

BAD FAITH

A PLAINTIFF'S PERSPECTIVE

(AS IF THERE COULD BE ANOTHER)

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WHAT IS BAD FAITH?

- Most courts define bad faith as acting (or not acting) without a reasonable basis with knowledge of the lack of a reasonable basis or with reckless disregard of the absence of a reasonable basis
- ***But:*** Does this definition really help the insurance professional in the real world?



A GOOD LAWYER ASKS:

- Is the conduct in question representative of *good* faith? *Bad* faith is the opposite of *good* faith.
- Is the conduct arbitrary?
- Was the insured harmed?
- Can we win?



A GREAT LAWYER ASKS:

- Does the case have **PIZAZZ**?
- Is a jury going to be **ANGRY**?
- Is it **SEXY**?
- Do I go **WOW**?



WOW FACTORS:

“They must be crazy. They’re not offering a dime. They won’t give me authority to offer any money in this case, you know I can’t believe it.”

Birth Center v. St. Paul Cos., Inc.,
787 A.2d 376,380-81 (Pa. 2001)
(quoting N.T. 5/3/96 at 69).



WOW FACTORS:

**“[We try] all of these bad baby cases,
and we’re going to trial.”**

Birth Center v. St. Paul Cos., Inc.,
787 A.2d 376,380 (Pa. 2001)
(quoting N.T. 5/6/96 at 16).



More Wow (but only after digging)

“She/he who has control of the dollars
is in a position of power!

If you are in a position of power,
use it!

If you are in a position of no power,
delay.”

Negotiating Skills for the Claim Professional, introduced as
an exhibit in State Farm v. Campbell



More Wow (but only after digging)

Premise:

“Show me a company’s compensation plans, and I’ll show you how its people behave.”

Jack Welch, *How to Be a Good Leader*, Newsweek, (Apr. 4, 2005) (quoting Charles Ames, former chairman and CEO of Reliance Electric Co.).



Court's Agree on the Wow

- Evidence of philosophy to reduce average claim payment to level first consistent with then lower than major competitors supported bad faith verdict. Bonenberger v. Nationwide Mut. Ins. Co., 791 A.2d 378, 381-82 (Pa. Super. 2002)
- Evidence regarding Provident's practice of claims adjudication in light of "termination ratios" in respect to claims arising under disability policies supported bad faith verdict. Hangarter v. Provident Life and Acc. Ins. Co., 373 F.3d 998, 1011 (9th Cir. 2004)
- Evidence suggested State Farm set arbitrary claim payment goals for its claims personnel in order to reach company goal of having the most profitable claims service in the industry, with promotions and salary increases for claims personnel based upon reaching these goals. Zilisch v. State Farm Mut. Auto. Ins. Co., 995 P.2d 276, 279 (Ariz. 2000)



Court's Agree on the Wow

- Evidence of corporate policy of taking tough stance towards insureds implemented through periodic evaluations of claim handlers and supervisors admissible as evidence of bad faith. State Farm Mut. Auto. Co. v. Weiford, 831 P.2d 1264, 1267 (Alaska 1992)
- Evidence that claim personnel had a financial incentive to deny claim. Armstrong v. Aetna Life Ins. Co., 128 F.3d 1263, 1265 (8th Cir. 1997)
- Evidence that State Farm had a comprehensive nationwide policy of handling certain claims in a like manner. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134 (Utah 2001), *rev'd on other grounds and remanded*, 538 U.S. 408 (2003), *on remand*, 98 P.3d 409 (Utah), *cert. denied*, 543 U.S. 874 (2004)



Rewarding Claims for Not Paying:

- An insurer cannot encourage its claim personnel to meet certain arbitrary average or median claim payment amounts before the facts and circumstances of the claims to be evaluated and valued are known. It is, by definition, arbitrary.
- Don't you agree?



Mantra

- Bad Faith is an arena where few gladiators should be. It's tough combat. Blood is spilled, and it's not for the faint of heart.
- To be successful, the Plaintiff lawyer must wake up with two questions, each and every day:

What did the Bastards do last night?

What are they hiding today?