AUTO INSURACE BAD FAITH CLAIMS

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September 30, 2016

AUTO INSURANCE BAD FAITH CLAIMS IN VIRGINIA

A. COMMON LAW BAD FAITH LIABILITY CLAIM

With the 1966 decision in *Aetna v. Price*, 206 Va. 749, 146 SE 2d 220, the VSC confirmed that an insured does indeed have a common law legal remedy for its insurer's bad faith refusal to settle third party claims within the policy limits. Weldon Price was a pediatrician practicing in Arlington, Virginia who carried an Aetna malpractice insurance with limits of 50/150. While coverage was in place, a child was injured as a result of the failure to conduct blood testing. A judgment in the District Court for the District of Columbia was awarded in favor of the child and his father. The judgment for the father was in excess of the $50,000 policy limits. Aetna paid the judgments up to its 50k limits.

Thereafter Dr. Price sued Aetna in Virginia, alleging wrongful failure to communicate, investigate and then settle the claims within the policy limits. Dr. Price sought to force Aetna to pay the excess judgment. Dr. Price was successful with a Virginia jury and a verdict was entered against Aetna for the unpaid judgment. The opinion sets forth in detail the medical evidence and investigation performed by counsel hired by Aetna in defense of Dr. Price. After a thorough investigation, Aetna's counsel deemed the case one of "no liability".

Prior to the medical malpractice trial, settlement negotiations were sponsored by the DC court and during those negotiations counsel hired by Aetna advised he would recommend a $45,000 settlement. Later, the Plaintiff agreed to accept $45,000, but Aetna/Dr. Price's counsel then advised "his client would not pay that much". Trial ensued and during trial, Dr. Price wrote a letter to counsel hired by Aetna stating that he was aware of the settlement demand within policy limits and Aetna's refusal to pay. The letter continued that he would hold Aetna responsible for any verdict in excess of the policy limits. The attorney wrote back that he understood that Dr. Price denied liability and asked for evidence or information which established liability. Dr. Price did not respond to that letter.

The VSC addressed whether an insured could sue its liability insurer for conduct which resulted in an excess verdict. This was a question of first impression in Virginia. The *Aetna* Court surveyed common law throughout nation and concluded the rule has become firmly established that "the insurer may, under proper circumstances, be held liable to the insured for the whole amount of a judgment exceeding the policy limits."

The Court went on to explain the "reason for the rule becomes obvious"

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

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

(3) in such a situation, a relationship of confidence and trust is created between the insurer and insured which imposes upon the insurer the duty to deal fairly with the insured….

The next question answered by the *Aetna* Court was how to instruct the jury about what constitutes actionable conduct by the insurer. The Court adopted the "bad faith rule" over the "negligence rule". In enunciating the "bad faith rule" the court set forth the following standards:

1. A reasonably diligent effort must be made to ascertain the facts upon which a good faith judgment as to settlement can be formulated;
2. A decision not to settle must be an honest one; it must result from a weighing of probabilities in a fair manner;
3. To be a good faith decision, it must be an honest and intelligent one in light of the insurer's expertise in the field;
4. Where reasonable and probable cause exists for rejecting a settlement offer, the insurer will be vindicated.

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

1. Repudiation of the claim by Dr. Price of an inadequate investigation by Aetna. (Dr. Price admitted in his brief that no evidence was introduced of which he was unaware.

2. Repudiation of Dr. Price's claims that:
   a. Counsel hired by Aetna should have filed a motion *forum non conveniens* to move the underlying malpractice action from the District of Columbia to Virginia. (expert testimony in the bad faith action confirmed that such a motion would have failed).

   b. Counsel hired by Aetna should have filed a third party complaint against another physician to reduce Dr. Price's exposure. (there existed no evidence that such 3rd

party physician could have been served with the Complaint. This is a curious response by the VSC given the ease with which parties outside the District of Columbia can be served with process. It might reflect an evidentiary mistake by Dr. Price's counsel in not introducing evidence on this point).

3. Repudiation of Dr. Price's claim that the lawyer hired by Aetna failed to advise him of the opportunity to settle within policy limits. (Dr. Price's letter to his counsel during the med-mal trial effectively establishes that he was aware of the previous discussion of a $45,000.00 settlement).

4. Repudiation of the claim that Aetna was guilty of bad faith because it refused to accept the recommendation of its counsel to settle within the policy limits ($45,000.00). The VSC announced that the failure of an insurer to follow the settlement recommendation of its counsel, standing alone, is insufficient to sustain a claim of bad faith. (Dr. Price was unable to point to any evidence brought to light before or during trial which should have caused a reversal of Aetna's "no liability" position in the litigation, and throughout the case Dr. Price himself asserted he was not negligent).

