments to the counseling of clients and could undermine one of the important goals of the privilege: frank communication to aid in compliance with the law and otherwise to provide necessary legal representation. Because businesses must operate in an increasingly complex legal environment, a closer, rather than more formal and distant relationship should be encouraged between client and counsel.”¹³⁹⁸

Justice Saylor was also concerned that the breadth of the subject matter waiver adopted by the Opinion in favor of affirmance would fail to render distinctions between legal and business advice, and chill the attorney-client relationship.

(2) *Copley Associates, Inc. v. Erie Ins. Exch., Inc.*, 2006 Phila. Ct. Com. Pl. LEXIS 473 (Phila. 2006) (Abramson, J.)

In this case, Judge Abramson of the Philadelphia Court of Common Pleas ruled that certain documents within the company’s claim file relating to the defense of an underlying lawsuit were protected by the attorney-client privilege and/or the work product doctrine. Other documents, however, were discoverable, the court held. The court recognized that the work product doctrine and attorney-client privilege may apply to documents within an insurer’s claim and litigation file. However, the court concluded that the limited documents at issue did not contain confidential communications, and contained very little substantive information, but were procedural documents such as fax cover pages, requests for files, attorney referral and the like. Although the insurer challenged on appeal the plaintiff’s entitlement to even the limited documents, the appeal was ultimately dropped when the company prevailed in the bad faith lawsuit in a motion for judgment on the pleadings.¹³⁹⁹

(3) *Mora v. Nationwide Mutual Fire Ins. Co.*, 65 Pa. D. & C.4th 59 (Lawrence 2003) (Motto, J.)

In a suit arising out of a denial of a property insurance claim, the insurer moved *in limine* to exclude communications between it and its counsel. Judge Motto of Lawrence County agreed that “confidential communications between attorney and client are privileged and, as such, inadmissible.”¹⁴⁰⁰

(4) *Reusswig v. Erie Ins. Co.*, 49 Pa. D. & C.4th 338 (Monroe 2000) (Cheslock, J.)

In this bad faith litigation arising out of the handling of a UIM claim, the court held that the attorney work product materials sought could not have been prepared in anticipation of the subsequent action because at the time the information and/ or documents were prepared for the original litigation, the defendant insurance carriers could not have foreseen the subsequent bad faith action.¹⁴⁰¹

With respect to the insurer’s assertion that the attorney-client privilege precluded the discovery, the court held that the privilege “does not protect any information which the counsel obtained from third parties in the course of the representation.”¹⁴⁰² The court ruled that the materials in question did not contain confidential information, and were thus discoverable.

§14:05(b) — Cases, Federal Court

(1) *Lane v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 64679 (M.D. Pa. May 18, 2015) (Mariani, J.)

Plaintiff filed this statutory and common law bad faith action after he was unable to resolve his UM claim with defendant State Farm. After defendant produced materials in discovery that contained redactions for attorney-client privilege and work product doctrine protections, plaintiff filed a motion to compel, requesting that the court review each of the redacted documents *in camera*. Judge Mariani of the Middle District denied the motion, which is also discussed in §14:14.

The court set forth Pennsylvania’s attorney-client privilege and the federal work product protections for documents prepared in anticipation of litigation and for core opinion work product. Noting that the basis for each redaction was adequately set forth in the privilege log, mostly as billing invoices for legal work or correspondence between defendant and its attorneys, it would not review the documents “simply because the Plaintiff does not trust counsel’s

¹³⁹⁸ *Id.* at 72 (quoting Brief for Amici Energy Ass’n of Pa. and Pa. Tel. Ass’n at 1-3.).

¹³⁹⁹ See *Copley Assocs., Inc. v. Erie Ins. Exch., Inc.*, 2005 Phila. Ct. Com. Pl. LEXIS 610 (Phila. Dec. 29, 2005), and subsequent 2007 opinion.

¹⁴⁰⁰ *Mora*, 65 Pa. D. & C.4th at 67.

¹⁴⁰¹ *Id.* at 350.

¹⁴⁰² *Id.* at 351 (quoting *MacQuown v. Dean Witter Reynolds, Inc.*, 47 Pa. D. & C.3d 21, 24-25 (C.P. Allegheny 1987)).

representations. In the absence of any evidence that the statements made before this Court are fraudulent, we shall accept them as true.”¹⁴⁰³

Plaintiff also objected to defendant’s redactions of post-complaint mental impressions of defendant’s employees on the grounds that they were “necessarily relevant to a bad faith claim.” The court found that the privilege log contains “just barely sufficient” descriptions to allow it to conclude that defendant met its burden of showing that the materials were protected. The court stated that “[p]laintiff puts forward no plausible justifications as to how post-Complaint mental impressions *could* be relevant to the facts of his specific bad faith claim,”¹⁴⁰⁴ and the existence of a bad faith claim was insufficient to overturn work product protections. Further, plaintiff failed to show that he had a substantial need for the information and that he could not obtain the information another way without undue hardship.

Finally, the court concluded that pre-complaint documents relating to the attorney’s impressions of the EUO were protected by the attorney-client privilege and work product doctrine, and plaintiff had failed to overcome the “almost absolute” protections in this situation in the absence of defendant specifically placing that advice at issue:

While he attempts a cursory argument to the effect that attorney communications may be discoverable when they are put at issue in the litigation, he offers no explanation as to how this general principle applies in any way to this case. There is no evidence that Defendant has ever tried to defend against the bad faith claim by relying on the advice of counsel. Nor can Plaintiff avoid this fact by stating that “the documents that have been redacted from State Farm’s ECS log may contain information from defendant’s attorney regarding the UM claim.” The Court assumes that State Farm’s lawyers will communicate with their client “regarding” the underlying issues they are retained to litigate; if this were not the case, State Farm would be getting very little return on its litigation expenses. However, the mere fact that attorney-client communications may relate to the lawsuit does not expose them to discovery. Quite the contrary: it is in exactly these situations where attorney-client privilege is most properly invoked. To allow Plaintiff to prevail on this argument would essentially obliterate the privilege, as it would open all attorney-client communications pertaining to the underlying litigation—which can be expected to include the vast majority of such communications—to discovery.¹⁴⁰⁵

(2) *Keefer v. Erie Ins. Exch.*, 2014 U.S. Dist. LEXIS 29282 (M.D. Pa. Mar. 7, 2014) (Rambo, J.)

In this UIM/bad faith action brought by plaintiff against her auto insurer, defendant Erie, plaintiff sought to depose defendant’s adjuster and supervisor regarding the claims. When defendant objected to certain areas of potential questioning, plaintiff contacted the court to resolve the parties’ dispute. Judge Rambo of the Middle District granted plaintiff’s request in part and denied it in part with respect to discovery relating to attorney-client privilege and work product issues.

The court rejected Erie’s argument that reserves were protected work product because the reserves were set in the ordinary course of business: “Under the work product doctrine, mental impressions and opinions of attorneys and their agents are protected from discovery when they are prepared in anticipation of litigation, as distinguished from materials prepared in the ordinary course of business.”¹⁴⁰⁶

Erie also contended that plaintiff should not be able to question witnesses regarding their conclusions and opinions regarding the UIM claim. Again noting that mental impressions are not protected unless developed in anticipation of litigation, the court found that “Plaintiff shall be permitted to inquire into the adjuster’s opinions, mental impressions, and conclusions that he or she formed while investigating the UIM claim in the ordinary course of business and not formed with litigation reasonably anticipated.”¹⁴⁰⁷ Because it was not clear at what point defendant reasonably anticipated litigation, it could not provide further guidance.

Plaintiff maintained that she was entitled to a complete, unredacted claim file; Erie maintained that it had properly redacted information protected by the attorney-client privilege and work product doctrine. The court concluded that protected information was properly redacted, and if plaintiff wished to challenge any particular item, could file a motion setting forth such a challenge. This case is also discussed in §§14:13, 14:07, and 14:11.

(3) *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 30436 (M.D. Pa. Mar. 10, 2014) (Rambo, J.)

Plaintiffs filed this bad faith suit after they and his auto insurer, State Farm, were unable to resolve their UIM claim. During the course of discovery, plaintiff objected to redactions State Farm made in its production of the claim

¹⁴⁰³. *Lane v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 64679, at *9 (M.D. Pa. May 18, 2015).

¹⁴⁰⁴. *Lane v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 64679, at *13-14 (M.D. Pa. May 18, 2015).

¹⁴⁰⁵. *Lane v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 64679, at *17-18 (M.D. Pa. May 18, 2015) (citations to record omitted).

¹⁴⁰⁶. *Keefer v. Erie Ins. Exch.*, 2014 U.S. Dist. LEXIS 29282, at *9 n.1 (M.D. Pa. Mar. 7, 2014).

¹⁴⁰⁷. *Keefer v. Erie Ins. Exch.*, 2014 U.S. Dist. LEXIS 29282, at *12-13.

file. The court held a telephone conference, prior to which it ordered State Farm to produce an unredacted file to the court. Following the conference, Judge Rambo of the Middle District filed this opinion, which is also discussed in §14:13.1408

The court explained that the work product doctrine applies to work done in anticipation of litigation, and that parties typically “anticipate litigation and begin preparation prior to the time suit is formally commenced.”¹⁴⁰⁹ The court also noted that when a party begins to anticipate litigation is a fact-sensitive inquiry, and it was not provided with facts to allow it to make a clear-cut determination in this regard. However, it was obvious to the court that certain entries were protected: “Although the court lacks the necessary evidence to determine when State Farm reasonably anticipated litigation, the court has reviewed the claims file with this standard in mind, and concludes that certain portions of the record were prepared in anticipation of litigation and should be protected.”¹⁴¹⁰

(4) *Smith v. Life Investors Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 96310 (W.D. Pa. Oct. 16, 2009) (McVerry, J.)

This suit, also discussed in §§14:16, 14:18 and 14:20, concerned the interpretation of the policy term “actual charges” in a supplemental cancer policy issued by defendant Life Investors. Plaintiff, purporting to represent a class of policyholders,¹⁴¹¹ filed a motion to compel the deposition of an in-house attorney for the insurer, Edwards, who served on an internal task force that presumably recommended the change in the interpretation of “actual charges” because the work of that task force was at issue in the case. Plaintiff claimed that the attorney’s testimony was not privileged because he was working in a business capacity during his involvement with the task force. Life Investors argued the attorney-client privilege should preclude his testimony and that, in any event, plaintiff had deposed many task force members already. Judge McVerry of the Western District concluded that he would allow the testimony:

Indisputably, Edwards was a key member of the SKI Taskforce and is not serving as litigation counsel in this case. For example, Edwards has been used by Life Investors as a key fact witness as to the numerous attorney-client and work product issues that are discussed below. Plaintiff is entitled to explore the business and attorney roles performed by Edwards and the assertions made in Edwards’ Declaration. While such depositions are disfavored, the mere fact that Edwards is an attorney is not an absolute bar to the taking of his deposition.

Defendant will have ample opportunity to invoke any applicable privilege on a question-by-question basis.¹⁴¹²

Plaintiff also sought to compel production of a published article circulated in the previous year before the change in interpretation of “actual charges” that Defendant Life Investors had withheld. Plaintiff claimed that its publication destroyed any confidentiality. Life Investors argued that the article was protected by the work product doctrine because it was created in anticipation of litigation, even though the change in the interpretation of the pertinent policy language did not happen for another year.

The court noted that the work product doctrine applied where a document “ha[s] been prepared in anticipation of litigation if ‘in light of the nature of the document and the factual situation of the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.’”¹⁴¹³ According to the court, there must be some “‘identifiable specific claim or impending litigation’”¹⁴¹⁴ in order to apply the doctrine. The court concluded that the article was not protected work product:

Defendant’s privilege log describes the documents at issue as: “Article-Publication under review by counsel for purposes of providing legal review, advice, and comment.” This description falls far short of meeting Defendant’s burden. The conclusory arguments in Defendant’s brief fare no better. Indeed, Defendant fails to provide any explanation, beyond bald assertions, as to why it anticipated litigation in 2004 and why the published articles at issue were created because of litigation. The “nature of the document” is a published article – which is not consistent with the fundamental purpose of the work product protection. The factual situation is that the article was created a year prior to the decision to change the policy interpretation that eventually triggered this litigation. It cannot fairly be said that the article was prepared in anticipation of litigation.¹⁴¹⁵

¹⁴⁰⁸. An earlier decision in the case is discussed in §§9:03(a) and 9:11.

¹⁴⁰⁹. *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 30436, at *11 (M.D. Pa. Mar. 10, 2014) (quotation omitted).

¹⁴¹⁰. *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 30436, at *11.

¹⁴¹¹. The motion for class certification was later denied by Judge McVerry in an unpublished opinion found at 2009 U.S. Dist. LEXIS 103533 (W.D. Pa. Nov. 6, 2009).

¹⁴¹². *Smith v. Life Investors Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 96310, at *15-16 (W.D. Pa. Oct. 16, 2009).

¹⁴¹³. *Smith v. Life Investors Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 96310, at *18 (quoting *Martin v. Bally’s Park Place Hotel & Casinos*, 983 F.2d 1252, 1258 (3d Cir. 1993)).

¹⁴¹⁴. *Smith v. Life Investors Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 96310, at *18 (quoting *Schmidt, Long & Assocs. v. Aetna U.S. Healthcare, Inc.*, 2001 U.S. Dist. LEXIS 7145, 2001 WL 605199, at *4 (E.D. Pa. 2001)).

¹⁴¹⁵. *Smith*, 2009 U.S. Dist. LEXIS 96310, at *20-21.

Plaintiff also requested an order to compel a report prepared by outside counsel, which defendant Life Investors claimed was privileged under the attorney-client privilege, work product doctrine and self-critical analysis privilege and requested that the court review those documents *in camera*. Defendant claimed that it retained outside counsel as it was discussing the change in policy interpretation because it anticipated litigation as a result of the change.

The court concluded that it would review the report *in camera* to determine whether the attorney-client privilege or work product doctrine prevented discovery.¹⁴¹⁶ It also noted that the self-critical analysis privilege did not apply because neither Pennsylvania nor the Third Circuit had recognized it.¹⁴¹⁷ Similarly, the court ruled that e-mails sent from the in-house actuary to the task force, which included an in-house attorney, would be reviewed *in camera* to determine whether they were privileged.

(5) *Walter v. Travelers Personal Ins. Co.*, 2013 U.S. Dist. LEXIS 72771 (M.D. Pa. May 22, 2013) (Carlson, M.J.)

Plaintiff was severely injured in a motor vehicle accident and eventually filed suit against insurer Travelers for recovery of the applicable \$100,000 bodily injury policy limits. Plaintiff filed the instant motion to compel the production of documents which the insurer had refused to produce on the basis of the attorney-client privilege or the work product doctrine. After Magistrate Judge Carlson of the Middle District of Pennsylvania conducted an *in camera* review of the materials, he denied the plaintiff's motion.

The court observed that the attorney-client privilege "applies both to information that the client provides to the lawyer for purposes of obtaining legal advice, as well as to the advice the attorney furnishes to the client. . . . However, the privilege extends only to the disclosure of the communications, and does not extend to disclosure of the underlying facts conveyed in those communications."¹⁴¹⁸ Because it interferes with "the truth-finding process," however, it should only be asserted when necessary.¹⁴¹⁹

The court further observed that the work product doctrine "is intended 'to protect material prepared by an attorney acting for his client in anticipation of litigation.'"¹⁴²⁰ "The doctrine does not extend to protect documents that were prepared 'in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes.'"¹⁴²¹

The court reviewed the documents identified on the insurer's privilege log and determined that each were properly withheld on the basis of the attorney-client privilege, work product doctrine, or both. The court disagreed with plaintiff that the privilege log was insufficient:

The log identifies the authors and recipients of the various documents, and the date they were created; the documents are briefly and generally identified (e.g., email, deposition report, letter, uninsured motorist worksheet); and the type of privileges being asserted are set out in the log. More importantly, review of the documents themselves supports the defendant's stated reasons for withholding the documents from production as either privileged communications or documents that fall within the category of protected attorney work-product.¹⁴²²

The court also rejected plaintiff's argument that documents should be produced "because the coverage counsel in this case was, in the plaintiff's view, really acting as a claims adjuster and not as counsel to the insurer."¹⁴²³ Based on review of the protected documents, the court stated that it was

satisfied that coverage counsel was, in fact, serving the client in an attorney-client capacity, and not in some other function as a business advisor or claims adjuster. We also agree with the plaintiff [sic] that merely because an attorney may have, at other times, performed non-legal functions, or had communications with the defendant's employees or agents outside of his capacity as an attorney, that the defendant has somehow waived or relinquished the right to withhold all communications with that lawyer on the basis of the attorney-client privilege.¹⁴²⁴

Plaintiff argued that although defendant had not specifically set forth an "advice of counsel" affirmative defense, defendant had waived the attorney-client privilege because it was defending the action on the grounds that it complied with state regulations and insurance industry practices. Citing numerous other cases which had disposed of the same

¹⁴¹⁶. The court's opinion ruling on the documents he reviewed *in camera* can be found in an unpublished opinion, 2009 U.S. Dist. LEXIS 109128 (W.D. Pa. Nov. 23, 2009). That opinion was later vacated by request of the parties in another unpublished opinion, 2010 U.S. Dist. LEXIS 8083 (W.D. Pa. Jan. 13, 2010).

¹⁴¹⁷. *Smith*, 2009 U.S. Dist. LEXIS 96310, at *22-24.

¹⁴¹⁸. *Walter v. Travelers Personal Ins. Co.*, 2013 U.S. Dist. LEXIS 72771, at *7-8 (M.D. Pa. May 22, 2013).

¹⁴¹⁹. *Id.* at *8.

¹⁴²⁰. *Id.* at *10 (citation omitted).

¹⁴²¹. *Id.* at *10.

¹⁴²². *Id.* at *13.

¹⁴²³. *Id.* at *14.

¹⁴²⁴. *Id.*

argument, the court rejected this argument and concluded that “the defendant’s general defense that it conducted itself lawfully does not negate its ability to protect from disclosure confidential attorney-client communications.”¹⁴²⁵

(6) *Craker v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 141811 (W.D. Pa. Dec. 9, 2011) (Lancaster, C.J.)

The Crakers filed this breach of contract and bad faith suit against their auto insurer, State Farm, after the parties failed to resolve their UIM claim. At issue before the court was the Crakers’ motion to compel discovery of communications between State Farm’s outside counsel and State Farm’s claims department prior to the filing of the complaint. Chief Judge Lancaster of the Western District denied the motion. The court found the motion untimely, given that it took nearly two months to file the motion after State Farm provided the privilege log and the motion was filed just as the discovery deadline approached. The court also found that the motion lacked substance, noting that both the Crakers and State Farm were represented by counsel for years prior to the filing of the complaint and that both parties communicated through counsel during that time: “This factual backdrop indicates that both the Crakers and State Farm were represented by counsel and preparing for litigation as early as 2007. There is no dispute that all of the [attorney] communications that the Crakers now seek occurred months after they sent their formal demand to State Farm”¹⁴²⁶

(7) *Mirarchi v. Seneca Specialty Ins. Co.*, 2011 U.S. Dist. LEXIS 80871 (E.D. Pa. July 22, 2011) (Pratter, J.), *aff’d*, 564 F. App’x 652 (3d Cir. 2014) (Ambro, J.)

Plaintiff owned a pizzeria which was damaged by a fire. Following a coverage dispute with his property insurer, Seneca, plaintiff filed this bad faith action. During discovery, Seneca refused to produce unredacted documents relating to setting its reserves. As discussed in detail in §14:14, Judge Pratter of the Eastern District ordered that Seneca produce the documents for in camera review. Seneca argued that the redacted material relating to reserves was protected by the work product doctrine. The court disagreed, stating, “Here, none of the documents were prepared by or for a lawyer, and, aside from a blanket statement that the documents were prepared in anticipation of litigation, the documents themselves, with one exception, give no indication that they were prepared outside of the ordinary course of business. Thus, Defendant’s claim for work product protection must fail.”¹⁴²⁷ The one document to which the court extended protection was because the attorney-client privilege applied.¹⁴²⁸

(8) *Consugar v. Nationwide Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 61756 (M.D. Pa. June 9, 2011) (Munley, J.)

In this case, also discussed in §§14:03, 14:07, 14:09 and 14:13, plaintiff filed a bad faith action against Nationwide in connection with a UIM claim. The parties disagreed as to the scope of permissible discovery under the federal rules. Judge Munley of the Middle District largely granted plaintiff’s requests for information.

Plaintiff sought the entire claims file from Nationwide; the insurer turned over much of the file, but either withheld or redacted certain documents on the basis of attorney-client privilege. Judge Munley agreed that plaintiff was entitled to discover the claims file, but agreed with Nationwide that it could refuse to turn over privileged portions of that file: “The defendant’s claims file is discoverable in a bad-faith case like this one, as information in that file on defendant’s decision to deny the claim is relevant or could lead to potentially relevant information. . . . Courts that have allowed discovery of claims files have, as the defendant suggests, limited such discovery on the basis of attorney-client privilege.”¹⁴²⁹ Because plaintiff had not addressed the claims of privilege, the court was unable to decide whether the documents for which the insurer claimed privilege were appropriately withheld, reserving that decision until the parties addressed the issue specifically.

