

## INSURANCE AND REINSURANCE

October 2017

### IN THIS ISSUE

*In this article David Rosenberg reviews a recent Pennsylvania Supreme Court decision clarifying the elements for establishing Statutory Bad Faith. The result can be viewed as policy holder friendly, as it holds that it is not necessary for the policyholder to prove motives of ill-will or self-interest on the part of the insurer to meet their standard of proof. Also reviewed is how recent shifts in the Court since the 2015 elections may impact the direction the Court will take in deciding coverage disputes.*

## ***Rancosky vs. Washington National: Pennsylvania Finally Deals with Bad Faith Standards Head On***

### ABOUT THE AUTHOR



**David J. Rosenberg** is a Partner in the Pittsburgh office of Weber Gallagher. He concentrates his practice on insurance and commercial litigation. He handles matters including employment, civil rights, coverage, bad faith, construction litigation, premises liability, products liability and toxic torts. David's clients include some of the nation's largest property and casualty insurers and their insureds from a variety of businesses and professions. David is currently a member of the Board of Directors of the International Association of Defense Counsel (IADC). He can be reached at [drosenberg@wglaw.com](mailto:drosenberg@wglaw.com).

### ABOUT THE COMMITTEE

The Insurance and Reinsurance Committee members, including U.S. and multinational attorneys, are lawyers who deal on a regular basis with issues of insurance availability, insurance coverage and related litigation at all levels of insurance above the primary level. The Committee offers presentations on these subjects at the Annual and Midyear Meetings. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



**Natalie T. Furniss**  
**Vice Chair of Newsletters**  
Bricker & Eckler LLP  
[nfurniss@bricker.com](mailto:nfurniss@bricker.com)

*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

The Pennsylvania Supreme Court recently issued an order clarifying the bad faith standard that likely will be viewed as a victory for the plaintiff's bar. In a unanimous ruling, Pennsylvania's highest Court affirmed the decision by the Superior Court holding that a plaintiff does not have to establish self-interest or ill will in order to prove a bad faith claim. The Court held that a motive of self-interest or ill will is merely one factor to be considered.

In the case of *Rancosky v. Washington National Insurance Company* 28 WAP 2016, the Court reviewed an appeal from judgment entered in the Court of Common Pleas of Washington County. In this case, the plaintiff, Rancosky, had purchased a "cancer policy." This policy provided certain limited benefits if the policyholder was diagnosed with cancer. Rancosky was diagnosed with cancer. She then requested a claim form seeking benefits and ultimately, submitted two signed claim forms with supporting documentation. Premiums had been paid through payroll deduction. Because she was unable to work as a result of her cancer treatment, the final premium payment extended the coverage only until May 24, 2003. Eighteen months later, the carrier discovered that the payroll deductions had ceased. The insurer provided the insured with a letter informing her that in order to keep the policy from lapsing, she would have to tender payment within 15 days. The insured did not respond.

Approximately six weeks later, the carrier sent a letter to the insured advising her that the coverage had lapsed. The plaintiff took the position that the policy provided for a waiver of premiums if she was diagnosed with cancer and totally disabled. The carrier took the position that the waiver of premium (WOP) claim form had not been completed and therefore, the policy was not on WOP status.

The policyholders filed suit raising a number of claims including bad faith and breach of contract. The Trial Court granted a Motion for Partial Summary Judgment that eliminated all of the claims except for breach of contract and bad faith. These two claims were bifurcated. In an unusual quirk in Pennsylvania law, in State Court statutory bad faith is decided by the Judge. Had the case proceeded in Federal Court, it would have been a jury question. The Trial Court bifurcated and allowed the breach of contract action to proceed to the jury. After a verdict was obtained, then a non-jury trial proceeded on the bad faith claim. The jury found in favor of the plaintiff on breach of contract. The bench verdict on bad faith was in favor of the insurance carrier. The policyholder appealed this decision after the Court denied motions for post-trial relief.