The VSC held that although Aetna was aware a verdict would exceed policy limits if liability was established, it conducted an accurate and complete investigation, was heedful of its insured's interests as much as its own, honestly and intelligently weighed the probabilities of success in a trial, and was therefore not acting in bad faith in refusing to settle within policy limits.

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

1. Rejecting both the plaintiff's definition based on "fairness" and State Farm's definition requiring fraud, deceit, dishonesty, malice or ill-will, the *Floyd* Court held that bad faith required a showing that the "*insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured."* 235 Va. 136,143-144. The VSC noted that attorneys have a duty to convey settlement offers to the insured that may significantly affect settlement or resolution of the matter and the failure to do so is one important factor in evaluating for bad faith.

The *Floyd* court also held that the standard of proof required "clear and convincing evidence" of bad faith. 235 Va. 136, 144.

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

PRACTICE POINTERS:

Bad Faith Letter

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

Assignment of Tortfeasor's Bad Faith Claim

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

B. VIRGINIA HAS A STATUTORY REMEDY FOR BAD FAITH LIABILITY CLAIMS OF $3,500 OR LESS

Virginia Code §8.01-66.1(B) provides for a claim of $3,500 or less against a liability carrier where:

> *the judge finds that such denial, refusal or failure to pay was not made in good faith, the company, in addition to the liability assumed by the company under the provisions of the insured's policy of motor vehicle liability insurance, shall be liable to the third party claimant:*
>
> *(1) in an amount double the amount of the judgment awarded the third party claimant,*
>
> *(2) together with reasonable attorney's fees and expenses.*

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

C. INSURER CAN FILE DECLARATORY JUDGMENT TO DETERMINE COVERAGE AND AVOID PAYING ON EXCESS VERDICT

In Virginia, the liability insurer has the option of filing a declaratory judgment action if it thinks the underlying facts are outside its coverage. In personal injury cases, this arises most frequently when it appears the insured engaged in intentional conduct which was excluded from coverage by the terms of the insurance policy. For example, in *Reison v Aetna Life & Casualty Co.*, 225 Va. 327,302 S.E 2d 529 (1983), Reison approached Goins on a street in Alexandria and claimed Goins owed him $33.00. After an argument Goins drove his truck over the sidewalk and injured Reison. Goins later pleaded guilty to hit and run and reckless driving.

Reison filed suit against Goins and alleged both negligent and intentional conduct. Aetna was Goins' motor vehicle liability insurer. Aetna filed a declaratory judgment action alleging it had no duty to defend Goins because his actions were intentional and were excluded from coverage. The DJ action was heard two weeks before the personal injury trial, and a jury found that Goins did intend to injure Reison. The trial court (Judge

Grenadier) entered an order declaring Aetna owed no duty to defend or afford coverage to Goins. Two weeks later a jury found Goins negligent and awarded $372k, an amount in excess of Aetna's liability policy. Prior to verdict Reison's counsel sent Aetna a letter offering to settle within the policy limits.

An appeal followed. Reison argued that where the liability of Goins was a jury question in the tort action, it was improper to allow Aetna to make an end run around the tort trial with a DJ action. The VSC held that it was proper to hear the DJ action before the tort action. Acknowledging that Aetna's duty to defend Goins and pay any judgment was dependent upon coverage under the policy, the VSC held that "advance determination of the coverage question served to remove the clouds from the legal relations of the parties." This decision left Reison without a claim against Aetna for bad faith failure to defend Goins and resulted in a mostly unpaid verdict (Reison had $25k in UM coverage). The court, quoting from a 4th Circuit case, added the following:

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

It appears the VSC thought that Reison's drafting of alternative theories was suspect. Given that such drafting is now commonplace and assumed to comply with the standard of care, one must wonder if such commentary would still be forthcoming from Virginia's highest court.

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

At the time this publication went to press, there were two cases on appeal to the Virginia Supreme Court which pose this exact question. Arguments on the Petitions were heard on August 31, 2016. It is anticipated that at the time of this lecture the VSC will have decided whether to grant the petition for a writ, or in plain English, award a full appeal. The two cases on appeal are *Conner v. Glasgow, et al.*, Record Number 160611 (2016) and *Manu v. Geico*, Record Number 160852 (2016).