The insurer contended that it realized on July 15, 2010, during claims handling, that litigation was “substantial and imminent” and therefore, that that any documents added to the claim file after that date were protected by the work product doctrine. The court disagreed, finding the work product doctrine was more limited than that, and concluding that Nationwide could not withhold the documents in blanket fashion:

The court rejects this position, since to place all documents created and placed in the file after that date in the category of work product would be to ignore the limitations on work product inherent in the federal rules. The rule covers “the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.” Fed. R. Civ. P. 26(b)(3). A determination of whether such material fits in the categories covered by the work product rule

¹⁴²⁵ *Id.* at *18 (citing, e.g., *George v. Wausau Ins. Co.*, 2000 U.S. Dist. LEXIS 16813 (E.D. Pa. Mar. 13, 2000), *McCrink v. Peoples Benefit Life Ins. Co.*, 2004 U.S. Dist. LEXIS 23990 (E.D. Pa. Nov. 30, 2004)).

¹⁴²⁶ *Craker v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 141811, at *5 (W.D. Pa. Dec. 9, 2011)

¹⁴²⁷ *Mirarchi v. Seneca Specialty Ins. Co.*, 2011 U.S. Dist. LEXIS 80871, at *2-3 (E.D. Pa. July 22, 2011) (footnote omitted).

¹⁴²⁸ *Id.* at *3 n.1.

¹⁴²⁹ *Consugar v. Nationwide Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 61756, at *5-6 (M.D. Pa. June 9, 2011) (citing *Fidelity & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516, 524 (E.D. Pa. 1996), *Dombach v. Allstate Ins. Co.*, 1998 U.S. Dist. LEXIS 13241 (E.D. Pa. Aug. 27, 1998), and *Provident Life & Accident Ins. Co. v. Nissenbaum*, 1998 U.S. Dist. LEXIS 18576 (E.D. Pa. Nov. 17, 1998)).

requires more than mere categorization by date of filing; the defendant must show that the document actually falls in one of these categories or the protection does not apply.¹⁴³⁰

(9) *Maiden Creek T.V. Appliance Inc. v. General Casualty Ins. Co.*, 2005 U.S. Dist. LEXIS 14693 (E.D. Pa. July 21, 2005) (Bartle, J.)

In this case arising out of a fire to the plaintiff's appliance business, the plaintiff alleged that the defendant insurer acted in bad faith by its delays and failure to provide full payment under the policy. In discovery, the plaintiff sought information pertaining to claim log entries and investigative reports, letters and e-mails which reflected communication between the company's claims handlers, Ebensen and O'Brien, and the company's attorney, Janiczek. In the litigation the insurer acknowledged that it would not be asserting a defense that it relied upon the advice of counsel. Judge Bartle of the Eastern District denied the plaintiff's request, and held that the materials were protected from discovery:

The attorney-client privilege protects disclosure of professional advice by an attorney to a client or of communications by a client to an attorney to enable the attorney to render sound professional advice The work product doctrine protects material prepared by or for an attorney in preparation for possible litigation but does not protect materials prepared in the ordinary course of business. . . . The party asserting the work product doctrine bears the burden of demonstrating qualification of the materials for protection. . . . Where the court nevertheless orders discovery of work product documents, it must protect against disclosure of the party's attorney's mental impressions, conclusions, opinions or legal theories. . . .

There are several portions of the investigative reports by Ebensen relating to Brian Scott of General Casualty what Ebensen was told by outside attorney Lee Janiczek. These portions are protected by the attorney-client privilege and need not be produced.

Despite plaintiff's argument that correspondence between Janiczek and Ebensen or O'Brien was during a period when Janiczek should be considered a claims investigator, we find after our review that these correspondences are protected by attorney-client privilege. . . . An attorney does not step outside of his role as an attorney simply because he conducts some investigation. Thus the correspondence between Ebensen or O'Brien and Janiczek is privileged. We note that defendant has stated it will not assert a defense to plaintiff's bad faith claim that it relied upon the advice of counsel.¹⁴³¹

(10) *Safeguard Lighting Sys., Inc. v. North American Specialty Ins. Co.*, 2004 U.S. Dist. LEXIS 26136 (E.D. Pa. Dec. 30, 2004) (Bartle, J.)

In this breach of contract and bad faith action arising out of the plaintiff-insureds' claim arising from water damage, the insured sought in discovery documents created by the North American's claims supervisor, an outside adjuster (Rizzo), and the insurer's outside attorney (Henry) and his law firm relating to the investigation and adjustment of the loss.

The insurer agreed to produce only the non-privileged portions of the reports of its adjusters relating to the "ordinary course of business in the evaluation, analysis and adjustment of the claim," and underlying factual material. The plaintiffs maintained that the law firm was acting as an investigator and that documents generated before litigation was instituted could not be considered work product. Plaintiffs further argued that any attorney-client privilege was waived when the communications were shared with the outside claims adjuster.

Judge Bartle of the Eastern District held that the attorney-client and work product protection applied:

We disagree with plaintiffs' unfounded contention that litigation must have been instituted before the attorney-client privilege can take effect. . . . [T]he work-product doctrine protects material prepared by an attorney as well as material prepared for an attorney in preparation for possible litigation. . . . Although Mr. Henry was formally retained in October 2001, North American has proffered evidence that the possibility of litigation arose as early as March 2001. There is no evidence that Mr. Henry was acting in a capacity other than as an attorney at any point. Therefore, at all relevant times an attorney-client relationship existed between Mr. Henry and North American.¹⁴³²

With respect to the plaintiffs' argument that any privilege had been waived because of the communications with the outside adjuster, Rizzo, the court wrote:

We agree with North American that Mr. Rizzo was its agent and his communications with Mr. Henry are protected by the attorney-client privilege. The presence of a third party who is an agent of the client will not destroy the attorney-client privilege.¹⁴³³

¹⁴³⁰ *Id.* at *11.

¹⁴³¹ *Maiden Creek T.V. Appliance Inc. v. General Cas. Ins. Co.*, 2005 U.S. Dist. LEXIS 14693, at *4-6 (E.D. Pa. July 21, 2005).

¹⁴³² *Safeguard Lighting Sys., Inc. v. North Am. Specialty Ins. Co.*, 2004 U.S. Dist. LEXIS 26136, at *5-6 (E.D. Pa. Dec. 30, 2004).

¹⁴³³ *Id.* at *6.

(11) *F.P. Woll & Co. v. Valiant Ins. Co.*, 2003 U.S. Dist. LEXIS 3134 (E.D. Pa. Feb. 13, 2003) (Angell, M.J.)

In the bad faith litigation, the plaintiff insured issued a subpoena upon the law firm which had provided a coverage opinion to the insurer on the claim, and had handled the subrogation aspect of the claim. As to the coverage file, Magistrate Judge Angell of the Eastern District stated, “I have little trouble concluding that defendant Valiant may properly assert attorney-client and/or work product protection as to some, if not all, of the documents contained in the coverage file.”¹⁴³⁴ The court held that any legal advice would be shielded from discovery, but ruled that the law firm would have to produce a privilege log identifying documents that were subject to privilege, so that the plaintiff would have an opportunity to challenge the claims of privilege.

With respect to the subrogation file, however, the court held that documents within that file might not be privileged. The court found that Valiant was precluded from asserting the attorney-client privilege against plaintiff under the “common-interest doctrine,” which provides that “when one attorney acts for two clients who have a common interest, there is no attorney-client privilege as between the two clients, but that they jointly hold the privilege against anyone else.”¹⁴³⁵ The court did rule that to the extent documents contained in the attorneys’ subrogation file were prepared in anticipation of the breach of contract/bad faith litigation, the underlying attorney was permitted to identify any protected documents in a privilege log, which could be challenged by the plaintiff.

(12) *Arters t/a Greendale Builders v. Zurich American Ins. Co.*, 2003 U.S. Dist. LEXIS 12264 (E.D. Pa. 2003) (Fullam, J.)

The insured sued its insurance carrier alleging bad faith for refusing to defend it in connection with a lawsuit arising out of an accident that occurred on the insured’s premises. At issue before Judge Fullam was the insured’s request for production of documents dealing with the insurer’s determination that it had no duty to defend the insured. The insurer objected to the discovery requests, claiming that the documents were subject to work product and attorney-client privileges. The court took the position that, “since plaintiff was asserting that the defendant’s decision not to defend or indemnify was made in bad faith, plaintiff is entitled to discover those parts of the defendant’s claim file pertaining to its decision not to provide a defense to the state court action, as distinguished from its defense in the present lawsuit.”¹⁴³⁶

(13) *Jones v. Nationwide Ins. Co.*, 2000 U.S. Dist. LEXIS 18823 (M.D. Pa. July 20, 2000) (Munley, J.)

This case involved a breach of contract and bad faith action arising out of an automobile accident. During discovery, the plaintiff-insured requested documents which contained numerous communications between the defendant insurer and its counsel in the underlying claim, including letters between counsel and the insurance company adjusters containing legal opinions, strategy, and mental impressions, as well as billing statements and expenses. The insurer objected to these discovery requests, on the basis of the attorney-client privilege and work product doctrine, and produced a privilege log itemizing the documents objected to.

Applying questionable reasoning, Judge Munley of the Middle District held that the insurer’s documents were discoverable, stating that the advice of counsel in a bad faith matter “is interwoven into the substantive issues of fact and law,” and is therefore discoverable.¹⁴³⁷ The court also found that the advice of counsel was relevant because the insurer had pleaded that it had acted in compliance with Pennsylvania law while handling the claim.

The insurer argued further that the documents in question were protected under the work product doctrine. Although the plaintiff asserted that she had a “substantial need” under the Federal Rules of Civil Procedure for such work product, the insurer responded by suggesting that the plaintiff could obtain all of the requested information via deposition. The court agreed with the plaintiff, stating, “It is academic that depositions alone without documents are not as valuable as depositions with documentation that can refresh one’s recollection and flush out the essential facts.”¹⁴³⁸

(14) *Atiyeh v. Liberty Mutual Ins. Co.*, 2000 U.S. Dist. LEXIS 17607 (E.D. Pa. Nov. 15, 2000) (Hart, M.J.)

The defendant insurer, Liberty Mutual, terminated the plaintiff’s claim for wage loss benefits after receipt of a medical report from an IME physician, stating that the plaintiff was not impaired or disabled. In the breach of contract/bad faith litigation, the insurer claimed that various documents from its claims file were protected from discovery by the attorney-client privilege and Federal Rule of Civil Procedure 26(b) relating to trial preparation materials. The insurer claimed that once it received the IME report, its focus changed from merely processing the claim to anticipating litigation, and therefore materials generated after that time were protected from discovery. The plaintiff countered that the company could not have anticipated litigation until the suit was actually filed.

¹⁴³⁴ *F.P. Woll & Co. v. Valiant Ins. Co.*, 2003 U.S. Dist. LEXIS 3134, at *6.

¹⁴³⁵ *Id.* at *9.

¹⁴³⁶ *Arters*, 2003 U.S. Dist. LEXIS 12264, at *2.

¹⁴³⁷ *Id.* at *8.

¹⁴³⁸ *Id.* at *9.

Magistrate Judge Hart rejected the policyholder's argument, stating, "if we were to adopt this logic, a defendant would never be able to 'anticipate' litigation."¹⁴³⁹ Because an insurance company has a duty to investigate, evaluate and make a decision with respect to claims made by its insureds, the court recognized that portions of the claims file were discoverable. The court acknowledged, however, that there might arise a point where documents would be protected as having been prepared in anticipation of litigation. The Magistrate Judge ordered the insurer to produce all the documents to the court for an *in camera* review, in which the court would make a determination as to when the insurer's focus changed from routine claims handling to action in anticipation of litigation.

(15) *Robertson v. Allstate Ins. Co.*, 1999 U.S. Dist. LEXIS 2991 (E.D. Pa. Mar. 10, 1999) (Scuderi, J.)

The plaintiff sought production of a letter which was written by Allstate's attorney in the UIM action to another attorney requesting that he serve as Allstate's arbitrator. Allstate objected to the production of this letter, asserting that it was protected by the work product doctrine. The court ruled that the plaintiff would be permitted to discover the document because Allstate had waived the work product privilege by asserting the affirmative defense that it had relied upon the advice of its attorney in the underlying UIM action. According to the court, waiver occurs where "the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication."¹⁴⁴⁰ The court stated that by placing the advice of its attorney at issue in the bad faith litigation, "Allstate has opened to examination the facts relating to that advice."¹⁴⁴¹

The plaintiff also sought production of various communications between Allstate and its staff counsel. The plaintiff asserted that *all* communications between Allstate and its attorneys were waived as a result of Allstate's assertion of the advice of counsel defense. In denying the plaintiff's motion to compel, the court stated that "[p]laintiff's simple assertion of bad faith does not entitle him to circumvent the attorney-client privilege."¹⁴⁴² The court found that Allstate had asserted the defense of reliance on *outside* counsel only, not staff counsel:

To allow plaintiff to discover communications between Allstate and in-house counsel would undermine the very purpose behind the exception to attorney-client privilege at issue here—fairness.¹⁴⁴³

The plaintiff also sought production of a report prepared by an Allstate employee to an outside law office. Allstate contended that the report was also protected by the work product doctrine because it was a suit assignment to counsel and contained a litigation plan. The court held that the document was generated in anticipation of litigation, and was therefore work product. The court noted, however, that a party may still be entitled to a protected document if it is able to establish substantial need for the document in question. The court found that the information plaintiff sought could be developed through depositions and other discovery of non-privileged information. As such, the court concluded that Allstate need not produce the report.

(16) *Slater v. Liberty Mutual Ins. Co.*, 1999 U.S. Dist. LEXIS 275 (E.D. Pa. Jan. 13, 1999) (Waldman, J.)

In this bad faith litigation, counsel for the respective parties sought to depose each other. The insurer wished to depose the policyholder's counsel because the latter had communicated with Liberty Mutual's employees on a number of occasions, and the carrier contended that it was entitled to know whether plaintiff's counsel would contradict any of the company representatives' recollections concerning such conversations. The policyholder wished to depose Liberty Mutual's attorney, alleging that his discovery conduct further evinced Liberty's bad faith conduct toward the plaintiff. Judge Waldman of the Eastern District rejected both attempts to depose counsel of record, suggesting that there were alternative measures available to each side on the respective topics. The court held that depositions of counsel of record are only appropriate where the information sought is relevant, non-privileged, critical to the preparation of the case, and there is no other way to obtain the information.

(17) *Dombach v. Allstate Ins. Co.*, 1998 U.S. Dist. LEXIS 13241 (E.D. Pa. Aug. 27, 1998) (Buckwalter, J.)

In this bad faith case, Allstate provided a significantly redacted version of its UM claim file, excluding those portions dealing with communications between Allstate's claims adjusters and its outside counsel. The plaintiff sought the entire, unredacted file. Judge Buckwalter of the Eastern District refused to order production of the unredacted claim files, noting that neither the bad faith statute nor court decisions contained an implicit exception to the attorney-client privilege for insurer bad faith cases.

(18) *Provident Life & Accident Ins. Co. v. Nissenbaum*, 1998 U.S. Dist. LEXIS 18576 (E.D. Pa. Nov. 17, 1998) (McGirr Kelly, J.)

This case involved an *in camera* review of documents sub-mitted to the court by the insurer, which had claimed attorney-client and work product protection. Noting preliminarily that "defendants' mere claim of bad faith is not

¹⁴³⁹ *Atiyeh v. Liberty Mut.*, 2000 U.S. Dist. LEXIS 17607, at *3.

¹⁴⁴⁰ *Robertson*, 1999 U.S. Dist. LEXIS 2991, at *12 (quoting *McCulloch*, 168 F.R.D. at 520).

¹⁴⁴¹ *Id.* at *10.

¹⁴⁴² *Id.* at *16.

¹⁴⁴³ *Id.* at *5.

enough to shatter the privilege,”¹⁴⁴⁴ the court held that Federal Rule 26(b)(3) protected the documents, which were prepared in anticipation of litigation, and that the defendant policy-holders did not establish substantial need and undue hardship in obtaining the substantial equivalent of the documents. The court further held that letters from the insurer to its counsel and from counsel to the insurer were confidential communications under 42 Pa.C.S.A. §5928.

(19) *Quaciari v. Allstate Ins. Co.*, 1997 U.S. Dist. LEXIS 13834 (E.D. Pa. Sept. 3, 1997) (Welsh, M.J.)

During discovery in this UM case, the plaintiff sought all documents in the claim file. Allstate produced portions of its claim file, but redacted “diary entries” relating to communications between Allstate’s claims adjuster and Allstate’s counsel or other personnel in counsel’s office. The District Court, in reviewing the documents redacted, concluded that the “diary entries” were protected by the attorney-client privilege, and plaintiff was not entitled to those redacted entries.

(20) *Fidelity & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516 (E.D. Pa. 1996) (Joyner, J.)

The policyholder sought information from the insurer’s claim file, including communications between the insurer and its attorney. The court found that these documents were protected by the attorney-client privilege. The court noted that an insurer waives the attorney-client privilege only where it asserts the “advice of counsel” defense, and attempts to prove that defense by disclosing or describing an attorney-client communication. The court added that, “[a]dvice of counsel is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney’s advice might affect the client’s state of mind in a relevant manner. Rather, the [insurer] must take the affirmative step in the litigation to place the advice of the attorney in issue.”¹⁴⁴⁵

(21) *Connecticut Indem. Co. v. Markman*, 1993 U.S. Dist. LEXIS 10853 (E.D. Pa. Aug. 6, 1993) (Yohn, J.)

In this case, Judge Yohn of the Eastern District held that where an insurer puts forth an affirmative defense of reliance upon the advice of counsel to a claim of bad faith, all information and documentation relative to that advice is discoverable because the attorney-client privilege is waived. However, the court also held that information and documentation related to legal advice prepared in anticipation of litigation and not related to the affirmative defense of reliance upon the advice of counsel was privileged and not discoverable.

§14:06 Production of Claims Manuals and Educational Materials

§14:07 — Cases

(1) *Keefer v. Erie Ins. Exch.*, 2014 U.S. Dist. LEXIS 29282 (M.D. Pa. Mar. 7, 2014) (Rambo, J.)

In this UIM/bad faith action brought by plaintiff against her auto insurer, defendant Erie, plaintiff sought to depose defendant’s adjuster and supervisor regarding the claims. When defendant objected to certain areas of potential questioning, including the subject of “claims manuals,” plaintiff contacted the court to resolve the parties’ dispute. Judge Rambo of the Middle District granted plaintiff’s request with respect to discovery relating to claims manuals. This case is also discussed in §§14:13, 14:05(b), and 14:11.

Defendant objected to questioning regarding claims manuals, on the grounds that such information was not discoverable, and even if it was, production in the context of an action combining breach of contract and bad faith would be unduly prejudicial. The court agreed with plaintiff that the materials were relevant to the bad faith action:

Such material would allow Plaintiff to compare Defendant’s standards for evaluating claims with the conduct of Defendant’s agents in this matter. Although the fact that Defendant’s agents departed from established standards or policies in handling Plaintiff’s UIM claim may not alone establish bad faith, such information is “probative evidence” and could make it more likely that Defendant acted in bad faith in investigating Plaintiff’s UIM claim.¹⁴⁴⁶

(2) *Safeguard Lighting Sys., Inc. v. N. Am. Specialty Ins. Co.*, 2004 U.S. Dist. LEXIS 26136 (E.D. Pa. Dec. 30, 2004) (Bartle, J.)

In this breach of contract and bad faith action arising out of the plaintiff-insureds’ claim arising from water damage, the insured sought in discovery North American’s claims handling manuals. The insurer objected to the discovery. The insurer argued that its claims supervisor relied on his fifteen years of experience, rather than on the claims manual, which he did not review. The insurer further argued that it maintained the library of insurance literature which included a “Claim Technical Procedure Manual,” a general outline on claim handling concentrating primarily on general liability lines of business.

Judge Bartle of the Eastern District ruled that any claims handling materials given to the adjusters who worked on plaintiff’s claim should be produced:

¹⁴⁴⁴ *Nissenbaum*, 1998 U.S. Dist. LEXIS 18576, at *2.

¹⁴⁴⁵ *Fid. & Deposit v. McCulloch*, 168 F.R.D. 516, 519 (quoting *Rhone Polenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994), discussed above).

¹⁴⁴⁶ *Keefer v. Erie Ins. Exch.*, 2014 U.S. Dist. LEXIS 29282, at *10-11 (M.D. Pa. Mar. 7, 2014).