On appeal, the policyholder contended that the Trial Court erroneously determined that no bad faith had occurred because the plaintiff failed to prove that the carrier had a motive of self-interest or ill will. Citing the Pennsylvania case of *Terletsky v. Prudential*

*Property & Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. 1994), the policy holder argued that the standard for establishing bad faith was two-pronged: (1) that the insurer lacked a reasonable basis for denying claims under the policy; and (2) the insurer knew or recklessly disregarded its lack of a reasonable basis in denying the claim. The policyholder argued that it was an error for the Trial Court to treat motive of self-interest or ill will as a third prong for the finding of bad faith and that standard should only have been used as probative of establishing a second prong of the test. The Superior Court held that the Trial Court's verdict was faulty because the Trial Court erroneously determined that the insured failed to establish the first prong of the test for bad faith (that the insurer did not have a reasonable basis for denying benefits under the policy) because the plaintiff failed to prove that the insurer had a dishonest purpose or a motive of self-interest or ill will against its insured. The Court had held that a motive of self-interest or ill will is probative of the second prong for the test of bad faith, not the first prong. The Superior Court vacated the trial court's judgment regarding the bad faith claims and remanded it for a new trial.

This decision was appealed to the Pennsylvania Supreme Court that ultimately did accept it for argument. Argument took place in April 2017. The Supreme Court granted *allocatur* on the issues of ratifying the *Terletsky* two-prong test and "whether or not establishing that the insurer acted

with self-interest or ill will" was essential to recover for bad faith.

This has been a longstanding issue of controversy since the bad faith statute was established over 25 years ago, 42 Pa. C.S.A. §837 which sets forth: "In an action arising under an insurance policy, if the Court finds that the insurer has acted in bad faith towards the insured, the Court may take all of the following actions: (1) award interest on the amount of the claim from the date the claim was made by the insured equal to the prime rate of interest plus 3%, (2) award punitive damages against the insurer, (3) assess Court costs and attorney fees against the insurer."

The Act did not provide a definition of bad faith. It also did not establish the manner in which an insured must prove bad faith. Since that time, Pennsylvania Courts have wrestled with this standard. In September 2017 in *Rancosky*, the Pennsylvania Supreme Court affirmed the decision of the Superior Court and adopted the *Terletsky* two-prong test for proving statutory "bad faith." The Supreme Court, agreeing with the Superior Court, that falling short of requiring evidence of an insurance company's motive of self-interest or ill will in order to establish the second prong of the test will not be fatal to the claim. In the *Terletsky* decision from 1994, there was a reference to a Black's Law Dictionary definition that defining bad faith as involving self-interest or ill will. Since that time some Pennsylvania decisions have applied that standard. This Supreme Court decision clarifies the standard. The Supreme

Court did address other unanswered issues regarding the Pennsylvania Bad Faith Statute. The burden for proving bad faith under the statute is clear and convincing evidence. This issue was not specifically addressed and the clear and convincing standard was applied. The Court also did not address the long-standing controversy on constitutional limitations on punitive damages.

This was a unanimous decision. Justice David Wecht filed a concurring opinion that could be interpreted to suggest a broader interpretation of what is bad faith in the future. In Pennsylvania, the Supreme Court is elected. The year 2015 saw three new Justices elected, all of whom are Democrats. Currently the makeup of the Supreme Court includes five Democrats and two Republicans (one of whom was appointed on an interim basis). Pennsylvania has traditionally been viewed as an insurer friendly or neutral venue. With the change in the makeup of the Court there were predictions that the State would shift to being more policyholder friendly. This opinion would appear to be the first salvo to support those predictions.

## Past Committee Newsletters

Visit the Committee's newsletter archive online at [www.iadclaw.org](http://www.iadclaw.org) to read other articles published by the Committee. Prior articles include:

### AUGUST 2017

The Rise of Autonomous Vehicle Technology Means that Insurance Companies Need to Become Just as Innovative in their Product Development  
David J. Rosenberg

### FEBRUARY 2017

Medicare Secondary Payer Act Claims Present Problems for Claimants Counsel, Insurance Counsel, and Malpractice Counsel  
Bryan D. Bolton

### JULY 2017

Why Auto Insurers May Need to Consider Redrafting the "Owned-But-Not-Insured" Exclusion  
Donna M. Lamontagne

### JUNE 2017

Captive Insurance Company Claims: Problems that Can Arise When Captives Dispute (or Should Dispute) Claims Made by Their Parent  
Rod S. Attride-Stirling

### MAY 2017

Class Actions – A History of Class Actions and Recent Legislative Amendments and Proposals  
Elizabeth J. Bondurant and Brendan H. White