Jeremy Flachs is lead counsel in *Manu v. GEICO.* The crash occurred when Mr. Manu's driver became the 4th car in a 4 car pile-up caused by a John Doe vehicle cutting off the lead car. Deposition testimony established that both cars #1 and #2 saw John Doe. Manu's driver was also negligent for rear-ending car #3, and his insurer, Allstate, paid its liability policy limits prior to trial. Geico was Manu's insurer and Manu demanded payment from Geico under the UM coverage for the negligence of John Doe. Manu, in writing, demanded a sum within Geico's UM limits, but despite serious injury to Manu, Geico refused to offer more than $5,000.00. Geico defended on the ground the injury was not serious, the negligence of Manu's driver was an intervening and superseding cause, and that the evidence of a John Doe was not clearly established. Geico's defense that Manu's driver was an intervening and superseding cause of Manu's injury was struck by the trial judge (Roush) before the case went to the jury. The jury returned an excess verdict for Mr. Manu against John Doe. Geico paid its policy limits and Manu filed a "bad faith" action against Geico. Manu relied on Va. Code 8.01-66.1(D)(1) and also cited to Va. Code § 38.2-209.[1]

Geico demurred on the ground that Virginia does not recognize a bad faith UM action. The demurrer was initially overruled by Judge Kloch, sitting as a visiting judge in Fairfax, but subsequently Judge Ortiz was assigned the case after hearing a discovery motion and he issued a letter inviting Geico to refile its demurrer. Judge Ortiz then wrote an opinion sustaining the demurrer, and his letter opinion is attached as Exhibit 1.

The appeal followed.

[1] Section 38.2-209 provides that if Manu is successful in the bad faith action against his insurer (Geico), he shall be entitled to recover from the insurer (1) costs, and (2) such reasonable attorney fees as the court may award.

Manu's brief relies primarily on the unambiguous language used in Virginia Code 8.01-66.1(D)(1).

> *Whenever a court of proper jurisdiction finds that an insurance company licensed in this Commonwealth to write insurance as defined in § 38.2-124 denies, refuses or fails to pay to its insured a claim of more than $3,500 in excess of the deductible, if any, under the provisions of a policy of motor vehicle insurance issued by such company to the insured and it is subsequently found by the judge of a court of proper jurisdiction that such denial, refusal or failure to pay was not made in good faith, the company shall be liable to the insured . . . (emphasis added).*[2]

Any question of statutory interpretation begins with the question of whether an ambiguity exists. The plain, literal language of §8.01-66.1(D)(1) provides a remedy for the insured against a UM insurer that fails to act in good faith. "When the language of a statute is unambiguous, we are bound by the plain meaning of that language. Furthermore, we must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity." Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104, (2007) (citations omitted).

By enacting 8.01-66.1(D), the General Assembly intended to provide insureds a remedy against their insurers. This is an unambiguous reference to first party claims, which includes UM claims. In further support of that view, the statute cross references Va. Code §38.2-124. Section 38.2-124(A)(2) expressly defines motor vehicle insurance to include coverage under Va. Code §38.2-2206, the UM statute. Through this explicit cross-reference, the General Assembly included UM insurance within the scope of §8.01-66.1(D)(1). A comparison of §8.01-66.1(D)(1) with §8.01-66.1(B) further illustrates the legislative intention to regulate and remedy first party bad faith claims practices. While subsection (D)(1) uses the phrase "its insured" after "denies, refuses or fails to pay", subsection (B) uses the phrase "third party claimant." The only plausible interpretation of §8.01-66.1(D)(1) is one which applies a duty of good faith to UM insurers.

[2] The damages provided under 8.01-66.1, in addition to the amount otherwise due and payable, include (1) interest on the amount due at double the rate provided in § 6.2-301 from the date that the claim was submitted to the insurer or its authorized agent, and (2) reasonable attorney's fees and expenses.

The legislative history provides significant additional evidence of the General Assembly's intent in enacting the subsection. Subsection (D)(1) was passed in 1991. This subsection was the result of a multi-year study by the General Assembly into the motor vehicle insurance industry in the Commonwealth of Virginia. 1991 Va. Acts 155 and Final Report of the Joint Subcommittee Studying Motor Vehicle Insurance and Unisex Ratings, Senate Document No. 29, pp. 4-5 (1991). The Joint Subcommittee conducted a thorough investigation, after which it provided recommendations to the General Assembly and Governor. Id. at 11-13. These included the recommendation that:

> *Section 8.01-66.1 of the Code of Virginia be amended to create a civil remedy for an insured for a bad faith failure of his insurer to pay a claim totaling more than $1,000.00. . .The Joint Subcommittee decided that the fiduciary relationship between an insurance company and its insured remains the same regardless the size of the claim, and there should be a specific civil remedy available when an insurance company refuses to settle in good faith large or small claims with its own insured. Id.* at 19. (emphasis added).