We agree with North American insofar as requiring production of its entire library of insurance literature would be overly broad and unduly burdensome. However, any material which pertains to instructions and procedures for adjusting claims and which was given to the adjusters who worked on plaintiffs' claim may be relevant to the action and must be produced.¹⁴⁴⁷

(3) *Consugar v. Nationwide Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 61756 (M.D. Pa. June 9, 2011) (Munley, J.)

In this case, also discussed in §§14:03, 14:05(b), 14:09 and 14:13, plaintiff filed a bad faith action against Nationwide in connection with a UIM claim. The parties disagreed as to the scope of permissible discovery under the federal rules. Judge Munley of the Middle District largely granted plaintiff's requests for information.

Plaintiff sought production of policy manuals, educational materials and other written documents used in training the insurer's agents, which, it was argued, were relevant to the bad faith claim because it would reveal why the claim was denied. The insurer argued that the materials were confidential and irrelevant to the issues presented by the bad faith claim. Nationwide also contended that production of those documents would unduly prejudice its handling of the pending UIM claim. The court held that the materials were, in fact, relevant to the bad faith claim because:

Such material would allow plaintiff to compare defendant's standards for evaluating claims with the conduct of defendant's agents in this matter. A failure to follow established policy could make it more likely that defendant acted in bad faith in denying plaintiff's UIM claim.¹⁴⁴⁸

The court rejected Nationwide's argument that production of these materials would unduly prejudice the defense of the UIM claim. The court stated that the two claims were part of the case and would proceed together, so discovery of this relevant material would continue:

The material is relevant to plaintiff's bad faith claim, which is part of the case. There is no reason to bifurcate this trial. . . .

Since the case will not be bifurcated, the defendant [sic] is at this time entitled to discovery material which, like the claims files, seems reasonably calculated to lead to relevant information for plaintiff's claims. The most economical way of proceeding with this case is to have all discovery collected at once. Motions *in limine* and jury instructions will serve to ensure that evidence is used for the proper purpose.¹⁴⁴⁹

(4) *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 U.S. Dist. LEXIS 23364 (E.D. Pa. Mar. 24, 2008) (Golden, J.)

The underlying facts of this bad faith action arising out of the denial of a disability claim appear in §14:11. Among other items sought in discovery, the plaintiff requested materials related to training given by in-house counsel to claims department representatives concerning bad faith insurance practices, insurance litigation in general, and privacy rights. The insurer objected to production of the materials based upon the attorney-client privilege, and plaintiff filed a motion to compel before Judge Golden of the Eastern District. After conducting an *in camera* review of the materials, the court denied the plaintiff's motion, finding the materials to be privileged. The court found that the materials sought were those that the insurer's in-house attorneys prepared for the purpose of answering their clients' questions concerning the effect of statutes and court decisions in the areas of bad faith, insurance litigation, and privacy on the way the company handles claims. As discussed in §14:05(b), the court deemed the documents privileged because the insurer's attorneys presented the materials to its claims representatives during training sessions in a question and answer format, and that the contents of the materials generally included explanations of basic legal concepts and direction concerning where claims representatives fit into the legal process when the company was sued.¹⁴⁵⁰

(5) *Robinson v. Hartford Ins. Co.*, 2004 U.S. Dist. LEXIS 8962 (E.D. Pa. May 11, 2004) (Robreno, J.)

In a very brief order arising out of a property insurance dispute, Judge Robreno of the Eastern District addressed several separate issues. Without providing any analysis, the court required the defendant insurers to produce "relevant portions of claims and procedural manuals that applied to Plaintiff's claim," subject to "a mutually agreeable confidentiality agreement."¹⁴⁵¹

(6) *Sickora v. Northwestern Mut. Life Ins. Co.*, 2001 U.S. Dist. LEXIS 16394 (E.D. Pa. Oct. 10, 2001)

Plaintiff alleged that the insurer wrongly denied him total disability benefits under three policies. The insurer raised an affirmative defense that plaintiff was not entitled to benefits because he was not under the regular "care of a physician" as the policies required. Judge Waldman of the Eastern District held that plaintiff was entitled to discovery

¹⁴⁴⁷. *Safeguard Lighting Sys. Inc. v. N. Am. Specialty Ins. Co.*, 2004 U.S. Dist. LEXIS 26136, at *9-10 (E.D. Pa. Dec. 30, 2004).

¹⁴⁴⁸. *Consugar v. Nationwide Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 61756, at *18 (M.D. Pa. June 9, 2011).

¹⁴⁴⁹. *Consugar v. Nationwide Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 61756, at *19-21 (M.D. Pa. June 9, 2011).

¹⁴⁵⁰. *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 U.S. Dist. LEXIS 23364, at *2-3 (E.D. Pa. 2008).

¹⁴⁵¹. *Robinson*, 2004 U.S. Dist. LEXIS 8962, at *2.

of drafting histories relating to the “care of a physician” clauses in the subject insurance policies. The court denied plaintiff’s request to discover “all training manuals and claim processing data” as “overly broad, unduly burdensome and, in large part, irrelevant”¹⁴⁵² but compelled the insurer to produce such documents pertinent to its interpretation and application of the “care of a physician” clauses.

At the request of the insurer, the court allowed the insurer to maintain the confidentiality of its training material and claims manual stating that general access to the claims manual would “injure [the insurer] competitively” and help insureds “facilitate fraud.”¹⁴⁵³

(7) *Parker v. Nationwide Ins. Co.*, 2001 U.S. Dist. LEXIS 15910 (E.D. Pa. Aug. 1, 2001) (Fullam, S.J.) (required limited production of claims manual with confidentiality)

In this bad faith action, Judge Fullam of the Eastern District ordered the insurer to provide plaintiff’s counsel with a copy of its claims manual. The insurer refused to turn over its claims manual until plaintiff’s counsel executed an elaborate confidentiality order. Plaintiff filed a motion to compel and for sanctions. The court granted plaintiff’s motion, stating, “[The insurer] will be ordered promptly to deliver its Claims Manual . . . subject only to a letter-commitment from plaintiff’s counsel that the materials will not be distributed to other lawyers, and will be used only in connection with this case.”¹⁴⁵⁴

(8) *Jones v. Nationwide Ins. Co.*, 2000 U.S. Dist. LEXIS 18823 (M.D. Pa. July 20, 2000) (Munley, J.)

In this case, Judge Munley of the Middle District held that an insurance company’s claims manuals were discoverable in a bad faith action. According to the court, where the insurer alleges that it had a reasonable basis for handling and investigating the claim, this defense rendered the claims manual “highly relevant” and discoverable.¹⁴⁵⁵ The court also ruled that claims manuals were appropriate for use in the deposition of company claims personnel since “a deposition on oral recollection alone is insufficient without accompanying documentation.”¹⁴⁵⁶ The court did rule that “all such documentation, including all company policies and all claims manuals are to be kept confidential, for the eyes of plaintiff’s counsel only.”¹⁴⁵⁷

(9) *Robertson v. Allstate Ins. Co.*, 1999 U.S. Dist. LEXIS 2991 (E.D. Pa. Mar. 10, 1999) (Scuderi, M.J.)

The plaintiff insured sought production of all claims and procedural manuals outlining company practices or policies regarding the handling of UIM claims. The court held that “the information contained in the manuals is relevant because it contains instructions concerning procedures used by Allstate employees in handling UIM claims such as plaintiff’s claim.”¹⁴⁵⁸ The court cautioned, however, that “the fact that Allstate employees departed from established standards in handling plaintiff’s UIM claim would not alone establish bad faith.”¹⁴⁵⁹ Allstate argued that disclosure of its manuals would lead to the release of “trade secrets” that would be used by its competitors. On this issue the court held that “plaintiff is required to keep all information provided in the claims manual confidential in order to provide adequate safeguards for Allstate’s confidential material.”¹⁴⁶⁰

(10) *Adams v. Allstate Ins. Co.*, 189 F.R.D. 331 (E.D. Pa. 1999) (Joyner, J.)

Plaintiff policyholder alleged that Allstate acted in bad faith in handling the plaintiff’s two uninsured motorist claims. In discovery, the plaintiff requested Allstate’s claims manual and training materials. The company objected on the ground that the requests were overly broad and unreasonably burdensome. Judge Joyner of the Eastern District ordered Allstate to produce the portions of its claims manuals that related to the processing of the specific claims at issue. The court also ordered that company policies relating to the plaintiff’s specific bad faith allegations were discoverable. These included materials pertaining to company policies regarding independent medical examinations, policies regarding the company’s relationships with outside counsel over the past five years, policies regarding UM and UIM policyholders, and training materials. Acknowledging that some of the materials might include confidential information, the court ordered the plaintiff to keep all information confidential.

(11) *Dombach v. Allstate Ins. Co.*, 1998 U.S. Dist. LEXIS 15611 (E.D. Pa. Oct. 7, 1998) (Buckwalter, J.)

The plaintiff brought a bad faith action against Allstate, alleging that it maintained several improper corporate policies with respect to settling claims for uninsured motorist benefits. During discovery, the plaintiff sought all instructional materials and manuals that Allstate had given to its claims personnel at any time in the last five years. Judge Buckwalter of the Eastern District denied the plaintiff’s request as being overly broad. The court held that the

¹⁴⁵². 2001 U.S. Dist. LEXIS 16394, at *3.

¹⁴⁵³. *Id.*

¹⁴⁵⁴. *Parker*, 2001 U.S. Dist. LEXIS 15910, at *2.

¹⁴⁵⁵. *Jones v. Nationwide*, 2000 U.S. Dist. LEXIS 18823, at *11.

¹⁴⁵⁶. *Id.*

¹⁴⁵⁷. *Id.*

¹⁴⁵⁸. *Robertson*, 1999 U.S. Dist. LEXIS 2991, at *18.

¹⁴⁵⁹. *Id.*

¹⁴⁶⁰. *Id.* at *13 n.7.

plaintiff was obliged to redraft his discovery request, and admonished the plaintiff that “discovery should be aimed at disclosing whether defendant *in this particular case* (1) did not have a reasonable basis for [its settlement offer]; and (2) knew or recklessly disregarded as lack of a reasonable basis.”¹⁴⁶¹

(12) *Conway v. State Farm Fire & Cas. Co.*, 1998 U.S. Dist. LEXIS 20137 (E.D. Pa. Dec. 10, 1998) (Kauffman, J.)

The plaintiff insured alleged that State Farm breached its contract by failing to provide coverage for the theft of his boat, and acted in bad faith in the processing of his claim. In discovery, the plaintiff sought disclosure of State Farm’s claims handling policies and procedures as well as “information regarding its history of sanctions by governing bodies.” A federal magistrate judge in the Eastern District ordered State Farm to produce the requested documents. This decision was upheld by the district court. The court held that State Farm’s principal argument, that the documents were irrelevant, was inapposite because relevancy is an issue to be determined by the trial court.

(13) *Cantor v. Equitable Life Assurance Society of the U.S.*, 1998 U.S. Dist. LEXIS 13240 (E.D. Pa. Aug. 26, 1998) (Rueter, M.J.)

The plaintiff asserted that the insurer, Equitable, improperly denied disability benefits and acted in bad faith. In the course of litigation, the plaintiff sought production of an administrative agreement between Equitable and Paul Revere Insurance Co., asserting that the agreement between the two companies might have provided economic incentives for terminating benefits. The court granted Equitable’s motion for protective order because the claim representative who actually made the claim decision testified that she did not consult her superiors or otherwise make herself aware of the administrative agreement prior to the claim decision. Hence, the court concluded, the administrative agreement was not relevant.

(14) *Kaufman v. Nationwide Mutual Ins. Co.*, 1997 U.S. Dist. LEXIS 18530 (E.D. Pa. Nov. 12, 1997) (Rueter, M.J.)

In an action against Nationwide alleging that it acted in bad faith in the handling of a UM claim, the plaintiff requested copies of all claims manuals and newsletters distributed over the course of a year. U.S. Magistrate Judge Rueter of the Eastern District held that the request was overly broad but that some of the information contained in the claims manuals and newsletters would be relevant if it contained instructions concerning procedures used by the company’s employees in handling claims. The Magistrate Judge expressly disagreed with *Garvey v. National Grange*, stating that “a claims manual could be relevant if it requires an adjuster to take certain investigative steps before adjusting a claim and plaintiff can show that these steps were deliberately omitted.”¹⁴⁶² Nationwide suggested that any manuals would be “trade secrets”; the court suggested that that would not bar discovery, although the court stated it would consider entering a protective order to provide safeguards for confidentiality. The court ordered Nationwide to produce those portions of the manuals or newsletters containing instructions of procedures on handling claims, and which were sent to the employees who directly handled the plaintiff’s claims.

(15) *Garvey v. National Grange Mut. Ins. Co.*, 167 F.R.D. 391 (E.D. Pa. 1996) (Hutton, J.)

The insured filed a bad faith action against his insurer after the insurer denied coverage of his claim for a fire loss to the contents of his business. In discovery, the plaintiff sought production of the insurer’s claims and underwriting manuals pertaining to its adjustment procedures. The insurer refused to produce the requested manuals on relevance and trade secret grounds. The Eastern District held that the insurer’s claims and underwriting manuals were not discoverable, stating:

The contents of these manuals do not pertain to whether the plaintiff’s present claim for loss is “covered” under the insurance contract issued by the defendant. Moreover, the fact that the defendant may have strayed from its internal procedures does not establish bad faith on the part of the defendant in handling the plaintiff’s loss.¹⁴⁶³

(16) *Shellenberger v. Chubb Life America*, 1996 U.S. Dist. LEXIS 2375 (E.D. Pa. Feb. 22, 1996) (Huyett, J.)

In this alleged bad faith disability action, the insured sought production of the definition section of all manuals utilized by the defendant insurer that contained definitions of certain terms. The court agreed with the insurer that the request as written was overly broad and that the insurer should not be compelled to respond to it. However, the court went on to state that “copies of the definitions sections of defendants’ manuals are relevant if they are related to the facts of the case at issue. If plaintiff rewrites the request so that it is not overly broad, de-fendants should comply if it is clear, in light of this order, that the request is reasonable and relevant.”¹⁴⁶⁴

¹⁴⁶¹ *Id.*

¹⁴⁶² *Kaufman*, 1997 U.S. Dist. LEXIS 18530, at *5 n.2.

¹⁴⁶³ *Garvey*, 167 F.R.D. at 396.

¹⁴⁶⁴ *Shellenberger*, 1996 U.S. Dist. LEXIS 2375, at *5.

(17) *Cincinnati Ins. Co. v. Clark*, 1992 U.S. Dist. LEXIS 2054 (E.D. Pa. Feb. 18, 1992) (Waldman, J.)

In this bad faith litigation concerning a disputed policy provision, the plaintiff sought production of all claim policy manuals and educational materials. The court required the defendant to produce these materials *as they pertained to the clause in issue*, reasoning that documents pertinent to the insurer's interpretation and application of the policy provision were discoverable. However, the court noted that other documents unlikely to lead to relevant information were not discoverable.

§14:10 Other Claims or Actions Brought Against the Insurer

§14:11 — Cases

(1) *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 U.S. Dist. LEXIS 21767 (E.D. Pa. Mar. 19, 2008) (Golden, J.)

The plaintiff was a teacher at the University of Alabama Birmingham at the time she claimed disability. Teachers Insurance and Annuity Association ("TIAA") administered disability benefits for the University. TIAA later sold the rights to administer its disability claims to Standard Benefit Administrators ("Standard") in October 2002. Standard began administering the plaintiff's benefits in March 2003. Standard terminated disability benefits in June 2005 based upon the results of a functional capacity evaluation, an independent medical examination, and surveillance, and the fact of plaintiff's participation in volunteer organizations. The plaintiff filed suit in May 2006 and the defendants thereafter reinstated benefits with back pay about two months later. The plaintiff proceeded with the lawsuit for alleged breach of contract, breach of the covenant of fair dealing, and statutory bad faith.

In discovery, the defendants had provided the plaintiff with the claims file, several hundred reports of the physician who reviewed the insured's file and recommended terminating her benefits, a claims manual and employee training materials, documents relating to third party vendors, and documents related to employee evaluations. Plaintiff also sought documents in three main categories: (1) those relating to TIAA and Standard's pre- and post-transaction evaluations of the disability claims business block sold to Standard;¹⁴⁶⁵ (2) Standard's performance evaluations of the units and individuals handling the plaintiff's disability claim;¹⁴⁶⁶ (3) claims denial letters from the third party vendors who performed Standard's independent medical examination and functional capacity evaluation; and (4) e-mails from the claims representatives who handled plaintiff's claim with respect to other claimants. The defendants objected to this discovery, and plaintiff filed a motion to compel before Judge Golden of the Eastern District.

The court observed the scope of discovery in a bad faith case with respect to requests for documents concerning corporate practices:

Defining the scope of discovery in bad faith insurance litigation often requires a court to resolve disputes arising out of requests targeting broader corporate practices, as opposed to discovery seeking materials related to the handling of the individual plaintiff's claim. This court has typically dealt with such disputes by allowing "pattern and practice" requests only "when a bad faith policy or practice of an insurance company is applied to the specific plaintiff."¹⁴⁶⁷

According to the court,

Limiting discovery to the practices applied to the individual plaintiff is the preferable approach, as the "issue in a bad faith case is whether the insurer acted recklessly or with ill will towards the plaintiff in a particular case, not whether the defendants' business practices were generally reasonable." . . . That is because "[w]hat constitutes a reasonable set of business practices for the investigation and evaluation of claims is a question properly left to the Pennsylvania Insurance Commissioner, not a judge or a jury." . . . By limiting discovery to those practices employed in handling plaintiff's claim, the Court can ensure that the litigation remains focused on "the problems the bad faith statute intended to redress."¹⁴⁶⁸

In reviewing plaintiff's document requests, the court stated that it must remain "mindful that in order for plaintiff to discover the documents she seeks, the information sought must: (1) be sufficiently relevant to outweigh the burden of its production; and (2) have been applied in the handling of plaintiff's insurance claim."¹⁴⁶⁹ The court also noted that it was evaluating plaintiff's showing "only insofar as to answer the question of whether plaintiff has established a nexus between defendants' handling of her claim and the materials sought" and "need not and does not reach a conclusion concerning whether the defendants acted in bad faith."¹⁴⁷⁰

¹⁴⁶⁵. The court's treatment of these documents appears in §14:18.

¹⁴⁶⁶. The court's treatment of these documents appears in §14:16.

¹⁴⁶⁷. *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 U.S. Dist. LEXIS 21767, at *7 (E.D. Pa. 2008) (citing, *inter alia*, *Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169, 176 (E.D. Pa. 2004) [*Saldi* is discussed in §§14:11, 14:16 and 14:18]).

¹⁴⁶⁸. *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 U.S. Dist. LEXIS 21767, at *7-9 (E.D. Pa. 2008) (citations omitted).

¹⁴⁶⁹. *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 U.S. Dist. LEXIS 21767, at *9 (E.D. Pa. 2008).

¹⁴⁷⁰. *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 U.S. Dist. LEXIS 21767, at *9-10 (E.D. Pa. 2008).

The plaintiff sought denial letters from other claims based upon file reviews of the defendants' IME physician, Dr. Handelsman. Plaintiff also sought claims denial letters and functional capacity evaluations in other Standard claims relating to reviews by the functional capacity evaluator, Ergoscience. The plaintiff argued that the use of biased experts, improper use of experts, or the use of inappropriate evaluative criteria can support a claim for bad faith and punitive damages. The defendants previously produced several hundred reports regarding independent medical examinations the physician conducted for Standard. However, the plaintiff asserted that this production was insufficient because she needed the denial letters referencing such reports in order to determine whether and the extent to which Standard relied on the reports in terminating benefits.¹⁴⁷¹

The defendants countered that information relating to other insureds was not relevant to whether defendants denied the plaintiff's claim in bad faith. The defendants argued that if they were required to disclose the denial letters of other claimants, they would need to introduce information placing those denials in context, thereby leading to a series of "mini-trials" where the court would have to pass judgment on the propriety of defendants' actions in each and every claim denial involving the physician or third party vendor. The defendants also argued that any such production would be unduly burdensome.

The court observed that the "plaintiff has been able to connect some of the bad faith practices alleged to the particular requests at issue" and allowed the discovery with limitations:

Dr. Handelsman is not a vestibular disorder specialist, and presumably Standard could have provided a physician with greater experience in evaluating patients with plaintiff's condition. Moreover, the use of Ergoscience's functional capacity testing despite knowledge that Ergoscience's methodology did not have the appropriate approvals suggests at least some possibility that further discovery might uncover evidence relevant to plaintiff's claim. . . . Discovery is available where it is relevant to a claim or defense, and when its probity outweighs its cost. Here plaintiff has established some nexus between her allegations and the discovery sought such that the probity of further third party vendor discovery outweighs its cost. The Court will therefore order the production of the materials plaintiff seeks, redacted to exclude information concerning other insurance claimants, and produced consistent with the protective order in place in this case.¹⁴⁷²

The plaintiff also sought various e-mails to and from employees handling her claim relating to other claimants, containing keywords such as "recoveries," "reopens," "return to work," "RTW," "projections," or "resolutions." The court held that these documents were beyond the scope of proper discovery:

Because there are so many innocent uses for such words, they do not suggest bad faith in and of themselves. Likewise, plaintiff does not explain how E-mails containing these words might relate to the handling of her claim. The Court is thus left to assume that the only purpose for this request is the hope that it might uncover some heretofore unknown corporate misconduct. The Court will not permit this type of blind document grab.¹⁴⁷³

(2) *Consugar v. Nationwide Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 61756 (M.D. Pa. June 9, 2011) (Munley, J.)