This history leaves little doubt the legislature enacted subsection (D)(1) with the intent of providing a remedy to insureds when their insurers failed to meet their duty to adjust and pay claims in good faith.

Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 524 S.E. 2d 649 (2000) supports an expansive interpretation of this remedial statute. Although the insured in that case relied upon §8.01-66.1(A)[3], the relevant language in that subsection is nearly identical to that in subsection (D)(1). The Court held that:

> *Section 8.01-66.1(A), like § 38.2-209, **is a remedial statute**. . . [w]ithout the statutory authorization for recovery of multiplied damages, together with attorneys' fees and expenses, the expense of litigation to recover such claims would preclude that course of action in many cases. Section 8.01-66.1(A) operates as a punitive statute in the same manner as § 38.2-209 because both punish an insurer whose bad faith dealings force an insured to incur the expense of litigation. Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71,75 (2000).*

Although St. John dealt with an insured's medical expense claim, the Court's interpretation of the scope and effect of §8.01-66.1 is equally applicable in the uninsured motorist context.

[3] This subsection refers to an insurer's failure to pay its insured $3500 or less, and specifically includes medical expense claims.

Geico's defense relies primarily upon the language of Va. Code § 38.2-2206(A), which is known as the Uninsured Motorist Statute. This statute states that all liability insurance policies issued in Virginia shall include an endorsement undertaking to pay its insured all sums the insured is "legally entitled to recover" from an uninsured motorist. Geico argues that this means that the UM carrier is under no duty to pay until a judgment, which Geico argues is what triggers payment. Therefore, Geico argues it cannot be accused of bad faith for its pre-judgment handling of the claim.

Manu countered that Judge Ortiz's decision and Geico's arguments rely overwhelmingly upon a single phrase in Va. Code §38.2-2206, which has no direct application to the legal merits of a bad faith claim under §8.01-66.1(D)(1). The phrase is "pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle". The argument goes that because there are older decisions holding that judgment is the event which determines the legal entitlement to recovery, §8.01-66.1 (D)(1) must exclude UM claims. This argument conflates a legal duty to pay a judgment with a legal duty to engage in good faith pre-trial dealings. *See, Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 75 (2000). Manu argues that like two ships passing in the night, these legal duties have no connection beyond the fact that they deal with rights and responsibilities of insurers when dealing with their insureds.

In 2015 the Norfolk Circuit Court issued a written opinion affirming that under 8.01-66.1, an insured may allege bad faith against his UM carrier. *Chevalier-Seawell v. Mangum*, 90 Va. Cir. 420. *Chevalier* rejected the view that an insurer's duty to act in good faith was triggered only after a judgment or verdict against an uninsured motorist, as such a decision would render §8.01-66.1 "meaningless." *Chevalier-Seawell*, 90 Va. Cir. 420, 422 *citing Copenhaver*, 31 Va. Cir. 227.

Manu believes that Va. Code §38.2-2206(A) creates the trigger for when an insured must collect on the benefits under her UM policy regardless of the circumstances. So even if the UM insurer did not participate at trial or thinks the case was frivolous or the verdict is excessive, the UM insurer has to pay on an entered judgment. But Va. Code §38.2-2206(A) does not conflict with the duty of good faith claims adjusting imposed by Va. Code §8.01-66.1(D)(1). And even if it did, rules of statutory interpretation dictate that the specific language of Code §8.01-66.1(D)(1) will control.

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

1. In Virginia, a common law bad faith claim by a defendant against his liability insurer must be founded on more than a refusal of the insurer to follow counsel's advice to settle within the policy limits. Instead, such a claim must establish by clear and convincing evidence that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured. This will require evidence of at least some of the following:

    a. Sloppy investigation, such as incomplete or inadequate witness interviews.

    b. Inadequate discovery, such as the failure to depose relevant witnesses.

    c. Ignoring expert testimony and failing to hire experts of its own.

    d. Ignoring lay testimony.

    e. Rolling the dice on either damages or liability determinations when a settlement demand was made within policy limits and the damages likely would result in an excess verdict.

    f. Failing to communicate a settlement offer within policy limits.

    g. Procedural mistakes concentrating liability where it could be diluted by bringing in other potentially liable defendants

    See, *Aetna v. Price*, 206 Va. 749, 146 SE 2d 220 (1966) and *State Farm Mutual Auto Insur. v. Floyd*, 235 Va. 136, 366 SE 2d 93 (1988).