In this case, also discussed in §§14:03, 14:05(b), 14:07, 14:09 and 14:13, plaintiff filed a bad faith action against Nationwide in connection with a UIM claim. In discovery, plaintiff sought to compel production of Nationwide's underwriting file for her policy, and documents relating to the underwriting of all claims from 2009 on, arguing that such a request was calculated to lead to the discovery of information about whether defendant denied her claim solely for business reasons. Nationwide maintained that the files for other claims were not relevant to plaintiff's claims, and appeared to concede that it should produce plaintiff's file. Judge Munley agreed with plaintiff that the documents were relevant, and required the insurer to produce all of the underwriting files plaintiff sought:

The court agrees with the plaintiff and will order the defendant to comply with this discovery request. The Federal Rules allow parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . [and] [r]elevant matter need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Defendant does not claim that the files in question are privileged, but simply that they are irrelevant. The court concludes that requests for files on other claims, since they could reveal patterns of denials of claims similar to plaintiff's are reasonably calculated to lead to admissible evidence.¹⁴⁷⁴

¹⁴⁷¹. *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 U.S. Dist. LEXIS 21767, at *27-28 (E.D. Pa. 2008).

¹⁴⁷². *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 U.S. Dist. LEXIS 21767, at *32-33 (E.D. Pa. 2008).

¹⁴⁷³. *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 U.S. Dist. LEXIS 21767, at *26 (E.D. Pa. 2008).

¹⁴⁷⁴. *Consugar v. Nationwide Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 61756, at *16-17 (M.D. Pa. June 9, 2011).

(3) ***Morris v. USAA Cas. Ins. Co.*, 2016 U.S. Dist. LEXIS 58948 (M.D. Pa. May 3, 2016) (Kosik, J.)**

Plaintiff brought this entitlement to UIM benefits and bad faith action after he and his defendant auto insurer were unable to resolve his UIM claim. Defendant filed a motion in limine seeking to bar evidence regarding other claims and litigation. Judge Kosik of the Middle District of Pennsylvania granted the motion without substantive discussion.

(4) ***Blaylock v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 56726 (M.D. Pa. Aug. 3, 2007) (Caldwell, J.)**

The plaintiff sued its insurer, Allstate, in connection with the handling of a UIM claim. The plaintiff retained an expert who used to work for Harleysville Insurance Co. In discovery, Allstate sought to subpoena Harleysville to obtain records of claims that the expert handled when she worked for Harleysville. Harleysville moved to quash the subpoena. With respect to the request that Harleysville produce claim files on which the expert worked, Judge Caldwell accepted Harleysville's objection that such a request would be burdensome, and would require the company to review by hand thousands of files.

(5) ***Rhodes v. USAA Cas. Ins. Co.*, PICS Case No. 06-0273 (C.P. Blair Feb. 9, 2006) (Doyle, J.)**

The plaintiff sought numerous documents in discovery from defendant insurer, including information pertaining to all cases involving allegations of bad faith against the insurer. The court held that the company would be obligated to provide the requested information limited to allegations of bad faith in handling and/or settling underinsured motorist claims filed against the insurer within Pennsylvania and the Third Circuit Court of Appeals where the alleged wrongful behavior occurred in Pennsylvania. According to the court, the U.S. Supreme Court's analysis in *Campbell v. State Farm* provides support for the belief "that sufficiently similar behavior on the part of the defendant is relevant to actions under §8371. Furthermore, discovery of past bad faith lawsuits where the allegedly tortious behavior occurred in Pennsylvania is reasonably calculated to lead to the discovery of admissible evidence."¹⁴⁷⁵

(6) ***Psonak v. Peoples Benefit Life Ins. Co.*, 2006 U.S. Dist. LEXIS 49893 (M.D. Pa. July 1, 2006) (Conner, J.)**

The plaintiff policyholder sought to compel the production of information and documents regarding lawsuits and claims under unrelated insurance policies issued by the defendant insurers. Judge Conner of the Middle District rejected the plaintiff's request. Relying upon several cases cited in this section, the court found that "plaintiff has not demonstrated the relevance of the requested information and documents and . . . the request is overly broad and burdensome."¹⁴⁷⁶

(7) ***Robinson v. Hartford Ins. Co.*, 2004 U.S. Dist. LEXIS 8962 (E.D. Pa. May 11, 2004) (Robreno, J.)**

In a very brief order arising out of a property insurance dispute, Judge Robreno of the Eastern District, without providing any analysis, directed the insurers to produce limited information regarding prior bad faith lawsuits, specifically ordering the insurers to produce "the names of the parties, the court, the year, and the docket numbers for all civil actions filed against Defendants for bad faith on all policies issued in Pennsylvania related to property damage that resulted in a verdict or other final disposition by a court for the time period ranging from two years before Plaintiff filed her claim until the present."¹⁴⁷⁷

(8) ***Stewart v. State Farm Ins. Cos.*, 2000 U.S. Dist. LEXIS 4938 (E.D. Pa. Apr. 6, 2000) (Fullam, J.)**

In this very short opinion, Judge Fullam of the Eastern District addressed a discovery dispute in bad faith litigation stemming from a first party uninsured motorist claim. According to the briefs filed by the insurer, plaintiff's request for production of documents included requests for "all documents demonstrating all pending files" handled by the insurer's claims handlers during the pendency of the plaintiff's claim and for one year before and after its pendency. Plaintiff also asked for all advertising and promotion materials, including videotapes of any television advertisements since 1994. The court sustained the company's objections to all of the discovery requests, with the exception of those seeking reserve information:

My review of the record gives rise to a substantial suspicion that plaintiff's discovery requests are designed to inflict punishment upon the defendants, rather than to obtain useful information. All of the requests are hopelessly broad and burdensome, and few have any real bearing on the issues in the case. . . . I conclude that defendants' response to plaintiff's discovery requests are adequate.¹⁴⁷⁸

(9) ***Bacher v. Allstate Ins. Co.*, 211 F.3d 52 (3d Cir. 2000) (Greenberg, J.)**

This case arose out of a UIM automobile claim. Although the company ultimately paid the policy limits, the policyholder instituted an action under §8371 alleging improper claims handling. The late Judge Gawthrop of the Eastern District had approved an order allowing discovery of information regarding all prior actions filed against Allstate in Pennsylvania since January 1, 1994, alleging bad faith with respect to UM or UIM claims. The order

¹⁴⁷⁵ *Rhodes v. USAA Cas. Ins. Co.*, PICS Case No. 06-0273 at 8 (C.P. Blair Feb. 9, 2006).

¹⁴⁷⁶ *Psonak v. Peoples Benefit Life Ins. Co.*, 2006 U.S. Dist. LEXIS 49893, at *2 (M.D. Pa. July 1, 2006).

¹⁴⁷⁷ *Robinson*, 2004 U.S. Dist. LEXIS 8962, at *2.

¹⁴⁷⁸ *Stewart v. State Farm Ins. Cos.*, 2000 U.S. Dist. LEXIS 4938, at *3.

instructed Allstate to disclose the amount paid to satisfy any judgment or settlement in each prior action, although the plaintiff and her counsel were prohibited from disclosing or using the settlement information outside the boundaries of the pending litigation.

The insurer complied with the orders to the extent of identifying the prior bad faith actions, but refused to disclose the amount that it paid to settle any action. The company, arguing that the discovery order was a directly appealable collateral order, appealed to the Third Circuit Court of Appeals. The Third Circuit rejected the company's argument and dismissed the appeal. Although acknowledging the sensitivity of the settlement information, and that once disclosed, "the cat [will] already [be] out of the bag,"¹⁴⁷⁹ the Third Circuit nonetheless dismissed the action lest the appellate courts be faced with a flood of collateral appeals from discovery orders.

Although the Third Circuit did not upset the lower court's discovery order, it did express some skepticism as to the appropriateness of the order:

The parties should not infer from our opinion that we in any way are motivated by the belief that the requirement for disclosure of the details of the settlements was appropriate. Quite to the contrary, we find the disclosure order troubling because so many factors may lead to a settlement in any particular case. Accordingly, it is not immediately evident why reviewing the amount of settlements in other cases can be helpful here. Indeed, we can foresee that an attempt to use evidence of these settlements at trial could require significant exploration of the proceedings in other cases, thereby causing the parties to lose the proper focus in this case. Moreover, we can understand how by allowing a party to use evidence of settlements a court could discourage settlements in the future. Nevertheless in light of our absence of jurisdiction we cannot intercede.¹⁴⁸⁰

(10) *Ciccone v. Allstate Ins. Co.*, 49 Pa. D. & C.4th 505 (Monroe 2000) (Miller, J.)

The plaintiffs filed a bad faith action against their homeowner's insurer arising out of a denial of a claim for storm damage to a roof. In discovery, the plaintiffs propounded twenty-nine interrogatories requesting information regarding (1) documents filed in all fifty states pertaining to the policy language in question; (2) lawsuits within the previous five years in which the company was a party involving the construction and meaning of the applicable policy provisions; (3) other denied claims seeking coverage for roof damage in the U.S. for the previous nine years; and (4) any lawsuits instituted arising from such claims. The insurer objected to the overbreadth of the discovery requests.

Judge Miller of the Monroe County Court of Common Pleas denied for the most part plaintiff's motion to compel the discovery, agreeing with the insurer that the scope of the interrogatories was overly broad. The court held that the plaintiff had not limited the interrogatories to a reasonable geographic area nor to claims more specifically related to that before the court. The court held that it was unreasonable for the plaintiffs to expect the insured to search its files "for claims as far away as Alaska, Arizona, Wisconsin, etc., to establish its case," and to fail to limit the requests for information "to the type of claim brought by plaintiffs."¹⁴⁸¹ According to the court, the requests for discovery "could yield information from tens of thousands, if not hundreds of thousands of claims, the vast majority of which would not reveal the relevant facts plaintiffs intend."¹⁴⁸² The court concluded that the discovery request would cause undue and unreasonable expense to the insurer, with questionable relevancy.

Accordingly, the court narrowed the scope of the interrogatories and required the insurer to respond and provide relevant policy information relating to roof coverage claims on homeowner's insurance policies only within Monroe County, Pennsylvania.

(11) *Shellenberger v. Chubb Life America*, 1996 U.S. Dist. LEXIS 2375 (E.D. Pa. Feb. 22, 1996) (Huyett, J.)

In this alleged bad faith disability action, the insured sought to obtain the caption, docket number and date of filing for each suit against the defendant insurers for failure to pay disability benefits. The plaintiff also requested the current status of any litigation for failure to pay disability claims. The plaintiff argued that this information was relevant to showing whether there was a repeated practice of dishonoring claims for disability benefits. The court denied the plaintiff's request for this suit information. The court found that "Plaintiff's request is irrelevant and based on pure speculation," and commented that "[e]ven if there are other similar suits regarding payment of 'own occupation' disability benefits, the fact of these suits are unlikely to be relevant to the question of whether defendants acted in bad faith in denying plaintiff's claim."¹⁴⁸³ The court observed further that "[w]hile the discovery rules should be construed liberally, discovery is not a fishing expedition."¹⁴⁸⁴

¹⁴⁷⁹ *Bacher*, 211 F.3d at *10 (citing *In Re Ford Motor Company*, 110 F.3d 954, 963 (3d Cir. 1977)).

¹⁴⁸⁰ *Id.* at *17.

¹⁴⁸¹ *Ciccone v. Allstate Ins. Co.*, 49 Pa. D. & C.4th at 509.

¹⁴⁸² *Id.*

¹⁴⁸³ *Shellenberger*, 1996 U.S. Dist. LEXIS 2375, at *7-8.

¹⁴⁸⁴ *Id.* at *8.

(12) *North River Ins. Co. v. Greater New York Mutual Ins. Co.*, 872 F. Supp. 1411 (E.D. Pa. 1995) (Bartle, J.)

In this bad faith action between an excess and a primary insurance carrier, which arose out of the primary carrier's failure to settle an underlying action before trial, the excess carrier propounded an interrogatory asking whether the primary carrier had been a party to any other bad faith actions in the past seven years, and if so, inquiring into the details of those cases. The primary insurer objected to this interrogatory on relevance grounds, and the court upheld its objection.

The court held that information concerning an insurer's involvement in other bad faith litigation was not discoverable. It stated that "prior bad faith cases will necessarily involve totally different facts and circumstances from those present here" and reasoned that "[s]uch information not only is highly unlikely to have any relevance to whether or not GNY acted in bad faith. . . . but does not even 'appear reasonably calculated to lead to the discovery of admissible evidence.'"¹⁴⁸⁵ The plaintiff's discovery request was further characterized "[a]s a fishing expedition, causing needless expense and burden to all concerned."¹⁴⁸⁶

(13) *Conway v. State Farm Fire & Cas. Co.*, 1998 U.S. Dist. LEXIS 20137 (E.D. Pa. Dec. 10, 1998) (Kauffman, J.)

The plaintiff alleged that the insurer breached its contract by failing to provide coverage for the theft of his boat and acted in bad faith in the processing of his claim. In discovery, the plaintiff sought disclosure of the company's claims handling policies and procedures as well as "information regarding its history of sanctions by governing bodies." A federal magistrate judge in the Eastern District ordered the insurer to produce the documents; this decision was upheld by the district court.

(14) *Dombach v. Allstate Ins. Co.*, 1998 U.S. Dist. LEXIS 15611 (E.D. Pa. Oct. 7, 1998) (Buckwalter, J.)

The plaintiff brought a bad faith action against Allstate, alleging that it maintained several improper corporate policies with respect to settling claims for uninsured motorist benefits.

During discovery, the plaintiff sought information concerning all other bad faith cases ever filed against Allstate. The court denied the plaintiff's motion to compel, as it was "an obviously overbroad request for documents."¹⁴⁸⁷ In instructing the plaintiff to redraft the request, the court advised the plaintiff that "discovery should be aimed at disclosing whether defendant in this particular case (1) did not have a reasonable basis for [its settlement offer]; and (2) knew or recklessly disregarded as lack of a reasonable basis."¹⁴⁸⁸

(15) *Adams v. Allstate Ins. Co.*, 189 F.R.D. 331 (E.D. Pa. 1999) (Joyner, J.)

The plaintiff policyholder alleged that the insurer acted in bad faith in handling the plaintiff's two uninsured motorist claims. In discovery, the plaintiff requested documents and information relating to past claims brought by other insureds of the company. Citing *North River v. Greater New York Mutual Insurance Company*, Judge Joyner of the Eastern District held, "past claims by other insureds are not relevant to the present bad faith action before the court."¹⁴⁸⁹

(16) *Kaufman v. Nationwide Mut. Ins. Co.*, 1997 U.S. Dist. LEXIS 18530 (E.D. Pa. Nov. 12, 1997) (Rueter, M.J.)

In a case alleging that the insurer acted in bad faith in handling a UM claim, the plaintiff sought information regarding other bad faith cases that had been filed against the insurer for the previous seven years. U.S. Magistrate Judge Rueter denied this discovery request, agreeing with *North River Insurance Company v. Greater N.Y. Mut. Ins. Co.*, which held that prior bad faith cases will necessarily involve totally different facts and circumstances. Judge Rueter reasoned that such other claims would be irrelevant to the bad faith action before the court. In addition, he noted that even if there was limited relevance, the burden and expense of producing the information would outweigh the likelihood of finding relevant material.

(17) *Fidelity & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516 (E.D. Pa. 1996) (Joyner, J.)

In this case, Judge Joyner of the Eastern District rejected the insured's request for discovery of all lawsuits interpreting the policy language at issue despite the defendants' contention that the requests could reveal information indicative of bad faith. The court reasoned that "allowing discovery of other actions which concerned completely different facts and circumstances would run counter to the important but often neglected Rule 1 of the Federal Rules of Civil Procedure which requires that all rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

¹⁴⁸⁵ *North River Ins. Co.*, 872 F. Supp. at 1412.

¹⁴⁸⁶ *Id.*

¹⁴⁸⁷ *Dombach*, 1998 U.S. Dist. LEXIS 15611, at *15.

¹⁴⁸⁸ *Id.*

¹⁴⁸⁹ 189 F.R.D. at 332.

(18) *First Fidelity Bancorporation v. National Union Fire Ins. Co.*, 1992 U.S. Dist. LEXIS 3087 (E.D. Pa. Mar. 13, 1992) (Kelly, J.)

In coverage litigation under a director and officer insurance policy, a federal magistrate had granted the insured's requests for "pattern and practice discovery," and ordered the production of nearly 20,000 insurance policies and 3,000 claim files. However, Judge Robert Kelly of the Eastern District overruled the magistrate's order, stating:

It would take years to implement compliance at a horrendous expense. . . . Accordingly, I find that the burden and expense of this discovery clearly outweighs its relevance. This ruling is also based on the fact that at trial, the scope of this discovery request far exceeds what would be reasonably admissible under Fed. R. Evid. 406. This is especially so considering [the insurer] National's understandable desire to have a "mini-trial" over each and every instance of bad faith claim by Fidelity.¹⁴⁹⁰

The court found that "the type and quantity of production to date draws a proper balance between discovery opportunities [the policyholder] genuinely deserves, and the ridiculous desires of counsel."¹⁴⁹¹ It should be noted that, prior to the discovery motion which was the subject of this case, the insurer had already produced all pleadings since 1987 in which bad faith had been alleged; approximately 75 claim files involving the same type of claims as the underlying litigation; and 200 director and officer liability policies.

§14:13 Cases, Discovery of Reserve Information Permitted

(1) *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 30436 (M.D. Pa. Mar. 10, 2014) (Rambo, J.)

Plaintiffs filed this bad faith suit after they and his auto insurer, State Farm, were unable to resolve their UIM claim. During the course of discovery, plaintiff objected to redactions State Farm made in its production of the claim file. The court held a telephone conference, prior to which it ordered State Farm to produce an unredacted file to the court. Following the conference, Judge Rambo of the Middle District filed this opinion, which is also discussed in §14:05(a).¹⁴⁹²

One of the issues discussed was whether plaintiffs were entitled to reserve information. The court noted a split of opinion on the issue, and held that reserve information should be produced: "Since Plaintiffs claim State Farm has acted in bad faith during its investigation of their UIM claim, the amount set aside for reserves is relevant to the determination of whether State Farm acted in bad faith in processing the claim. . . ." ¹⁴⁹³

(2) *Borgia v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 123180 (E.D. Pa. Sept. 3, 2014) (Sanchez, J.)

Plaintiff Borgia was involved in an auto accident, and after he resolved his bodily injury claim with the tortfeasor's carrier, sought UIM benefits for himself and his wife from their auto carrier, defendant State Farm. When the parties could not resolve the claim, plaintiffs brought this breach of contract and bad faith action. During discovery, State Farm redacted reserve information. Plaintiffs filed a motion to compel. Judge Sanchez of the Eastern District, in this opinion also addressed in §14:05(b), granted the motion as to reserves.

State Farm contended that the reserve information was not relevant because they are not set with regard to the litigation process. The court concluded that there was relevance to the assessment of valuation:

As several district courts in this Circuit have recognized, however, the establishment of reserves would serve little, if any, purpose unless the reserves "have some relationship to the insurer's estimation of the insured's potential liability," and the amount set aside for reserves is therefore "germane to any analysis [the defendant-insurer] made of the claims' value and is relevant to the determination of whether the defendant-insurer acted in bad faith in processing the claim." The Court agrees with this analysis and concludes reserve information is relevant to Plaintiffs' bad faith claim.¹⁴⁹⁴

(3) *Clemens v. N.Y. Central Mut. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 77180 (M.D. Pa. June 15, 2015) (Conaboy, J.)

In this UIM and bad faith case, at issue was the ability of the plaintiff insureds to introduce evidence at trial of reserves. Before the court were various motions in limine. Judge Conaboy of the Middle District granted some motions and denied others, as discussed in §§8:07, 4:03, 14:11, 14:20.

¹⁴⁹⁰ *First Fidelity Bancorporation v. Nat'l Union*, 1992 U.S. Dist. LEXIS 3087, at *10-11 (E.D. Pa. Mar. 13, 1992).

¹⁴⁹¹ *First Fidelity Bancorporation v. Nat'l Union*, 1992 U.S. Dist. LEXIS 3087, at *11 (E.D. Pa. Mar. 13, 1992).

¹⁴⁹² An earlier decision in the case is discussed in §§9:03(a) and 9:11.