The list of prohibited practices set forth in § 38.2-510, the Unfair Claim Settlement Practices act are worth keeping in mind for any bad faith claim against an auto insurer. See attached Exhibit 2. Unfortunately, subsection B of the act eliminates a private cause of action for violation of the Unfair Claim Settlement Practices and instead assigns enforcement to the State Corporation Commission. Also, the predicate for sanctioning an insurer under this statute is showing that violations were committed with such frequency as to indicate a general business practice. Nevertheless, evidence of the prohibited practices listed in Exhibit 2 could meet the criteria for a common law bad faith claim.

2. With the lower burden of proof available for statutory bad faith claims under 8.01-66.1, (preponderance of the evidence) chances of success are greater. Unfortunately, the jurisdictional limit for third party bad faith claims under 8.01-66.1 is $3,500.00.

3. It remains to be seen if Virginia recognizes a bad faith uninsured or underinsured motorist claim, but we will soon know the answer when the VSC addresses the petitions for appeal in the *Manu* and *Connor* cases.

F. WHAT TO PROVIDE AND WHAT TO DENY THE AGGRESSIVE CLAIMS ADJUSTER

The best policy is to provide the aggressive claims adjuster all your liability and damages evidence and documentation as soon as feasible. Regardless of how aggressive, the adjuster is still governed by the Unfair Claim Settlement Practices act, Va. Code § 38.2-510. Among other protections, the Act prohibits arbitrarily or unreasonably refusing to pay claims, compelling insureds to institute litigation to recover what is due by offering substantially less than the amount ultimately recovered, failing to promptly settle clams where liability has become reasonably clear, and attempting to settle claims for less than the amount to which a reasonable person would believe he was entitled.

If the adjuster aggressively denies liability without the supporting evidence, or low balls with an offer, consider sending him or her a copy of Va. Code § 38.2-510 and write a letter to the Va. State Corporation Commission's Bureau of Insurance.

Bureau of Insurance
P.O. Box 1157
Richmond, Virginia 23218-1157

I recommend that you do not have your client provide a recorded statement or sign a HIPAA release in favor of the insurance company. It is always best that Plaintiff's counsel control the flow of information, medical or otherwise, to the claims adjuster. That being said, there are cases where it is important to provide the adjuster with medical bills, records and photographs documenting substantial property damage and injury. This will enable the adjuster to maintain an adequate reserve for settlement or litigation, which is definitely in the interest of the Plaintiff. It can also be useful to answer questions posed by the adjuster by allowing your client to prepare a written statement, with your supervision.

G. ADJUSTER CASE EVALUATION STRATEGIES: MERITS OF THE CASE VERSUS EXCESS VERDICT

Most claims adjusters are averse to being hit with an excess verdict. My guess is that should it happen too often the adjuster's employment could be in jeopardy. For that reason, while the adjuster will strive to settle the case for as little as possible, eventually an offer that could meet the definition of fair" should be forthcoming. Unfortunately, that offer may not be forthcoming until the Plaintiff files suit.

Plaintiff's counsel should always set the stage for a possible bad faith suit. But given the burden of proof for a common law bad faith liability claim (clear and convincing) and the fact that common law bad faith requires a finding that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured, such claims will frequently be difficult to win.

EXHIBIT 1

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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RANDY I. BELLOWS
ROBERT J. SMITH
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JUDGES

COUNTY OF FAIRFAX CITY OF FAIRFAX

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March 11, 2016

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Re: *Ebenezer Manu v. GEICO Casualty Company*, CL-2015-6367

Dear Counsel:

This case is before the Court on Plaintiff Ebenezer Manu's ("Mr. Manu") Motion to Compel Discovery from Defendant GEICO Casualty Company ("GEICO") and GEICO's Motion to Reconsider its Demurrer. Both motions were taken under advisement after oral argument by counsel. For the reasons set forth below, the Court grants GEICO's Motion to Reconsider, vacates the Order overruling GEICO's Demurrer, sustains GEICO's Demurrer with prejudice, and denies Mr. Manu's Motion to Compel Discovery as moot.

I. Background and Prior Proceedings

The allegation of insurance bad faith in this case warrants a summary of the underlying tort action. GEICO insured Mr. Manu pursuant to an uninsured motorist endorsement that provided coverage up to a limit of $25,000 per person. On October 30, 2010, Mr. Manu was a passenger in a vehicle involved in a four-car accident. A John Doe driver triggered the collision when his vehicle cut off a line of cars traveling west on Interstate 495. Mr. Manu suffered personal injuries as a result.