¹⁴⁹³ *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 30436, at *10 (M.D. Pa. Mar. 10, 2014).

¹⁴⁹⁴ *Borgia v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 123180, at *13 n.5 (E.D. Pa. Sept. 3, 2014) (quoting *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 931101, at *3 (M.D. Pa. Mar. 10, 2014)).

Having allowed discovery of reserve information, the court was faced with the question of admissibility of such information at trial. The court rejected defendant insurer's argument that the relationship between reserves and settlement offers was "so tenuous as to make the size of the reserve irrelevant for purposes of determining a bad faith claim."¹⁴⁹⁵ Instead, the court found that the plaintiffs' argument "that the amount set aside in reserve necessarily reflects a company's assessment of the potential worth of the claim and, to the extent the reserve is dissimilar from the amount offered in settlement, is germane to an analysis of whether the company acted in bad faith in pretrial settlement negotiations."¹⁴⁹⁶

(4) *Javorski v. Nationwide Mut. Ins. Co., Slip Opinion, No. 3:06-cv-1071, PICS No. 06-1727 (M.D. Pa. Nov. 30, 2006) (Conaboy, J.)*

In this case arising out of a UIM claim, the plaintiff insured sought information from the insurer's claim file pertaining to the setting of reserves. The insurer objected, arguing that because liability was not contested in the case, reserve information should not be discoverable. Judge Conaboy of the Middle District rejected this argument and permitted discovery of reserve information.

(5) *Consugar v. Nationwide Ins. Co. of Am., 2011 U.S. Dist. LEXIS 61756 (M.D. Pa. June 9, 2011) (Munley, J.)*

In this UIM case, also discussed in §§14:03, 14:07, 14:09 and 14:13, plaintiff requested information relating to the reserves set aside for her claim. Nationwide argued that such information was not discoverable because it was confidential and disclosure was not necessary, citing to *Kaufman v. Nationwide Mut. Ins. Co.*,¹⁴⁹⁷ Judge Munley of the Middle District rejected this argument, relying on *North River Ins. Co. v. Greater New York Mut. Ins. Co.*,¹⁴⁹⁸ finding instead that "reserves, of course, must have some relationship to the insurer's estimation of the insured's potential liability. Otherwise, the setting aside of reserves would serve little, if any, purpose.'... Thus, the amount set aside for reserves 'is certainly germane to any analysis [defendant] made of' the claim's value, and whether defendant acted in bad faith in processing the claim."¹⁴⁹⁹ The court ordered production of the reserve information, stating as follows:

The court agrees with the plaintiff that "the amount of reserve, if any, assigned to Ms. Consugar's UIM claim" should be produced. The amount set aside for reserves provides some evidence of the value assigned by defendant to plaintiff's claim. Since plaintiff here claims that defendant acted in bad faith, a comparison between the reserve value of the claim and defendant's actions in processing plaintiff's claim could shed light on defendant's potential liability. The reserve amount is therefore relevant or could potentially lead to relevant information, and the court will order the disclosure of such information. To the extent that defendant contends that some documents relating to the establishment of reserves are protected by attorney-client or work-product privilege, those claims should be included in the privilege log and will be evaluated by the court if necessary.¹⁵⁰⁰

(6) *Mirarchi v. Seneca Specialty Ins. Co., 2011 U.S. Dist. LEXIS 80871 (E.D. Pa. July 22, 2011) (Pratter, J.)*

In this case discussed in the following section (§14:14), Judge Pratter of the Eastern District ordered that Seneca Specialty Ins. Co. produce its reserve documents for in camera review, to determine whether the documents contained information other than specific amounts set for loss reserves (which amounts, the court held, would not be discoverable).

(7) *Stewart v. State Farm Ins. Cos., 2000 U.S. Dist. LEXIS 4938 (E.D. Pa. Apr. 10, 2000) (Fullam, J.)*

In a case concerning bad faith allegations in the context of the handling of an uninsured motorist claim, the Eastern District held that the insurer was obligated to disclose the amount of reserve, if any, assigned to the plaintiff's UM claim: "Whether, and when, a reserve figure was decided upon, and the amount of the reserve, might possibly shed light upon whether defendants' handling of the claim was in good faith."¹⁵⁰¹

(8) *Liberty Mut. Fire Ins. Co. v. Corry Industries, Inc., 1998 U.S. Dist. LEXIS 22969 (W.D. Pa. Dec. 12, 1998) (Cohill, J.)*

In this case, the applicable Liberty Mutual policy allowed for collection of premiums on a retroactive rating basis, *i.e.*, the amount of premium would be determined based on an annual calculation of actual and projected payments for open losses. In a counterclaim, the policyholder alleged bad faith on the part of the insurer in allegedly "mishandling"

¹⁴⁹⁵. *Clemens v. N.Y. Central Mut. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 77180, at *4-5 (M.D. Pa. June 15, 2015).

¹⁴⁹⁶. *Clemens v. N.Y. Central Mut. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 77180, at *5 (M.D. Pa. June 15, 2015).

¹⁴⁹⁷. 1997 WL 703175, at *1 (E.D. Pa. 1997).

¹⁴⁹⁸. 872 F. Supp. 1411, 1412 (E.D. Pa. 1995).

¹⁴⁹⁹. *Consugar v. Nationwide Ins. Co. of Am.*, 2011 U.S. Dist. LEXIS 61756, at *14 (M.D. Pa. June 9, 2011) (quoting *N. River Ins. Co. v. Greater N.Y. Mut. Ins. Co.*, 872 F. Supp. 1411, 1412 (E.D. Pa. 1995)).

¹⁵⁰⁰. *Id.* at *15-16.

¹⁵⁰¹. *Stewart*, 2000 U.S. Dist. LEXIS 4938, at *3.

a prior claim, which adversely impacted the retroactive premium rating. In discovery the policyholder sought evidence of the insurer's past handling practices with respect to similar worker's compensation claims, and also the manner in which the insurer set its reserves and calculated the retrospective premium charged to the insured. Judge Cohill of the Western District permitted the discovery because "it appears that the information sought is reasonably calculated to lead to the discovery of admissible evidence. . . ."¹⁵⁰² With respect to the insurer's concern for confidentiality, the court stated that it could be addressed by appropriate protective order.

(9) *Cantor v. Equitable Life Assurance Soc'y of the U.S.*, 1998 U.S. Dist. LEXIS 13240 (E.D. Pa. Aug. 26, 1998) (Rueter, M.J.)

In this case, the plaintiff policyholder alleged bad faith on the part of its disability insurer. In discovery, the plaintiff requested information pertaining to Equitable's reserves. Relying upon *North River*, the court granted the plaintiff's request for discovery of the reserves set by Equitable. However, the court imposed limits on the reserve information, stating that it did not find that collateral information relating to the amount of reserves, such as the procedure for setting reserves or the interest rate Equitable had earned on the reserve for plaintiff's claim, would lead to the discovery of admissible evidence. Therefore, Equitable was not obligated to provide such information.

§14:15 Evaluation, Selection and Compensation of Insurer's Employees or Agents

§14:16 — Cases

(1) *Sickora v. Northwestern Mutual Life Ins. Co.*, 2001 U.S. Dist. LEXIS 16394 (E.D. Pa. Oct. 10, 2001) (Waldman, J.)

The plaintiff alleged that the insurer wrongly denied him total disability benefits under three policies. The insurer raised an affirmative defense that plaintiff was not entitled to benefits because he was not under the regular "care of a physician" as the policies required.

Judge Waldman of the Eastern District denied the plaintiff's request for identities of all former claims personnel as overly broad but did allow the plaintiff to seek discovery from those employees who handled the plaintiff's claim or exercised responsibility in interpreting the "care of a physician" clause in resolving similar claims during a reasonable period prior and subsequent to the denial of benefits to plaintiff.

(2) *Small v. Provident Life & Accident Ins. Co.*, 1999 U.S. Dist. LEXIS 18930 (E.D. Pa. Dec. 8, 1999) (Hutton, J.)

In this case the plaintiff policyholder, an attorney, sued Provident for breach of contract and bad faith in connection with a disability insurance policy. In the course of the claims handling, Provident had retained Jonathan Bromberg, M.D., to perform an independent medical examination. In discovery, the plaintiff served upon Dr. Bromberg and his associates a subpoena requesting any and all medical records, billing records, reports, statements or scheduling books pertaining to any forensic independent medical evaluations performed by Dr. Bromberg or his practice group in connection with any civil litigation or on behalf of any insurance company, agency or law firm. The plaintiff alleged that the information was necessary to show a pattern and practice by the physician of making unfavorable and biased determinations against claimants for the benefit of the insurers. Both the insurance company and the physician moved for a protective order.

The late Judge Hutton of the Eastern District denied in part the motion for protective order. He limited the scope of the plaintiff's subpoena to Dr. Bromberg only, on those occasions when he was acting on behalf of an insurance company, and to a period of ten years. Otherwise, the court ordered that all such records be produced, with references to patient names and other confidential information redacted. The court ordered that the plaintiff should pay the reasonable administrative expenses incurred in reproducing and redacting the relevant documents.

Judge Hutton found that the documents may be relevant to the plaintiff's bad faith claim:

The thrust of Plaintiff's claim is that Provident Life obtained in bad faith an inaccurate and unreliable medical report for the sole purpose of terminating Plaintiff's benefits. . . . In this respect, the existence of a pro-insurance bias on the part of Dr. Bromberg is germane to Plaintiff's claim and cannot be dismissed as lacking relevancy to Plaintiff's underlying bad faith action.¹⁵⁰³

With respect to the privacy concern of the various claimants whose medical history would be contained in any IME reports, the court felt this could be adequately protected by redaction.

(3) *Adams v. Allstate Ins. Co.*, 189 F.R.D. 331 (E.D. Pa. 1999) (Joyner, J.)

The plaintiff policyholder alleged that Allstate acted in bad faith in handling plaintiff's two uninsured motorist claims. In discovery, the plaintiff sought the personnel files of every company employee who worked on plaintiff's claims. Judge Joyner of the Eastern District rejected this request, stating, "this request is overbroad, and seeks

¹⁵⁰². *Liberty Mut. Fire Ins. Co.*, 1998 U.S. Dist. LEXIS 22969, at *3 (W.D. Pa. Dec. 12, 1998).

¹⁵⁰³. 1999 U.S. Dist. LEXIS 18930, at *5.

information that is unnecessarily invasive. The plaintiff should seek the information that it needs by a less invasive means, such as by deposition or interrogatory.”¹⁵⁰⁴

(4) *Pierre v. Keystone Ins. Co., No. 93-CV-6368 (C.P. Lackawanna Sept. 8, 1999) (Minora, J.)*

In a bad faith lawsuit arising out of a UIM claim, the estate of the insured sought items in the assigned claim representative’s personnel file. The insurer objected to production of its employee’s materials, arguing that it was sensitive, proprietary, personal and confidential. Judge Minora of Lackawanna County overruled the insurer’s objections, and granted the plaintiff’s motion to compel. The court ruled that the insurer “failed to satisfactorily establish that the items requested are in fact immune from discovery by virtue of some privilege or some other protection.”¹⁵⁰⁵

In ordering production of the items from the personnel file, the court relied upon an in camera assessment by another judge who had determined that the materials requested were “arguably relevant.”

(5) *Dombach v. Allstate Ins. Co., 1998 U.S. Dist. LEXIS 15611 (E.D. Pa. Oct. 7, 1998)*

During discovery, the plaintiff sought the personnel files of all individuals who played any part in reviewing the plaintiff’s claim, including employee salary review forms, progress development summaries, performance review forms, education and training records, and goals and reports. The plaintiff also sought production of all bonus or incentive compensation programs provided to claims personnel. The court denied the plaintiff’s request as overbroad and instructed the plaintiff to redraft the request, stating that “discovery should be aimed at disclosing whether defendant in this particular case (1) did not have a reasonable basis for [its settlement offer]; and (2) knew or recklessly disregarded as lack of a reasonable basis.”

(6) *Shellenberger v. Chubb Life America, 1996 U.S. Dist. LEXIS 2375 (E.D. Pa. 1996) (Huyett, J.)*

In this alleged bad faith disability action, the insured sought to obtain all documentation concerning the qualifications of a firm hired by the insurer to select the physician who performed the plaintiff’s independent medical examination. The plaintiff also sought the identification of all persons consulted in the determination to use that firm’s services and certain further information about the specific physician who performed the examination.

The plaintiff argued that the requested information was relevant to the IME doctor’s qualifications and to potential bias. The court agreed with the plaintiff, compelling the insurers to produce the requested information. The court observed that “[i]nformation about the company used to select a physician for an independent medical examination is relevant to plaintiff’s claim that the doctor selected was unqualified,” and that “[t]he process by which defendants selected Dr. Adams is clearly relevant.”¹⁵⁰⁶

§14:19 Miscellaneous Discovery Topics

§14:20 — Cases

(1) *Mine Safety Appliances Co. v. North River Ins. Co., 2012 U.S. Dist. LEXIS 132899 (W.D. Pa. Apr. 24, 2012), adopted by, 2012 U.S. Dist. LEXIS 132896 (W.D. Pa. Sept. 18, 2012) (Cercone, J.)*

Plaintiff filed a motion to compel answers to written discovery. In this discovery dispute, Special Discovery Master Alan S. Penkower, on behalf of Judge Cercone of the Western District found the sought after information not relevant to the bad faith claim, so he recommended denying the motion to compel.

Plaintiff sought to compel answers to interrogatories relating to experts who were not expected to testify at trial, contending that the information was relevant to the bad faith claim because defendant had identified those individuals as potential experts during the course of confidential mediation. The special master concluded that the information sought by plaintiff was not relevant because such actions occurring during litigation could not provide the basis for a bad faith claim:

I have concluded that, assuming, *arguendo*, North River improperly took information learned from its own insured during a confidential mediation session for its own use and for use against its insured, the information requested in the interrogatories is not relevant to [plaintiff’s] bad faith claim. The information sought does not involve the insurer-insured relationship, but, rather, clearly involves the parties’ relationship as legal adversaries. As such, that information could not constitute evidence of bad faith under Section 8371 of the Bad Faith Statute.¹⁵⁰⁷

The district court, on review of the report and recommendation, agreed that the interrogatories sought irrelevant information, but parted ways with the special discovery master in concluding that conduct during litigation can, in appropriate circumstances, provide a basis for a bad faith action. However, the conduct in this litigation amounted to no more than a rules violation, and that type of behavior could not provide the basis for a bad faith claim:

¹⁵⁰⁴. 189 F.R.D. at 332.

¹⁵⁰⁵. *Pierre v. Keystone*, No. 93-cv-6368, slip op. at 5.

¹⁵⁰⁶. *Shellenberger*, 1996 U.S. Dist. LEXIS 2375, at *3.

¹⁵⁰⁷. *Mine Safety Appliances Co. v. North River Ins. Co.*, 2012 U.S. Dist. LEXIS 132899, at *12-13 (W.D. Pa. Apr. 24, 2012).

[T]he conduct must at least be capable of giving rise to an inference that the insurer's action was part of a calculated undertaking "to evade the insurer's obligations under the insurance contract."

By definition a showing of bad faith is analytically distinct from orchestrating a rule violation in an effort to gain an upper hand in ongoing coverage litigation. . . .

The conduct which [plaintiff] seeks to further explore is akin to the pure rule violation that the *W.V. Realty* court found to be beyond the purview of relevant evidence that can establish bad faith.¹⁵⁰⁸

(2) *Rhodes v. USAA Casualty Ins. Co.*, PICS Case No. 06-0273 (C.P. Blair Feb. 9, 2006) (Doyle, J.)

The plaintiff sought numerous documents in discovery from defendant insurer, including information concerning "round table" proceedings, where the insurer conferenced the claim between file handlers of the subject claim with other file handlers, supervisors or legal advisers. The court held that the insurer should be required to produce documents pertaining to those meetings, if they occurred. Plaintiff also requested information concerning the costs that were expended by the insurer related to the plaintiff's UIM claim and insurance policy. The court held that this information should be produced.

(3) *Franklin v. General Electric Capital Assurance Co.*, 2004 U.S. Dist. LEXIS 22842 (E.D. Pa. Nov. 9, 2004) (O'Neill, J.)

The plaintiff was an insured under a group insurance policy that utilized a savings account automatic deduction plan with a credit union to pay the periodic premium. The plaintiff alleged that the group insurer acted in bad faith when it reduced the policy benefits for failure to have sufficient funds in his account to pay the premium. The plaintiff asserted that this conduct constituted bad faith, as the insurer allegedly deviated from its policy to obtain such funds from an alternative savings account with the credit union. In discovery, the plaintiff sought to depose a former employee of the credit union over the questions as to how the insurer handled the debiting of accounts with the employer. Judge O'Neill of the Eastern District allowed the discovery to proceed, finding it was relevant to whether the insurer acted in bad faith when plaintiff's coverage level was reduced.

(4) *Adams v. Allstate Ins. Co.*, 189 F.R.D. 331 (E.D. Pa. 1999) (Joyner, J.)

The plaintiff policyholder instituted action against Allstate alleging that the company acted in bad faith in handling plaintiff's two UIM claims. In discovery, the plaintiff sought documents and information relating to the company's relationship with its outside counsel and its oversight of outside counsel. The court held that the requested information was discoverable because the plaintiff's bad faith allegations apparently included allegations about the company's over-sight of its outside counsel.

The plaintiff also requested copies of Allstate's financial statements and financial filings with the Pennsylvania Insurance Department. The court held that these requests were overbroad. The court held that the company should produce whatever financial statements it makes publicly available for the period requested; if the plaintiff had a need for other financial information, the court held, the burden was on the plaintiff to file a motion explaining its reasons. The plaintiff also requested reports published by the A.M. Best Company. Finding that the reports were available in the public domain, the court held that the company was not obligated to produce them.

(5) *Liberty Mutual Fire Ins. Co. v. Corry Industries, Inc.*, 1998 U.S. Dist. LEXIS 22969 (W.D. Pa. Dec. 22, 1998) (Cohill, J.)

In this case, the applicable Liberty Mutual policy allowed for collection of premiums on a retroactive rating basis, i.e., the amount of premium would be determined based on an annual calculation of actual and projected payments for open losses. In a counterclaim, the policyholder alleged bad faith on the part of the insurer in allegedly "mishandling" a prior claim, which adversely impacted the retroactive premium rating. In discovery the policyholder sought evidence of the insurer's past practices with respect to similar worker's compensation claims, and also the manner in which the insurer set its reserves and calculated the retrospective premium charged to the insured. Judge Cohill of the Western District permitted the discovery because it appeared that the information was reasonably calculated to lead to the discovery of admissible evidence. With respect to the insurer's concern for confidentiality, the court stated that it could be addressed by appropriate protective order.

(6) *Cantor v. Equitable Life Assurance Society of the United States*, 1998 U.S. Dist. LEXIS 13240 (E.D. Pa. Aug. 26, 1998) (Rueter, M.J.)

In this case, the plaintiff asserted that Equitable improperly denied disability benefits, and acted in bad faith. In the course of litigation, the plaintiff sought production of an administrative agreement between Equitable and Paul Revere Insurance Co., asserting that the agreement between the two companies might have provided economic incentives for terminating benefits. The court granted Equitable's motion for protective order because the claim representative who actually made the claim decision testified that she did not consult her superiors or otherwise make herself aware of the

¹⁵⁰⁸ *Id.* at *4-5 (W.D. Pa. Sept. 18, 2012) (quoting *W.V. Realty, Inc. v. Northern Ins. Co.*, 334 F.3d 306, 313 (3d Cir. 2003)).

administrative agreement prior to the claim decision. Hence, the court concluded that the administrative agreement was not relevant.

CHAPTER 15 APPLICATION OF BAD FAITH TO MEDICAL AND WAGE LOSS CLAIMS UNDER THE MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW

§15:02 Cases Involving Determination by Peer Review Organization that Medical Treatment is Unreasonable or Unnecessary

(1) *Cronin v. State Farm Mut. Auto. Ins. Co.*, 2006 U.S. Dist. LEXIS 82139 (M.D. Pa. Oct. 30, 2006) (Caputo, J.)

The plaintiff claimed that he was denied medical benefits in bad faith under his automobile insurance policy. The insurer filed a motion to dismiss. Judge Caputo of the Middle District granted the insurer's motion to dismiss. Citing *Gemini Physical Therapy*, the court held that §1797 of the MVFRL was "the exclusive first-party remedy for bad faith denials by insurance companies with respect to claims arising out of automobile accidents."¹⁵⁰⁹ The court held that §1797 of the MVFRL preempted the §8371 claim. Citing *Harris v. Lumbermen's Mutual*, the court applied Pennsylvania statutory construction rules, and reasoned that the specific provision in §1797 of the MVFRL took precedence over the general bad faith statute which was enacted at the same time.

(2) *Schleinkofer v. National Cas. Co.*, 339 F. Supp. 2d 683 (W.D. Pa. 2004) (Gibson, J.)

In this case, Judge Gibson of the Western District addressed the issue of whether a plaintiff seeking first party medical benefits as a result of an automobile accident can seek punitive damages under Pennsylvania's bad faith statute. The facts recited do not specify whether a PRO was involved or not. Citing various prior federal court decisions, the court noted that (1) "courts have consistently held that a plaintiff 'may not seek punitive damages under §8371 for denial of benefits under an auto insurance contract,'"¹⁵¹⁰ and (2) "the courts have determined that §8371 conflicts with §1701, *et seq.* in that §1797(b) 'sets out the process an insured party must undertake to challenge a denial of a claim for medical benefits and allows a court to assess treble damages against an insurer deemed to have denied a claim 'wantonly.'"¹⁵¹¹ Accordingly, the court concluded that "the Pennsylvania Supreme Court would determine that §1797 provides the exclusive remedy (including punitive damages) in an auto insurance medical benefits claim."¹⁵¹²

(3) *Dougherty v. State Farm Mutual Automobile Ins. Co.*, 2002 U.S. Dist. LEXIS 4691 (E.D. Pa. Feb. 7, 2002) (McGirr Kelly, J.)

The plaintiff injured his right shoulder and neck in a car accident which occurred in July 1996. The plaintiff treated with an orthopaedic surgeon, a chiropractor and a pain management specialist.

The plaintiff submitted his medical bills to his automobile insurer. In early 1997, the insurer began to question the reasonableness and necessity of the plaintiff's continuing treatments and referred the matter for peer review with a chiropractor, an orthopaedic surgeon and a pain specialist pursuant to §1797(b) of the MVFRL.

Based on the peer reviewers' conclusions that much of the plaintiff's treatment was not reasonable or necessary, the insurer denied payment for chiropractic bills incurred after March 5, 1997, denied payment for orthopaedic bills, including injections, incurred after March 14, 1997, and denied payment for pain management bills incurred in April, 1997.

In September 1997, the plaintiff's treating orthopaedic surgeon wrote to the insurer informing them of his conclusion that the plaintiff was still in need of continuing treatment for his shoulder. He recommended a combination of medication, equipment and intermittent cortisone shots or surgery.

The insurer responded by offering the plaintiff the opportunity to undergo an IME to assess his condition. The plaintiff did not respond to the offer and the insurer closed its file in February 1999. In June 1999, the plaintiff, in connection with his third party claim against the driver with whom he was involved in the car accident, underwent an IME. The doctor who performed the IME recommended shoulder surgery and stated his opinion that the injections into the plaintiff's shoulder for pain relief were appropriate. He also opined that any chiropractic treatment beyond three or four months after the accident was inappropriate.

In July 2000, the plaintiff filed a complaint against his insurer pursuant to §§1701-1799 of the MVFRL and pursuant to §8371. The plaintiff served the insurer with the complaint along with the IME report taken in connection with his third party claim. In light of the IME report, the insurer agreed to pay for the plaintiff's shoulder surgery up to

¹⁵⁰⁹ *Cronin v. State Farm Mut. Auto. Ins. Co.*, 2006 U.S. Dist. LEXIS 82139, at *5-6 (M.D. Pa. Oct. 30, 2006).

¹⁵¹⁰ *Schleinkofer v. National Cas. Co.*, 339 F. Supp. 2d 683, 686 (W.D. Pa. 2004) (quoting *Danley v. State Farm Mut. Auto. Ins. Co.*, 808 F. Supp. 399, 401 (M.D. Pa. 1992)).

¹⁵¹¹ *Id.* (quoting *Danley*, 808 F. Supp. at 401).

¹⁵¹² *Id.* at 687.

the limits of the policy. Given that the plaintiff was a candidate for surgery, the insurer also paid for the plaintiff's orthopaedic treatment and pain management treatment that it had previously denied.

The insurer filed a motion for summary judgment on the plaintiff's bad faith claim. Judge James McGirr Kelly of the Eastern District granted the insurer's motion, reasoning that §1797 of the MVFRL is the plaintiff's exclusive means to challenge the denial of first party benefits made pursuant to a peer review determination "where the insurer utilized proper [peer review] for its intended limited purpose, to confirm that 'treatment, products, services or accommodations conform to the professional standards of performance and are medically necessary'" and that in "such cases, punitive damages and other remedies under §8371 are unavailable."¹⁵¹³

The court observed that the "statutory scheme of MVFRL, which contains its own procedures, remedies and penalties supports this reading," noting further that "where an insurer has failed to submit a [peer review] and the denial of benefits is 'wanton,' the statute allows treble damages."¹⁵¹⁴ The court held that the insurer properly utilized the peer review process and that, as a result, the plaintiff was not entitled to avail himself of the remedies of the bad faith statute.

(4) *Gringeri v. Maryland Cas. Co.*, 1998 U.S. Dist. LEXIS 5931 (E.D. Pa. Apr. 29, 1998) (Padova, J.)

A Maryland Casualty insured suffered injuries in two separate automobile accidents and received treatment from Dr. Gringeri. After the second accident, Maryland Casualty referred the matter to a PRO, which determined that much of the treatment was medically unnecessary. The insurer then declined to pay for further medical treatment. The plaintiffs, the insured and Dr. Gringeri, initiated suit to recover medical expenses. They also alleged bad faith. Maryland Casualty moved for summary judgment with respect to the bad faith claim, arguing that because its refusal to pay first party benefits was based on a PRO determination, the plaintiffs' exclusive remedy was under the motor vehicle law. Judge Padova of the Eastern District agreed. The court held that the MVFRL and the bad faith statute provide remedies that are at variance with one another. Given the conflict between the laws, the court held that where a plaintiff disputes medical payments under the MVFRL, the plaintiff is not entitled to seek punitive damages under §8371. The court stated, however, that a party *may* be entitled to seek punitive damages under the bad faith statute in limited circumstances, such as where the insurer knows the claim is legitimate but submits it to a PRO nevertheless.

(5) *Grevy v. State Farm Ins. Cos.*, 1996 U.S. Dist. LEXIS 2883 (E.D. Pa. Mar. 11, 1996) (Reed, J.)

The plaintiff was injured in a motor vehicle accident. He submitted medical bills to State Farm totaling \$1,380. State Farm submitted the bills to a PRO pursuant to §1797(b) of the MVFRL, and State Farm thereafter declined to pay such medical bills. The plaintiff sued State Farm for both treble damages under the MVFRL and for damages under Pennsylvania's bad faith statute.

In dismissing the plaintiff's bad faith claim, Judge Reed of the Eastern District employed the same reasoning as that set forth in *Gemini Physical Therapy v. State Farm*. The court acknowledged that its reconciliation of these two laws might well render an insurer immune from punitive damages if that insurer submits claims to a PRO, "leaving open the possibility that the insurer could act with impunity in connection with the PRO process."¹⁵¹⁵

However, the court further noted that "the fact that a court may be concerned that this system does not provide adequate protection for insureds does not allow that court to ignore Pennsylvania's rules of statutory construction."¹⁵¹⁶ The court also stated that the General Assembly "was free to design the PRO process so as to limit the damages that an insurer can face if it complies with the state created process. ..."¹⁵¹⁷

§15:03 Cases Involving Other Allegations Concerning Requests for Medical Benefits

(1) *Roppa v. GEICO Indem. Co.*, 2010 U.S. Dist. LEXIS 140033 (W.D. Pa. Dec. 29, 2010) (Lenihan, M.J.), adopted by 2011 U.S. Dist. LEXIS 5148 (W.D. Pa. Jan. 19, 2011) (Fischer, J.)

Roppa was involved in an auto accident in June 2011, in which he suffered injuries. He sought payment of first party medical benefits under his auto policy with GEICO, which had limits of \$100,000. In February 2009, Roppa's physician suggested a new course of treatment. Also in February 2009, GEICO had Roppa submit to an IME, after which the IME physician concluded that any further treatment was neither necessary nor reasonable because he foresaw no further medical improvement. Following the IME, GEICO ceased paying benefits. Roppa then filed this breach of contract and bad faith suit. GEICO filed a motion to dismiss the bad faith claim. Magistrate Judge Lenihan of the Western District granted in part and denied in part the motion; her opinion was later adopted by Judge Fischer.

GEICO's primary argument was that Roppa's bad faith claim, brought under §8371, was preempted by §1797 of the MVFRL. The court concluded that the Pennsylvania Supreme Court would rule that "the scope of §1797 is limited

¹⁵¹³. 2002 U.S. Dist. LEXIS 4691, at *16 (citing 75 P.S. §1797(b)); *Gringeri v. Maryland*, Civ. A. No. 97-7373, 1998 U.S. Dist. LEXIS 5931, *8-9 (E.D. Pa. Apr. 28, 1998).

¹⁵¹⁴. *Id.* (citing 75 P.S. §1797(b)(4)).

¹⁵¹⁵. *Grevy*, 1996 U.S. Dist. LEXIS 2883, at *7 (E.D. Pa. Mar. 11, 1996).

¹⁵¹⁶. *Id.*

¹⁵¹⁷. *Id.*

to claims challenging an insurer's denial of first party benefits predicated on the reasonableness and necessity of medical treatment."¹⁵¹⁸ Therefore, if the allegations challenged whether the medical treatment was reasonable or necessary, §1797 provided the sole remedy, preempting §8371. If the allegations pointed to claims that the insurer abused the IME or PRO process, the court held, such allegations could provide the basis for recovery under §8371: "A growing number of district courts have held that a bad faith claim can be asserted under §8371 where the insured alleges bad faith on the part of the insurer for failure to follow the procedure outlined in §1797 or for abuse of that process."¹⁵¹⁹ Section 1797 would preempt §8371 even if the insurer used an IME process rather than the PRO process, because the focus was on whether the insured and insurer disagreed on the reasonable-ness and necessity of medical treatment.¹⁵²⁰

The court found that nearly all of the allegations were essentially a challenge to the result of the IME, and whether the treatment was reasonable or necessary, and subsequent to the decision by GEICO to terminate benefits. Because these actions were all within the scope of §1797, the court held, §8371 was preempted and could not provide an avenue of relief. The motion to dismiss was granted on these claims of bad faith.

The court found that two allegations would survive because they were not preempted by §1797. Those allegations included that GEICO put its own financial interests ahead of the interests of its insured and that GEICO used "the IME process for an improper purpose, i.e., to create an artificial basis upon which defendant could terminate plaintiff's first party benefits."¹⁵²¹

Finding Judge Munley's decision in *Hickey v. Allstate Prop. & Cas. Ins. Co.*,¹⁵²² persuasive, the court concluded that because Roppa claimed abuse of the PRO process, such allegations fell outside the scope of §1797, so §8371 was a permissible remedy: "This Court finds *Hickey* persuasive and the reasoning consistent with the other district courts which have allowed statutory bad faith claims to survive a motion to dismiss where the claims were predicated on allegations of abuse of the PRO process."¹⁵²³

(2) *Hickey v. Allstate Prop. & Cas. Ins. Co.*, 722 F. Supp. 2d 609 (M.D. Pa. 2010), reconsideration denied, 2010 U.S. Dist. LEXIS 86086 (M.D. Pa. Aug. 20, 2010) (Munley, J.)

Hickey was in an automobile accident in which he injured his back and neck, and he sought first party medical benefits for treatment of those injuries from Allstate. Allstate paid for treatment from September 2007 through December 2009, terminating payment of benefits following a September 2009 IME that concluded that Hickey would receive no further benefit from treatment.

Hickey filed suit alleging breach of contract and statutory bad faith. Allstate filed a motion to dismiss seeking dismissal of the bad faith claim, arguing that §1797 of the MVFRL preempted that claim. Judge Munley of the Middle District denied the motion in part, finding bad faith claims relating to abuse of the PRO process were not preempted and would survive dismissal, but granted the motion as to the other bad faith claims.

According to the court, *Perkins v. State Farm Ins. Co.*¹⁵²⁴ set forth the current state of the case law on the relation between §1797 and §8371:

[S]ection 8371 is preempted by section 1797 where an insured alleges only that an insurer wrongly denied payment of first-party medical benefits based on a determination of the propriety of treatment and the associated charges. Claims based on allegations outside this narrow scope, such as a claim involving contract interpretation, a claim of abuse of the PRO process, or a claim disputing the cause of injury, go beyond the scope of section 1797 and may be pursued under section 8371.¹⁵²⁵

Turning to the allegations in the complaint, the court concluded that nearly all were preempted, including those that averred that Allstate failed to pay first party medical benefits, failed to properly evaluate the claim, improperly ordered an IME, improperly challenged the judgment of the treating physician, and caused Hickey to file the lawsuit. The only allegation that the court found survived preemption was the allegation that Allstate "had and has a practice of attempting to terminate medical treatment by 'independent medical examination' without reasonable cause to do so."¹⁵²⁶ The court decided that this averment was essentially an attack on Allstate's alleged abuse of the PRO process, so preemption would not apply and a bad faith action based on that allegation could go forward.

Hickey also argued that because Allstate had not actually used the statutorily-created PRO process in ordering and performing the IME, §1797 would not apply and the bad faith claims would not be preempted. The court disagreed,

¹⁵¹⁸ *Roppa v. GEICO Indem. Co.*, 2010 U.S. Dist. LEXIS 140033, at *11-18 (W.D. Pa. Dec. 29, 2010).

¹⁵¹⁹ *Roppa*, 2010 U.S. Dist. LEXIS 140033, at *16-17.

¹⁵²⁰ *Roppa*, 2010 U.S. Dist. LEXIS 140033, at *21-22 (citing *Hickey v. Allstate Prop. & Cas. Ins. Co.*, 2010 WL 2606646 (M.D. Pa. June 25, 2010)).

¹⁵²¹ *Roppa*, 2010 U.S. Dist. LEXIS 140033, at *22.

¹⁵²² 2010 U.S. Dist. LEXIS 63225 (M.D. Pa. June 25, 2010).

¹⁵²³ *Roppa*, 2010 U.S. Dist. LEXIS 140033, at *29.

¹⁵²⁴ 589 F. Supp. 2d 559 (M.D. Pa. 2008).

¹⁵²⁵ *Hickey v. Allstate Prop. & Cas. Ins. Co.*, 722 F. Supp. 2d 609, 614 (M.D. Pa. 2010).

¹⁵²⁶ *Hickey*, 722 F. Supp. 2d 609, 615 (citation to record omitted).

finding that an insurer does not need to actually use the peer review process to preempt bad faith claims under the MVFRL:

Thus, the purpose of section 1797 is to provide statutory remedies and procedures in case of a dispute over the reasonableness or necessity of treatment. The element necessary to trigger section 1797 is a dispute over the reasonableness or necessity of treatment, rather than an insurer's utilization of a PRO.... Section 1797 can be triggered even when an insurer does not utilize a PRO. In fact, section 1797(b)(4) provides a specific procedure an insured can use to challenge an insurer's denial of benefit payments where the insurer does not utilize a PRO.¹⁵²⁷

Regardless of whether or not Allstate reviewed Hickey's care under the PRO process, the court held that the dispute centered around the issue of whether Hickey's treatment was reasonable or necessary—exactly the type of claim §1797 was meant to address. Therefore, §1797 did apply, and the bad faith claims were thus largely preempted.

(3) *Martino v. Allstate Indem. Co.*, 2009 U.S. Dist. LEXIS 86612 (M.D. Pa. Sept. 22, 2009) (Vanaskie, J.)

In December 2003, Martino was in an automobile accident after which she sought first party medical benefits from Allstate, her auto insurer. Allstate began paying for expenses related to treatment of her back injuries. In September 2005, Martino had surgery on her back, and in March 2006, began treatment with another physician. In May 2006, she sought treatment for addiction to pain medication.

Allstate received a peer review report from a physician in August 2006; the report indicated that none of the treatment was reasonable or necessary and Allstate subsequently ceased payments. Almost a year later, Martino saw a chiropractor, whose care was noted to be unnecessary by another peer review report. Allstate denied coverage. Martino filed suit over a year later, claiming that Allstate breached its policy and acted in bad faith. Allstate filed a motion to dismiss the bad faith claim, which Judge Vanaskie of the Middle District denied.

Allstate claimed that because the peer review reports were generated pursuant to a state statute authorizing them, the bad faith claims could not stand. Martino argued that because the peer review reports went beyond the reasonableness of treatment issues and extended to whether the auto accident caused the injuries, her bad faith claims were not preempted. Accepting Martino's averments as true, the court agreed with Martino that the bad faith claims were not preempted in part because causation questions were of a legal nature, not a medical one, and thus not in the purview of the peer review process:

The peer review organization to which this statute refers consists of other medical providers, i.e., medical, not legal "peers." Submission and review of legal questions rather than medical questions, therefore, would not be "peer" review at all."¹⁵²⁸

The court found that "[t]he principles of causation and reasonableness or necessity are conceptually distinct."¹⁵²⁹ Because the peer review reports addressed the issue of whether the injuries were related to the auto accident, rather than whether the treatment being received was reasonable or necessary, the reports were outside the scope of §1797.

The court also rejected Allstate's argument that because the case law did not clearly set forth the medical/legal distinction for these statutorily authorized reports, its actions were reasonable and thus not in bad faith.

Allstate relies on *Bodtke v. State Farm Mutual Auto. Ins. Co.*, 432 Pa. Super. 31, 637 A.2d 648 (Pa. Super. Ct. 1994), *rev'd*, 540 Pa. 540, 659 A.2d 541 (1995). This argument is unavailing. *Bodtke* is a splintered opinion by a three judge panel, in which the majority, in *dicta*, stated that "the PRO's determination that certain injuries treated were not related to the accident is simply another way of stating that they were not medically necessary." *Id.* at 649. This conclusion was not integral to the outcome of the decision, and the concurring judge aggressively disagreed with the majority's conclusion. He felt the majority should not have addressed the issue and that the majority erred. He stated: "Whether treatment is medically necessary for a specified injury is an entirely different issue from whether that injury is causally related to the accident and therefore covered under the applicable policy of insurance. *Id.* at 650. Moreover, in *Schwartz [v. State Farm Ins. Co.]*, 1996 U.S. Dist. LEXIS 4994, 1996 WL 189839, at *8 n.5 [(E.D. Pa. Apr. 18, 1996)], Judge Marjorie Rendell, then a member of the Eastern District of Pennsylvania Court, expressly disagreed with the majority's reasoning in *Bodtke*. Therefore, reliance on *Bodtke*, especially in light of its unpersuasive rationale and court rulings to the contrary, is misplaced."¹⁵³⁰

The court concluded that because the case Allstate relied on in its denial was "unpersuasive," it would not weigh in Allstate's favor on the bad faith claim.

¹⁵²⁷ *Hickey*, 722 F. Supp. 2d 609, 615 (citations omitted).

¹⁵²⁸ *Martino v. Allstate Indem. Co.*, 2009 U.S. Dist. LEXIS 86612, at *11 (M.D. Pa. Sept. 22, 2009) (quoting *Daumer v. Allstate Ins. Co.*, 1992 U.S. Dist. LEXIS 3386 (E.D. Pa. Mar. 18, 1992)).

¹⁵²⁹ *Martino v. Allstate Indem. Co.*, 2009 U.S. Dist. LEXIS 86612, at *13.

¹⁵³⁰ *Martino v. Allstate Indem. Co.*, 2009 U.S. Dist. LEXIS 86612, at *14-15 (footnote omitted).

Martino also argued that the peer review organization from which Allstate sought a report was biased because it had a financial interest in providing reports in Allstate's favor so as to continue receiving Allstate's business. Judge Vanaskie noted that "courts have recognized that allegations of bias are not within the scope of §1797, and fall within §8371."¹⁵³¹ Thus, Martino's complaint withstood the motion to dismiss because she stated a claim that Allstate acted in bad faith.

(4) Cieplinski v. State Farm Mut. Auto. Ins. Co., 2010 U.S. Dist. LEXIS 75257 (M.D. Pa. July 26, 2010) (Caputo, J.)

Cieplinski was injured in an automobile accident and sought first party medical benefits from State Farm. State Farm submitted the claim to the PRO and the reviewer determined that the chiropractic treatment she was receiving was not necessary, so the company refused to provide coverage for that treatment. As a result of plaintiff filing suit, the insurer agreed to pay the expenses at issue, after which Cieplinski continued her chiropractic care. Cieplinski submitted the later bills to State Farm, which submitted the claim for a second PRO review. The same reviewer examined the claims, and determined that the chiropractic treatment was no longer necessary after a certain date. State Farm denied coverage of chiropractic care after that date.

Cieplinski filed suit against State Farm alleging breach of contract and statutory bad faith. State Farm filed a motion to dismiss the bad faith claim and part of the contract claim. As to the bad faith claim, State Farm argued that it was preempted by §1797 of the MVFRL. Judge Caputo of the Middle District disagreed, noting that in certain circumstances, preemption by §1797 is not complete, and such circumstances were present in this case.