On October 19, 2012, Mr. Manu filed a lawsuit in Fairfax County Circuit Court against John Doe, the driver of the car in which Mr. Manu was a passenger, and three other named defendants. GEICO elected to defend John Doe. During discovery, three of the defendants identified John Doe as the cause of the accident. Mr. Manu offered to settle his case against John Doe for $12,500. In response, GEICO made a $5,000 counteroffer that Mr. Manu rejected. Mr. Manu then settled his lawsuit against the driver of the car in which he was a passenger for the liability policy limit of $25,000 and proceeded to trial against John Doe. On February 10, 2015, the Court rendered a judgment against John Doe on a jury verdict in the amount of $68,528.24. On May 14, 2015, Mr. Manu filed a separate action against GEICO alleging bad faith in violation of Virginia Code § 8.01-66.1(D)(1), Virginia Code § 38.2-209(A), and the common law.

On July 24, 2015, the Honorable John E. Kloch overruled GEICO's Demurrer to the Complaint. The parties appeared before the Court again on December 18, 2015, upon Mr. Manu's Motion to Compel Discovery, including production of GEICO's claim file. The Court granted the Motion in part, ordered GEICO to produce a privilege log to Mr. Manu, and took under advisement the issue of whether the claim file, which the Court reviewed *in camera*, was subject to the work-product doctrine and attorney-client privilege. By letter to counsel dated January 28, 2016, the Court expressed its concern that if the Complaint failed to state a cause of action, privileged documents would be released. In its letter, the Court invited GEICO to file a Motion to Reconsider Judge Kloch's ruling on the Demurrer. The Court took GEICO's Motion to Reconsider under advisement after counsel appeared at a hearing held on February 26, 2016.

II. Arguments

GEICO argues that its obligations to Mr. Manu are governed exclusively by the terms of the policy and the Virginia uninsured motorist statute. It points to Virginia Code § 38.2-2206(A), which requires an uninsured motorist carrier to pay

its insured all sums that the insured is legally entitled to recover as damages from an uninsured motorist. GEICO contends that a judgment against an uninsured motorist is the event that determines legal entitlement to recovery. Thus, GEICO maintains that its duties to Mr. Manu arose only after he obtained a judgment against John Doe. For that reason, GEICO argues that it did not owe Mr. Manu a pre-trial duty to evaluate, adjust, and settle Mr. Manu's claim under Virginia Code § 8.01-66.1(D)(1) and Virginia Code § 38.2-209(A). Similarly, GEICO argues that Virginia Code § 38.2-209(A) does not create an independent cause of action for bad faith. GEICO also opposes Mr. Manu's Motion to Compel Discovery on the grounds of attorney-client privilege and the work-product doctrine.

In response, Mr. Manu asserts that Virginia Code § 8.01-66.1(D)(1) and Virginia Code § 38.2-209(A) provide insureds with a remedy against uninsured motorist carriers whose bad faith dealings force the expense of litigation. Mr. Manu argues that because Virginia Code § 8.01-66.1(D)(1) cross-references insurance as defined in Virginia Code § 38.2-124, it applies to the Virginia uninsured motorist statute. On the one hand, Mr. Manu contends that the Supreme Court of Virginia has construed Virginia's uninsured motorist statute to permit an insured to recover from an uninsured motorist carrier without regard to a judgment. According to Mr. Manu, the language of Virginia Code § 38.2-2206(A) that requires an insured to be "legally entitled to recover" from an uninsured motorist does not conflict with the imposition of a pre-trial duty on the part of an uninsured motorist carrier to evaluate, adjust, and settle claims in good faith. He cites *Aetna Casualty & Surety Co. v. Dodson*, 235 Va. 346 (1988), in support of this reading of Virginia Code § 38.2-2206(A). On the other hand, Mr. Manu posits that Virginia Code § 8.01-66.1(D)(1) and Virginia Code § 38.2-209(A) impose a pre-trial duty on uninsured motorist carriers to evaluate, adjust, and settle claims in good faith, even if a judgment is the event that determines legal entitlement to recovery under Virginia Code § 38.2-2206(A).

Thus, Mr. Manu alleges that GEICO acted in bad faith when it chose not to conduct an investigation into his claim. According to Mr. Manu, GEICO never discovered information that contradicted his, or the three other defendants' contention that John Doe's negligence was the proximate cause of the collision and Mr. Manu's personal injuries. He alleges that instead of resolving his claim through a settlement, GEICO unreasonably forced him to obtain a judgment against John Doe. In addition, Mr. Manu asserts that only attorney-client communications are privileged when an insured pursues its remedy against an underinsured motorist carrier for bad faith.