The court relied upon *Perkins v. State Farm Ins. Co.*,¹⁵³² which had determined that it was possible to effectuate both §1797 and §8371 where the claim involved an abuse of the peer review process:

The court [in *Perkins*] held that such allegations were not preempted by §1797, reasoning that "allowing a bad faith claim where an insurer abuses the [peer review] process gives effect to the intent of both §1797 and §8371 by ensuring that insurers utilize the [PRO] process only for its stated purposes—determining the reasonableness and necessity of treatment—and preserving the broad remedial provisions enacted by the bad faith statute."¹⁵³³

The court held that Cieplinski's allegations were similar to those in *Perkins*, and thus followed that decision: Like the plaintiff in *Perkins*, Plaintiff in the instant case has made allegations that State Farm has abused the peer review process by hiring a peer reviewer that it knew had previously provided negative reports regarding Plaintiff's treatment. . . . Such allegations are not preempted by §1797. However, to the extent that Plaintiff's §8371 claim is based on failure to conduct a reasonable investigation, evaluate coverage, or promptly notify her of a denial of first party benefits, such allegations are preempted by §1797. *See Perkins*, 589 F. Supp. 2d at 566. Thus, Plaintiff's bad faith claim survives only to the extent that she is alleging that State Farm abused the peer review process by hiring a peer reviewer that would give a biased determination.¹⁵³⁴

(5) Bukofski v. USAA Casualty Ins. Co., 2009 U.S. Dist. LEXIS 48128 (M.D. Pa. June 9, 2009) (Munley, J.)

In this case, the plaintiff alleged that the insurer acted in bad faith in its handling of a UIM claim. The plaintiff argued, among other things, that the insurer retained a Peer Review Organization to challenge the reasonableness and necessity of plaintiff's medical treatment in bad faith so as to force her health care providers to stop treatment necessary for alleged accident related injuries. The insurer moved to dismiss, arguing that the Section 8371 claim was pre-empted by the MVFRL. Judge Munley of the Middle District denied the insurer's motion to dismiss. The court held that this was not a case of whether the MVFRL pre-empted a bad faith claim in connection with first party benefits. The court held that plaintiff's theory really related to the handling of the UIM claim.

(6) Stephano v. TRI-ARC Financial Services, Inc., 2008 U.S. Dist. LEXIS 16673 (M.D. Pa. Mar. 4, 2008) (Vanaskie, J.)

The plaintiff filed a lawsuit against Tri-Arc Financial Frontier Adjusters, and Lexington Insurance Company for breach of contract and statutory bad faith under §8371, as well as for alleged violations of the Pennsylvania Motor Vehicle Financial Responsibility Law. Plaintiff claimed that these defendants unreasonably failed to pay first party medical benefits in breach of the applicable policy and in bad faith. Lexington sought dismissal of the §8371 bad faith claim as preempted by the MVFRL, 75 Pa.C.S. §1797.

Lexington argued that the bad faith statute and the specific MVFRL provision concerning "overdue benefits" conflicted, thus barring any type of recovery under the more general bad faith statute. Lexington further argued that

¹⁵³¹ *Martino v. Allstate Indem. Co.*, 2009 U.S. Dist. LEXIS 86612, at *16-17.

¹⁵³² *Perkins v. State Farm Ins. Co.*, 589 F. Supp. 2d 559 (M.D. Pa. 2008).

¹⁵³³ *Cieplinski v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 75257, at *7-8 (M.D. Pa. July 26, 2010) (quoting *Perkins v. State Farm Ins. Co.*, 589 F. Supp. 2d 559, 566 (M.D. Pa. 2008)).

¹⁵³⁴ *Id.* at *8 (citation to record omitted).

the more specifically applicable provision set forth in §1797 of the MVFRL afforded the exclusive avenue of relief. Judge Vanaskie of the Middle District disagreed, and ruled in favor of the plaintiff.

The court observed that the Supreme Court of Pennsylvania had not addressed the issue whether §1797 preempts §8371. The court also observed that “[a]s a general rule, ‘a plaintiff may not seek punitive damages under §8371 where he or she is complaining of the denial of first party benefits determined through the process outlined in §1797.’”¹⁵³⁵ In other words, the court stated, “§1797 preempts §8371 where both are applicable.”¹⁵³⁶

However, according to the court, two statutes can be read together in certain situations:

Consistent with 1 PA. CONS. STAT. § 1933, however, courts have recognized that a §8371 claim is not preempted when an insurance company’s alleged malfeasance goes beyond the scope of Section 1797, or “is obviously not amenable to resolution by the procedures set forth in section 1797(b).” . . . These situations arise when the allegations do not invoke the remedies and procedures in §1794(b), such as a claim concerning contract interpretation, a claim of abuse of process, or a dispute over whether a motor vehicle accident caused the medical expenses. In these situations, courts have reconciled the two statutes and found bad faith claims to supplement claims under § 1797.¹⁵³⁷

The court disagreed with Lexington’s arguments that the plaintiff’s claims for medical benefits were within the scope of §1797 because they amounted to nothing more than a denial of first party medical benefits. The court stated that:

Here, the allegations do not call into question the reasonableness or necessity of the medical treatment. In fact, the conduct in question occurred before the statutory scheme in §1797 would be triggered.¹⁵³⁸

The court therefore denied Lexington’s motion, holding:

In summary, Plaintiff’s allegations do not call into question the processes and remedies of §1797, or concern the very purpose of §1797 -- to confirm that “treatment, products, services or accommodations conform to the professional standards of performance and are medically necessary.” 75 PA. CONS. STAT. § 1797(b)(1). Therefore, Plaintiff will be allowed to proceed with her §8371 claim against Defendant Lexington.¹⁵³⁹

(7) *Roche v. New Jersey Manufacturers Ins. Co.*, 78 F. App’x 183 (3d Cir. 2003) (Alito, J.)

Following an automobile accident, the plaintiff brought suit alleging that her insurer breached its policy with her step-father by failing to pay her claim for medical costs under the policy and the Pennsylvania Motor Vehicle Financial Responsibility Law, and in doing so had breached its duty of good faith. Section 1797 of the MVFRL allows a court to award treble damages for insurer conduct that is considered “wanton.”¹⁵⁴⁰ The district court refused to award exemplary damages for the alleged bad faith conduct, and, in an unpublished opinion, the Third Circuit affirmed, reasoning as follows:

We have defined bad faith as a “frivolous or unfounded refusal to pay, lack of investigation into the facts, or a failure to communicate with the insured.” . . . Here we cannot conclude that such bad faith was present. [The insurer] never denied [plaintiff] Roche coverage but rather requested more information to make the necessary cost containment calculations under [the MVFRL]. It did not make frivolous refusals to pay but continued to request the proper documents so that it could fulfill its obligations under its policy with Roche’s stepfather.¹⁵⁴¹

(8) *Rudisill v. Continental Ins. Co.*, 2001 U.S. Dist. LEXIS 15946 (E.D. Pa. Sept. 14, 2001) (McLaughlin, J.)

The plaintiff was insured under a policy which provided first party coverage for treatment of injuries the plaintiff incurred after the accident.

The plaintiff sued the insurer under §1716 of the MVFRL (providing for awards of interest and attorney fees when an auto insurance company unreasonably delays payment to an insured) and §8371. The insurer argued that §1716 preempted §8371 because it provided different punishment for the same behavior.

Judge McLaughlin of the Eastern District noted Pennsylvania’s rules of statutory construction which provide that “provisions should be read so that they do not conflict, if possible” but that if they do conflict “then the more specific provision prevails, unless the general provision was enacted after the specific, and it was the ‘manifest intention’ of

¹⁵³⁵ *Stephano v. TRI-ARC Fin. Servs., Inc.*, 2008 U.S. Dist. LEXIS 16673, at *14 (M.D. Pa. 2008) (citations omitted).

¹⁵³⁶ *Id.* at *14 (citations omitted).

¹⁵³⁷ *Id.* at *15 (citations omitted).

¹⁵³⁸ *Id.* at *23-24.

¹⁵³⁹ *Id.* at *24.

¹⁵⁴⁰ See 75 Pa. C.S.A. §1797(b)(4).

¹⁵⁴¹ *Roche*, 78 F. App’x. 187.

the General Assembly that the general should prevail.”¹⁵⁴² The court held that §1716 did not preempt §8371. According to the court, “Section 1716 applies to unreasonable denials, and Section 8371 applies to denials that are both unreasonable and in bad faith. They are consistent with one another because they provide for different degrees of punishment for different degrees of bad behavior.”¹⁵⁴³

The court further observed, “Even if Section 1716 were inconsistent with Section 8371, Section 8371 would prevail” because “a general provision prevails if it is enacted later and it is the ‘manifest intention’ of the legislature that it should.”¹⁵⁴⁴ The court held that §1716 was enacted six years before §8371 and recognized the repealer section of the bad faith statute providing that “all other acts and parts of acts are repealed insofar as they are inconsistent with the act,”¹⁵⁴⁵ which the court reasoned made “manifest the legislature’s intention that Section 8371 should prevail over the precursor to Section 1716.”¹⁵⁴⁶

(9) *Pisarchick v. Progressive Cos.*, 52 Pa. D. & C.4th 1 (Lackawanna Apr. 27, 2001) (Minora, J.)

Judge Minora of the Lackawanna County Court of Common Pleas has held that a claim under §8371 has not been preempted by §1797(b) of the MVFRL. The court rejected the insurer’s arguments to the contrary, suggesting that the insurer’s reliance upon the Superior Court decision in *Barnum* and the Third Circuit decision in *Gemini Physical Therapy* was inappropriate, in light of the subsequent reversal of *Barnum* by the Pennsylvania Supreme Court. The court denied the insurer’s preliminary objections to the plaintiff’s bad faith complaint.

(10) *Hladinec v. Nationwide Ins. Co.*, 44 Pa. D. & C.4th 571 (Fayette 2000) (Solomon, J.)

In this case, the plaintiff alleged a cause of action for bad faith pursuant to the insurer’s utilization of a PRO. The insurer alleged that the MVFRL was the exclusive remedy for a denial of first party benefits. The court rejected this argument, stating:

From the reasoning in these decisions, bad faith claims under §8371 have been permitted to go forward even though the insurer had submitted the claims to a Peer Review Organization. The only condition imposed is that there must be an allegation of misconduct or abuse of the peer review process on the part of the insurer.¹⁵⁴⁷

(11) *Bubb v. Nationwide Mutual Ins. Co.*, No. 1:cv-99-1852 (M.D. Pa. Aug. 10, 2000) (Rambo, J.)

The plaintiff instituted a breach of contract and bad faith action for failure to pay first party medical bills alleged to have arisen as a result of an automobile accident. The insurer requested an independent physician to perform a “records review” of treatment rendered to the plaintiff by her dentist. Unlike a review by a peer review organization, this records review addressed causation issues, opining that the plaintiff’s injuries were unrelated to the motor vehicle accident. Judge Rambo of the Middle District held that such a record review was outside a §1797 peer review and therefore could be the subject of a claim under §8371. The court ruled that a reasonable jury could find that the company acted in bad faith when it denied coverage, and therefore denied the insurer’s motion for summary judgment.

(12) *Smith v. Zarnick*, 47 Pa. D. & C.4th 353 (Butler Apr. 11, 2000) (Doerr, J.)

In this case, the insurer denied the plaintiff-husband’s first party medical benefits claim because the injuries allegedly re-sulted from an accident involving a recreational vehicle which, the company argued, was not a “motor vehicle” as defined in the policy. Judge Doerr of Butler County held that such a denial is clearly not governed by §1797 of the MVFRL and therefore denied the insurer’s argument that the §8371 claim was preempted by the insured’s first party medical claim.

(13) *Taylor v. Nationwide Ins. Co.*, 35 Pa. D. & C.4th 101 (Allegheny 1997) (Wettick, J.)

In this case, discussed in §4:04, Judge Wettick of Allegheny County reaffirmed his analysis in *Pipchock* and held that *Barnum v. State Farm* did not mandate a different result. The court in *Taylor* agreed that a §8371 claim could not be maintained where an insurance company relied on a Peer Review Organization (PRO) determination that the medical treatment at issue was not medically necessary. Where a PRO was not utilized, however, the court concluded that §8371 was not inconsistent with the MVFRL.

(14) *Burgette v. Selective Ins. Co.*, 38 Pa. D. & C.4th 362 (Lackawanna 1998) (Corbett, J.)

Based upon a PRO, Selective Insurance advised its policyholder that it would not pay for any medical treatment that occurred more than four months after the automobile accident. The plaintiff filed a complaint alleging breach of contract, bad faith, and wrongful utilization of a PRO to deny first party benefits. Selective Insurance moved for summary judgment, which was denied. The court held that Section 1797(b) of the MVFRL allows an insurer to retain

¹⁵⁴² 2001 U.S. Dist. LEXIS 15946, at *3.

¹⁵⁴³ 2001 U.S. Dist. LEXIS 15946, at *9.

¹⁵⁴⁴ *Id.* at *10.

¹⁵⁴⁵ *Id.* at *10-11.

¹⁵⁴⁶ *Id.* at *11.

¹⁵⁴⁷ *Hladinec v. Nationwide*, slip op. at 5.

a PRO to ascertain only that the treatment conforms to professional standards and is medically necessary—not whether the medical treatment was causally related to the particular accident.¹⁵⁴⁸

(15) *Gringeri v. Maryland Cas. Co.*, 1998 U.S. Dist. LEXIS 5931 (E.D. Pa. Apr. 29, 1998) (Padova, J.)

In this case, discussed in §15:02 above, Judge Padova of the Eastern District stated that a party *may* be entitled to seek punitive damages under §8371 in limited circumstances, such as where the insurer knows the claim is legitimate but submits it to a PRO nevertheless.

(16) *Schwartz v. State Farm Ins. Co.*, 1996 U.S. Dist. LEXIS 4994 (E.D. Pa. Apr. 17, 1996) (Rendell, J.)

In this case, Judge Rendell of the Eastern District concluded that although the plaintiff's medical care provider could not assert bad faith for an insurer's denial of first party benefits after proper reference of those bills to a PRO under §1797, it could assert bad faith for an insurer's improper use or abuse of the PRO process. The plaintiff asserted a bad faith claim under §8371 on the ground that the insurer had improperly submitted medical bills to the PRO for a determination of causation and had also improperly selected the PRO based on its pattern of denying payment. The insurer moved to dismiss the plaintiff's bad faith claim, asserting that §1797 was the exclusive remedy for denial of first party medical claims, but the court declined to dismiss the bad faith count. The court reasoned that "[w]here an insurer has not complied with the specific provisions of §1797 with regard to its purpose in submitting a claim to a PRO, there is no reason to limit the damages that may be recovered from the insurer to the damages set out in that section. In that situation §§8371 and 1797 are not irreconcilable."¹⁵⁴⁹

(17) *Cacchiotti v. Material Damage Adjustment Corp.*, 31 Pa. D. & C.4th 437 (Dauphin 1996) (Clark, J.)

Judge Clark of Dauphin County held that an insurer's conduct prior to submitting a claim to a PRO may give rise to a bad faith claim, but such a claim requires more than a mere allegation that there was no reasonable basis for submitting the insured's claim to a PRO. In granting the defendant's preliminary objections, the court emphasized that an insured's allegation that there was no reasonable basis for the bills to be reviewed by the PRO was not sufficient to establish a §8371 claim.

§15:04 Cases Involving Requests for Wage Loss Benefits

(1) *Schleinkofer v. National Cas. Co.*, 339 F. Supp. 2d 683 (W.D. Pa. 2004) (Gibson, J.)

In this case, Judge Gibson of the Western District addressed the issue of whether a plaintiff seeking wage loss benefits as a result of an automobile accident can seek punitive damages under Pennsylvania's bad faith statute. The court observed that several courts have attempted to distinguish wage loss benefits from medical benefits for purposes of §8371, on the basis that "the conduct described in §1716 as 'unreasonable' is different from the conduct described in §8371 as 'bad faith.'"¹⁵⁵⁰ Accepting this distinction, the court concluded, "[I]f the Pennsylvania Supreme Court were presented with the issue before this Court it would determine that the Plaintiff may maintain a bad faith action with regard to denial of first party wage loss benefits pursuant to 42 Pa. C.S.A. §8371 because 75 Pa.C.S.A. §1716 does not provide the exclusive remedy for such a claim."¹⁵⁵¹

(2) *Bennett v. State Farm Fire & Cas. Ins. Co.*, 890 F. Supp. 440 (E.D. Pa. 1995) (Joyner, J.)

In ruling on the insurer's motion to dismiss for failure to state a claim, Judge Joyner of the Eastern District held that the MVFRL provided the exclusive remedy for an insured or medical provider to challenge an insurer's denial of first party *medical* benefits. However, the court also recognized that numerous courts at both the state and federal level have permitted bad faith actions in conjunction with claims under the MVFRL for lost wages. Because the plaintiff's complaint alleged general violations of the motor vehicle law, the court denied the insurer's motion to dismiss.

(3) *Weisbein v. Home Ins. Co.*, 1994 U.S. Dist. LEXIS 4330 (E.D. Pa. April 8, 1994) (Sutton, J.)

Judge Sutton of the Eastern District concluded that a plaintiff may assert a claim for punitive damages under §8371 for denial of wage loss benefits under an auto insurance policy. The court rejected defendant's argument that §1716 of the MVFRL, which governs the payment of insurance benefits generally, is the exclusive remedy for a wage loss claim. Relying on *Danley v. State Farm*,¹⁵⁵² the court held that "unreasonable conduct" is qualitatively distinct from "bad faith" conduct. The court rejected the defendant's contention that §1716 and §8371 are "irreconcilably inconsistent."

¹⁵⁴⁸ For similar cases and holdings, see *Neun v. State Farm Ins. Co.*, 1996 U.S. Dist. LEXIS 5738 (E.D. Pa. May 1, 1996) (if insurer invokes PRO process for statutorily impermissible purpose, insured's damages not limited to §1797 if he can prove bad faith); see also *Abbazio v. Nationwide Ins. Co.*, C.C.P. Monroe Co. (Oct. 24, 1996); *Hice v. Prudential Ins. Co.* (C.C.P. Westmoreland Co., Sept. 23, 1997).

¹⁵⁴⁹ *Schwartz*, 1996 U.S. Dist. LEXIS 4994, at *11 (E.D. Pa. Apr. 17, 1996).

¹⁵⁵⁰ *Schleinkofer v. National Cas. Co.*, 339 F. Supp. 2d 683, 688 (W.D. Pa. Sept. 29, 2004) (quoting *Danley v. State Farm Mut. Auto. Ins. Co.*, 808 F. Supp. 399, 402 (M.D. Pa. 1992)).

¹⁵⁵¹ *Schleinkofer*, 339 F. Supp. 2d at 688.

¹⁵⁵² 808 F. Supp. 339 (M.D. Pa. 1992).

CHAPTER 17 ADDITIONAL ISSUES UNDER THE BAD FAITH STATUTE

§17:04 Recent Cases

(1) *Salvatore v. Blue Cross of Ne. Pa.*, 2014 U.S. Dist. LEXIS 130212 (M.D. Pa. Sept. 15, 2014) (Mariani, J.)

Plaintiff applied for, and was issued a health policy with defendant Blue Cross, after she began work for an employer. Several months later, she had surgery for a neck problem that was caused by an auto accident prior to starting her job. About a year later, she was informed by Blue Cross that her policy was being rescinded and that she would be responsible for the costs relating to the surgery, because of misrepresentations in her application. Plaintiff then filed this breach of contract and bad faith suit. Blue Cross filed a motion to dismiss. Judge Mariani of the Middle District granted the motion. In so doing, he noted that in response to the motion to dismiss, plaintiff conceded that the bad faith claim was preempted by Third Circuit precedent.

(2) *Minchella v. Sun Life Assurance Co. of Canada*, 2013 U.S. Dist. LEXIS 136326 (E.D. Pa. Sept. 23, 2013) (Rufe, J.)

Plaintiff's decedent was insured with a group life insurance policy, issued by defendant Sun Life, through his employer. When he died, his estate's administrator sought benefits, but when the parties could not resolve the claim, plaintiff filed this bad faith action. Defendant filed a motion to dismiss. Judge Rufe of the Eastern District of Pennsylvania granted the motion.

Defendant contended that the statutory bad faith claim was preempted by ERISA. The court agreed: "The Third Circuit has squarely confronted the question of whether a person can pursue a §8371 claim against the provider of an ERISA plan, and answered in the negative. Plaintiff's §8371 claim is therefore dismissed without prejudice to the assertion of an appropriate claim under ERISA."¹⁵⁵³

(3) *Kirshy v. Life Ins. Co. of N. Am.*, 2011 U.S. Dist. LEXIS 47686 (M.D. Pa. May 4, 2011) (Caputo, J.)

In this case, Judge Caputo of the Middle District dismissed claims alleging breach of contract, bad faith and violation of the Unfair Trade Practices and Consumer Protection Law based upon ERISA:

[I]n *Barber v. Unum Life Ins. Co. of America*, the Third Circuit, in the wake of the expansive holding of *Aetna Health [Inc. v. Davila]*, 542 U.S. 200 (2004)], held that Pennsylvania's bad faith statute is preempted under ERISA §514(a). 383 F.3d 134, 140 (3d Cir. 2004). In that case, even though the bad faith statute was designed to govern the insurance industry, and thus appeared to be explicitly protected from preemption under ERISA's savings clause, the Third Circuit, applying the two-prong test propounded in *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 123 S. Ct. 1471, 155 L. Ed. 2d 468 (2003), found that the statute did not "regulate insurance" such that it was shielded from ERISA's express exemption provision. *Barber*, 383 F.3d at 141. Finally, applying *Aetna Health* and *Miller's* analysis of the insurance industry exception to §514(a), at least one Middle District of Pennsylvania court has found that a claim brought under Pennsylvania's UTPCPL is preempted by ERISA. See *Viechnicki v. Unumprovident Corp.*, No. 06-cv-2460, 2007 U.S. Dist. LEXIS 8959 (E.D. Pa. Feb. 8, 2007).¹⁵⁵⁴

The court permitted plaintiff leave to amend in order to plead any claims under ERISA.

(4) *Erbe v. Billeter*, 2006 U.S. Dist. LEXIS 98438 (W.D. Pa. Oct. 16, 2006) (Lenihan, M.J.), adopted by, 2006 U.S. Dist. LEXIS 80632 (W.D. Pa. Nov. 3, 2006) (McVerry, J.)

Plaintiff's husband worked for Exxon and died of a heart attack as he was leaving work. Plaintiff was executrix of her husband's estate. Following her husband's death, she pursued claims against defendant Connecticut General for accidental death and dismemberment (AD&D) under a group life insurance policy. Connecticut General denied the claim because the death was not caused solely by an accident independent of all other causes, as required under the policy. There were subsequent negotiations with the plaintiff, but ultimately the company maintained its denial. Plaintiff sued, claiming, *inter alia*, breach of contract and statutory bad faith. Connecticut General moved to dismiss based on ERISA preemption. Magistrate Judge Lenihan of the Western District recommended that the state law claims be dismissed without prejudice and that plaintiff be given leave to file an amended complaint. Judge McVerry accepted the recommendations of the Magistrate Judge.

The court concluded that the claims alleging violations of state statute were expressly preempted by ERISA because the insurance policy at issue in the case was an employee benefit plan: "Here Plaintiff's bad faith statute and UTPCPL claims relate to the denial of her claim for AD&D benefits under the Exxon employee benefit plan and

¹⁵⁵³. *Minchella v. Sun Life Assurance Co. of Canada*, 2013 U.S. Dist. LEXIS 136326, at *9 (E.D. Pa. Sept. 23, 2013) (footnote omitted; citing *Barber*).

¹⁵⁵⁴. *Kirshy v. Life Ins. Co. of N. Am.*, 2011 U.S. Dist. LEXIS 47686, at *7-8 (M.D. Pa. May 4, 2011) (footnote omitted).

therefore fall within the express preemption clause of 29 U.S.C. § 1144(a).¹⁵⁵⁵ The savings clause did not apply to preclude preemption, according to the court, reasoning as follows:

Pennsylvania's bad faith statute is not a law regulating insurance because that statute does not substantially affect the risk-pooling arrangement between the insurer and insured. . . . Therefore, since the saving clause does not apply to the Pennsylvania insurer bad faith statute, Plaintiff's claim alleging a violation of this statute is expressly preempted by ERISA and must be dismissed.¹⁵⁵⁶

(5) *Eric A. Shore, P.C. v. Indep. Blue Cross*, 2016 U.S. Dist. LEXIS 160022 (E.D. Pa. Nov. 18, 2016) (McHugh, J.)

Plaintiff law firm had a health insurance policy for its employees with defendant IBC. IBC improperly denied various claims submitted to it, so it proposed freezing plaintiff's premiums for 16 months. IBC subsequently told plaintiff that it erroneously offered to freeze the premiums for that long and that the offer should have been just until the end of that year. Plaintiff then filed this breach of contract and bad faith action. IBC filed a motion to remand. Judge McHugh of the Eastern District denied the motion.

In the course of its decision, the court held that ERISA applied to the subject health insurance policy, and ERISA would preempt the bad faith and UTPCPL claims: "Because ERISA controls, Plaintiff's claims for . . . statutory bad faith . . . and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law are preempted and must be dismissed."¹⁵⁵⁷

(6) *Harding v. Provident Life & Accident Ins. Co.*, 809 F. Supp. 2d 403 (W.D. Pa. Aug. 19, 2011) (Fischer, J.)

Plaintiff filed suit against her disability insurer, Provident for, inter alia, bad faith. Provident moved for summary judgment, arguing that the claim should be dismissed because ERISA preempted such state law claims. Judge Fischer of the Western District granted the motion. The court found that ERISA preempted the bad faith claim, relying on the Third Circuit decision in *Barber v. Unum Life Insurance Co.*¹⁵⁵⁸

(7) *Hillard v. Prudential Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 85753 (M.D. Pa. Sept. 18, 2009) (Munley, J.)

Plaintiff was injured in a car accident and applied for disability benefits through a group insurance policy issued by Prudential. The insurer provided short term disability benefits for a period of time, and then terminated those benefits and denied long term benefits. Plaintiff filed suit, alleging in count I that he was entitled to benefits under ERISA and alleging in count II that he was entitled to recovery under §8371. Defendant filed a motion for summary judgment, alleging in pertinent part that the bad faith claim was preempted. Judge Munley of the Middle District agreed, stating, "According to the Third Circuit Court of Appeals, a claim for bad faith under Pennsylvania state law is preempted by ERISA. *Barber v. UNUM Life Ins. Co.*, 383 F.3d 134, 140-41 (3d Cir. 2004)."¹⁵⁵⁹

(8) *Brown v. Independence Blue Cross*, 2008 U.S. Dist. LEXIS 55294 (E.D. Pa. July 21, 2008) (Shapiro, J.)

In this case involving delayed benefits under a health insurance policy, Judge Shapiro of the Eastern District reiterated the rule that ERISA preempts claims under the Pennsylvania bad faith statute, stating, "ERISA expressly preempts all state claims that 'relate to any employee benefit plan.' . . . Other than disputing whether Brown was an employee under ERISA, the parties do not dispute that the ECA health insurance plan is an 'employee welfare benefit plan' under 29 U.S.C. §1002(1)."¹⁵⁶⁰

(9) *Knochel v. HealthAssurance Pennsylvania*, 2006 U.S. Dist. LEXIS 81009 (W.D. Pa. Sept. 25, 2006) (Hay, M.J.)

Relying upon *Barber v. UNUM*, the Magistrate Judge recommended dismissal of plaintiff's bad faith claim.

(10) *Broadnax v. Life Ins. Co. of North America*, 2005 U.S. Dist. LEXIS 11884 (E.D. Pa. June 17, 2005) (Baylson, J.)

In an ERISA action arising out of the allegedly wrongful refusal to make payment under a long term disability insurance plan, the court held that a separate count which alleged that the insurers "acted arbitrarily and capriciously when they withheld plaintiff's long term disability benefits" was in essence a bad faith claim, and preempted by ERISA.

¹⁵⁵⁵ *Erbe v. Billeter*, 2006 U.S. Dist. LEXIS 98438, at *18 (W.D. Pa. Oct. 16, 2006).

¹⁵⁵⁶ *Erbe v. Billeter*, 2006 U.S. Dist. LEXIS 98438, at *19 (W.D. Pa. Oct. 16, 2006).

¹⁵⁵⁷ *Eric A. Shore, P.C. v. Indep. Blue Cross*, 2016 U.S. Dist. LEXIS 160022, at *7-8 (E.D. Pa. Nov. 18, 2016).

¹⁵⁵⁸ *Harding v. Provident Life & Accident Ins. Co.*, 809 F. Supp. 2d 403, 419 (W.D. Pa. Aug. 19, 2011) (citing *Barber v. Unum Life Insurance Co.*, 383 F.3d 134 (3d Cir. 2004)).

¹⁵⁵⁹ *Hillard v. Prudential Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 85753, at *14-15 (M.D. Pa. Sept. 18, 2009).

¹⁵⁶⁰ *Brown v. Independence Blue Cross*, 2008 U.S. Dist. LEXIS 55294, at *17-18 (E.D. Pa. July 21, 2008) (citations omitted).

(11) *Post v. Hartford Ins. Co.*, 2005 U.S. Dist. LEXIS 2633 (E.D. Pa. Feb. 23, 2005) (Kelly, Sr. J.)

The Third Circuit decided *Barber* while this case was pending, causing the plaintiff to amend her complaint, alleging that the disability insurance plan at issue was not subject to ERISA due to the applicability of the “safe harbor” provisions. Judge Kelly succinctly summarized the applicable law: “[I]f the safe harbor provisions are met, ERISA will not apply and the state law bad faith claim will not be preempted. However, if the safe harbor provisions are not satisfied, [plaintiff’s] state law bad faith claim will be preempted by ERISA.”¹⁵⁶¹ Reviewing the employer plan at issue, the court held that the plan did not satisfy the safe harbor criterion dealing with limited employer activities/no endorsement, so that ERISA applied, and the bad faith claim was preempted.

CHAPTER 18 THE UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW AND INSURER BAD FAITH

§18:02 Selected Cases Discussing the UTPCPL in Connection With Bad Faith Claims

(1) *Neal v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 20017 (M.D. Pa. Feb. 18, 2014) (Kane, J.)

Plaintiff was injured in an auto accident, following which she sought first party medical benefits under her policy with State Farm. After paying for benefits for a period of time, defendant had plaintiff submit to an IME, following which, it terminated benefits. Plaintiff then filed this bad faith action, also alleging a violation of the UTPCPL, and defendant filed a motion to dismiss the UTPCPL claim. Judge Kane of the Middle District denied the motion in this respect.

Defendant contended that the complaint alleged nonfeasance in failure to pay benefits, which was insufficient to state a claim. The court disagreed, noting that the bad faith claim alleged that defendant purposefully used a biased independent medical examiner, which constituted misfeasance: “Thus, the Court finds Plaintiff has stated a claim under the UTPCPL...”¹⁵⁶²

(2) *McGuckin v. Allstate Fire & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 99376 (E.D. Pa. July 30, 2015) (Beetlestone, J.)

Plaintiff Carl McGuckin purchased an auto policy with extraordinary benefits, believing that the agent for defendant Allstate had indicated that such policies would pay for any medical bills in excess of \$100,000 following an auto accident. His wife, Geri McGuckin, was also named as an insured in the policy. After Mr. McGuckin was injured in an auto accident, he sought first party benefits from Allstate. Once the bills exceeded \$100,000, he sought extraordinary benefits under the policy. Allstate paid some of the bills, but following a peer review, began to deny his claims. Allstate also denied coverage for certain lost wages claims. Plaintiffs then filed this bad faith and UTPCPL action. Allstate filed a motion to dismiss the UTPCPL claim. Judge Beetlestone of the Eastern District granted the motion as to this claim.

In this case, the court noted, the allegations were that Allstate failed to meet its obligations under the parties’ contract and inadequately handled the claim. The court concluded that it was bound by Third Circuit precedent¹⁵⁶³ to find that UTPCPL claims in this circumstance were barred by the economic loss doctrine. The court stated: “Where ‘the crux of [the] Plaintiff’s allegations . . . is that [the] Defendant has not fulfilled its obligations under the insurance contract,’ the economic loss doctrine bars recovery for that failure.”¹⁵⁶⁴ The court also concluded that the fraud in the inducement exception to the economic loss doctrine did not apply in this case, where plaintiffs were alleging misrepresentation of or failure to disclose policy terms and use of peer reviews to avoid obligations under the policy. The court found: “Allegations that a party did not intend to perform the contract properly ‘concern the subject matter of the contract of the party’s performance; and, thus, do not fit within the limited exception to the economic loss doctrine for fraud in the inducement.’”¹⁵⁶⁵

(3) *Papurello v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 154536 (W.D. Pa. Nov. 16, 2015) (Conti, J.)

Plaintiffs filed this putative class action claiming bad faith and violation of the UTPCPL in the calculation of estimated replacement costs under homeowners’ policies with defendant State Farm. Defendant filed a motion to dismiss. Judge Conti of the Western District granted the motion with respect to the UTPCPL counts.

Plaintiffs’ complaint alleged that defendant had advertised a replacement cost policy to induce purchase and knew that such the representations were false. The court found that the allegations were too conclusory under *Twombly* to

¹⁵⁶¹. *Post v. Hartford Ins. Co.*, 2005 U.S. Dist. LEXIS 2633, at *6 (E.D. Pa. Feb. 23, 2005).

¹⁵⁶². *Neal v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 20017, at *16 (M.D. Pa. Feb. 18, 2014).

¹⁵⁶³. *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (3d Cir. 2002).

¹⁵⁶⁴. *McGuckin v. Allstate Fire & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 99376, at *9-10 (E.D. Pa. July 30, 2015) (citation omitted).

¹⁵⁶⁵. *McGuckin v. Allstate Fire & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 99376, at *12 (E.D. Pa. July 30, 2015) (citation omitted).

survive a motion to dismiss, but also addressed the substance of the claims, and concluded that the process for calculating replacement cost was in the policy and had been followed, so there was no deception: “[I]t is not deceptive for an insurer to adhere to the unambiguous language of a policy and pay claims in accordance with those terms.”¹⁵⁶⁶

(4) *Moore v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 13018 (E.D. Pa. Feb. 3, 2015) (Beetlestone, J.)

Plaintiff Moore filed this bad faith and UTPCPL action after defendant State Farm denied coverage on her homeowner’s claim. State Farm filed a motion to dismiss the UTPCPL claim. Judge Beetlestone of the Eastern District granted the motion; the portion of the order discussing the bad faith claim is discussed at §8:04(b).

The court explained that the claim was barred by the economic loss doctrine that prevents a plaintiff from recovering tort damages where the relationship between the parties was contractual. It concluded that plaintiff’s entitlement to relief stemmed only from the contract, and therefore, could not set forth a claim under the UTPCPL, noting that the complaint allegations “are ‘inextricably intertwined’ with State Farm’s failure to pay amounts Moore asserts are due under her insurance policy. . . . Under Pennsylvania law, with the exception of her statutory bad faith claim, Moore’s recovery must come from the law of contract and not from the law of torts.”¹⁵⁶⁷

(5) *Fields v. Gerber Life Ins. Co.*, 2014 U.S. Dist. LEXIS 121671 (W.D. Pa. Sept. 2, 2014) (McVerry, J.)

Plaintiff applied over the phone for an endowment life insurance policy with defendant Gerber Life on the life of her grandson, who was born with a number of abnormalities. Plaintiff claimed she told the representative of these abnormalities; she never signed any application or other paperwork. After a second phone call several days later, Gerber Life issued the policy. The grandson died about 6 months later, and plaintiff sought payment of death benefits. Gerber Life denied coverage after reviewing the grandson’s medical records and cancelled the policy based on alleged misrepresentations. After plaintiff filed this bad faith and violation of UTPCPL action, Gerber Life filed a motion to dismiss the UTPCPL claim. Judge McVerry of the Western District denied the motion.

Gerber Life contended that the non-payment of benefits was mere nonfeasance that could not support a claim under the UTPCPL. The court agreed with this proposition, but concluded that the complained alleged misfeasance sufficient to state a claim: “Several of the averments extend beyond mere non-payment under the policy and include allegations that Gerber Life improperly performed its apparent contractual obligations by *inter alia* failing to properly investigate [plaintiff’s] claim and knowingly violating state and federal law [relating to paperwork associated with sale of policy].”¹⁵⁶⁸

(6) *Gibson v. Progressive Specialty Ins. Co.*, 2015 U.S. Dist. LEXIS 63144 (E.D. Pa. May 13, 2015) (Rice, M.J.)

Plaintiff was injured in an auto accident, following which he sought first party medical benefits from his auto carrier, defendant Progressive. Progressive had a PRO review the records, and the review concluded that the treatment beyond a certain date was not reasonable or necessary. Plaintiff then filed this breach of contract, violation of UTPCPL, and bad faith suit. Progressive filed a motion to dismiss the UTPCPL and bad faith counts. Magistrate Judge Rice of the Eastern District granted the motion to dismiss the UTPCPL claim, and granted in part the motion as to the bad faith claim, as discussed in §§15:02 and 15:03.

Progressive contended that UTPCPL claims must be directed to conduct in connection with the sale of a policy, and could not be based on claims of improper claims handling. The court also explained that failure to pay benefits did not constitute misfeasance, a required showing under the statute. The court concluded first that plaintiff failed to allege misfeasance: “[T]he allegations in his UTPCPL claim relate solely to Progressive’s refusal to provide coverage or failure to act in some way, rather than misfeasance or improper performance.”¹⁵⁶⁹ The court also held that because the allegations “relate[] to Progressive’s handling of [plaintiff’s] claim, rather than Progressive’s solicitation of the policy”, the claim must be dismissed because “the UTPCPL solely relates to claims concerning the improper sale of a policy and the statutory bad faith act is limited to claims concerning the handling of an insurance claim.”¹⁵⁷⁰

(7) *Jones v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 125601 (W.D. Pa. Sept. 9, 2014) (Motz, J.)

In addition to bringing a statutory bad faith claim, plaintiff brought a claim under the UTPCPL in this dispute under her homeowner’s policy. Defendant insurer filed a motion to dismiss the UTPCPL claim. Judge Motz of the Western District granted the motion. The court explained that failure to pay benefits was mere nonfeasance, and therefore, could not provide the basis for a claim under the statute. Further, the court explained that because it had found that defendant reasonably denied payment, plaintiff could not show that the denial was misfeasance.¹⁵⁷¹

¹⁵⁶⁶ *Papurello v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 154536, at *76 (W.D. Pa. Nov. 16, 2015) (quoting *Pellegrino v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 105511 (E.D. Pa. July 29, 2013)).

¹⁵⁶⁷ *Moore v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 13018, at *5 (E.D. Pa. Feb. 3, 2015) (citation omitted).

¹⁵⁶⁸ *Fields v. Gerber Life Ins. Co.*, 2014 U.S. Dist. LEXIS 121671, at *11 (W.D. Pa. Sept. 2, 2014).

¹⁵⁶⁹ *Gibson v. Progressive Specialty Ins. Co.*, 2015 U.S. Dist. LEXIS 63144, at *11-12 (E.D. Pa. May 13, 2015).

¹⁵⁷⁰ *Gibson v. Progressive Specialty Ins. Co.*, 2015 U.S. Dist. LEXIS 63144, at *12 (E.D. Pa. May 13, 2015).

¹⁵⁷¹ *Jones v. State Farm Fire & Cas. Co.*, 2014 U.S. Dist. LEXIS 125601, at *12-13 (W.D. Pa. Sept. 9, 2014).

(8) Kelly v. Progressive Advanced Ins. Co., 2016 U.S. Dist. LEXIS 13324 (E.D. Pa. Feb. 4, 2016) (Savage, J.)

Plaintiffs submitted a UIM claim to their auto carrier, defendant Progressive. When the parties could not agree on the value of the claim, plaintiffs filed this action, alleging bad faith and violation of UTPCPL. Progressive filed a motion to dismiss. Judge Savage of the Eastern District granted the motion as to the UTPCPL. The court concluded: “The UTPCPL applies to the sale of an insurance policy. It does not apply to the handling of insurance claims. . . . Hence, an insured cannot bring an action under the UTPCPL based on the insurer’s failure to pay a claim or to investigate a claim.”¹⁵⁷²

(9) Cahall v. Ohio Cas. Ins. Co., 2015 U.S. Dist. LEXIS 93943 (W.D. Pa. July 20, 2015) (Lenihan, M.J.)

Plaintiff was involved in an auto accident, and following resolution of the claim against the tortfeasor, plaintiff submitted a claim for UIM benefits with his defendant auto insurer. When plaintiff originally obtained the auto policy, he signed a waiver form rejecting UIM coverage; subsequently, he purchased a new vehicle which was added to the policy and was the vehicle involved in the accident. No new waiver form was signed. After defendant denied coverage, plaintiff filed this bad faith and UTPCPL action. Defendant filed a motion for summary judgment. Magistrate Judge Lenihan of the Western District granted the motion.

The court concluded that under the MVFRL and case law, no new waiver form had been required, so defendant properly denied coverage. Because of this, defendant could not have violated the UTPCPL because a correct application of the policy could not be the basis for a claim of fraud or deceptive business practices.¹⁵⁷³

¹⁵⁷². *Kelly v. Progressive Advanced Ins. Co.*, 2016 U.S. Dist. LEXIS 13324, at *5-6 (E.D. Pa. Feb. 4, 2016) (citations omitted).

¹⁵⁷³. *Cahall v. Ohio Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 93943, at *15 (W.D. Pa. July 20, 2015).