III. Standard of Review

The Court begins its analysis with the well-established standard of review applicable to a demurrer. The function of a demurrer is to test only whether the complaint states a cause of action upon which relief can be granted if all the allegations are admitted as true. In ruling on a demurrer, the Court considers all reasonable inferences of fact that fairly and justly could be drawn from the facts alleged. *Faulknier v. Shafer*, 264 Va. 210, 214–15 (2002).[1]

IV. Discussion

A. Uninsured Motorist Insurance Coverage under Virginia Code § 38.2-2206(A)

At issue in this case is whether Virginia Code § 8.01-66.1(D)(1) and Virginia Code § 38.2-209(A) impose a pre-trial duty of good faith on an uninsured motorist carrier to evaluate, adjust, and settle a claim before its insured obtains a judgment against an uninsured motorist in accordance with Virginia Code § 38.2-2206(A). The Virginia uninsured motorist statute states in relevant part:

> Except as provided in subsection J of this section, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued . . . unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472.

Va. Code Ann. § 38.2-2206(A).

In *Midwest Mutual Insurance Co. v. Aetna Casualty & Surety Co.*, 216 Va. 926 (1976), the Supreme Court of Virginia construed the predecessor section of Virginia Code § 38.2-2206(A) to mean:

> [T]he obligation of the uninsured motorist insurer arises *only* if it is determined that the insured is "legally entitled to recover" damages from the owner or operator of an uninsured motor vehicle. Judgment is the event which determines legal entitlement to recovery.

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[1] As Mr. Manu's Motion to Compel Discovery is moot, the Court forgoes a discussion of the applicable standard of review.

Id. at 929.

The Court is not convinced of Mr. Manu's argument that *Midwest Mutual* was limited to its facts by *Aetna Casualty & Surety Co. v. Dodson*, 235 Va. 346 (1988), and thus, Mr. Manu was legally entitled to recover under the policy without regard to a judgment.[2] To the contrary, *Midwest Mutual* set forth a correct statement of Virginia law that was affirmed in *State Farm Mutual Auto Insurance Co. v. Kelly*, 238 Va. 192 (1989). *Kelly* was an uninsured motorist case in which the Supreme Court of Virginia stated unanimously:

> We previously have held that judgment is the event which determines legal entitlement to recovery. *Midwest Mutual Insurance Co.* v. *Aetna Casualty and Surety Co.*, 216 Va. 926, 929, 223 S.E.2d 901, 904 (1976). Accordingly, State Farm's liability to Kelly was not established until February 18, 1986, when Kelly obtained the $50,000 judgment from the uninsured motorist.

Kelly, 238 Va. at 196 (internal brackets and quotations omitted).

Unlike *Midwest Mutual*, which involved contribution between insurance carriers, *Kelly* involved an injured party who sought payment of the policy limit under an uninsured motorist endorsement. *See id.* at 194. Consequently, *Dodson* did not limit *Midwest Mutual* to its facts.

Likewise, *Dodson* did not limit the controlling interpretation of Virginia's underinsured motorist statute announced in *Willard v. Aetna Casualty & Surety Co.*, 213 Va. 481 (1973). In *Willard*, the Supreme Court of Virginia resolved a choice of law issue by applying the North Carolina underinsured motorist statute, but in so doing observed:

> Under Virginia law, Aetna would not be subject to an action in contract on its uninsured motorist endorsement until judgment in tort had been entered against the unknown defendant as "John Doe." *See* Code § 38.1-381(e). . . ."

Id. at 482 (string citation omitted).

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[2] *See Dodson*, 235 Va. at 351 n.6 ("Aetna cites *Midwest Mutual* v. *Aetna Casualty*, 216 Va. 926, 223 S.E.2d 901 (1976), for the proposition that the insured is not 'legally entitled to recover' from an uninsured motorist until the insured's claim against the tortfeasor is reduced to judgment. *Midwest Mutual* is inapposite here. It was an action for contribution between two insurance carriers and turned solely upon the principles governing the equitable right of contribution enforceable at law between joint obligors.").

Willard, Midwest Mutual, and *Kelly* hold that an underinsured motorist carrier is not liable to its insured unless and until the insured is legally entitled to collect from the uninsured motorist. *See, e.g., Kelly*, 238 Va. at 195. Therefore, under Virginia law, a judgment against the uninsured motorist remains the event that determines legal entitlement to recovery.[3] *Id.* As GEICO would not be subject to an action in contract on its uninsured motorist endorsement unless and until a judgment in tort was entered against John Doe, the Court must determine whether Virginia Code § 8.01-66.1(D)(1) and Virginia Code § 38.2-209(A) provide Mr. Manu with a remedy against GEICO.

B. Bad Faith under Virginia Code § 8.01-66.1(D)(1) and Virginia Code § 38.2-209(A)

Mr. Manu contends that irrespective of Virginia Code § 38.2-2206(A), GEICO owed him a pre-trial duty to evaluate, adjust, and settle his claim in good faith under Virginia Code § 8.01-66.1(D)(1) and Virginia Code § 38.2-209(A). He argues that GEICO breached its duty when it refused to settle his uninsured motorist claim before a judgment was rendered against John Doe. In support of this position, Mr. Manu cites Virginia Code § 8.01-66.1(D)(1), which provides a remedy for the arbitrary refusal of a motor vehicle insurance claim:

> Whenever a court of proper jurisdiction finds that an insurance company licensed in this Commonwealth to write insurance as defined in § 38.2-124 denies, refuses or fails to pay to its insured a claim of more than $3,500 in excess of the deductible, if any, under the provisions of a policy of motor vehicle insurance issued by such company to the insured and it is subsequently found by the judge of a court of proper jurisdiction that such denial, refusal or failure to pay was not made in good faith, the company shall be liable to the insured in the amount otherwise due and payable under the provisions of the insured's policy of motor vehicle insurance, plus interest on the amount due at double the rate provided in § 6.2-301 from the date that the claim was submitted to the insurer or its authorized agent, together with reasonable attorney's fees and expenses.

Va. Code Ann. § 8.01-66.1(D)(1).

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[3] The plain language of the statute also supports this conclusion. *See, e.g.*, Va. Code Ann. § 38.2-2206(F) ("[I]mmunity from liability for negligence of the owner or operator of a motor vehicle *shall not be a bar to the insured obtaining a judgment enforceable against the insurer* for the negligence of the immune owner or operator, and . . . *any judgment obtained against an immune defendant shall be entered in the name of "Immune Defendant" and shall be enforceable against the insurer. . . .*") (emphasis added).

Mr. Manu also relies upon Virginia Code § 38.2-209(A), a statute that authorizes a trial judge to award attorney's fees and costs after the insured establishes coverage under a disputed policy and the court finds that the insurer denied coverage in bad faith.[4] *REVI, LLC v. Chi. Title Ins. Co.*, 776 S.E.2d 808, 813 (2015).

As an initial matter, Virginia Code § 38.2-209(A) does not create an independent cause of action. Va. Code Ann. § 38.2-209(B); *REVI*, 776 S.E.2d. at 813. It is apparent from the face of the Complaint that Mr. Manu has not sued GEICO to determine what coverage, if any, existed under the policy, but instead seeks fees, costs, and damages in excess of the policy limit paid by GEICO after a judgment was rendered against John Doe. *See* Va. Code Ann. § 38.2-209(A). Thus, the Complaint fails to allege facts sufficient to invoke the remedy provided by Virginia Code § 38.2-209(A) for an insurer's denial of coverage or failure to make payment under a policy.[5] The Court therefore turns to Mr. Manu's argument that Virginia Code § 8.01-66.1(D)(1) required GEICO to evaluate, adjust, and settle his claim in good faith.

The Supreme Court of Virginia has not decided whether an uninsured motorist carrier may be liable for pre-trial bad faith pursuant to Virginia Code § 8.01-66.1(D)(1). It did, however, observe the remedial nature of the statute in *Nationwide Mutual Insurance Co. v. St. John*, 259 Va. 71 (2000), holding, "Section 8.01-66.1(A) operates as a punitive statute in the same manner as § 38.2-209 because both punish an insurer whose bad faith dealings force an insured to incur the expense of litigation." *Id.* at 75. The Supreme Court reasoned that absent "the

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[4] Va. Code Ann. § 38.2-209(A) ("Notwithstanding any provision of law to the contrary, in any civil case in which an insured individual sues his insurer to determine what coverage, if any, exists under his present policy or fidelity bond or the extent to which his insurer is liable for compensating a covered loss, the individual insured shall be entitled to recover from the insurer costs and such reasonable attorney fees as the court may award. However, these costs and attorney's fees shall not be awarded unless the court determines that the insurer, not acting in good faith, has either denied coverage or failed or refused to make payment to the insured under the policy.").

[5] Although not cited in the Complaint, Mr. Manu referenced Virginia Code §§ 38.2-510(A)(6)–(7) in his Opposition to GEICO's Motion to Reconsider. Those provisions of Virginia's Unfair Trade Practices chapter state, "No person shall commit or perform with such frequency as to indicate a general business practice any of the following: . . . (6) Not attempting in good faith to make prompt, fair and equitable settlements of claims in which liability has become reasonably clear; (7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds. . . ." The Court is not persuaded that the quoted statutory provisions are of consequence to the motions before the Court, as the Complaint does not allege GEICO's conduct was indicative of "a general business practice" and Virginia Code § 38.2-510(B) provides, "No violation of this section shall of itself be deemed to create any cause of action in favor of any person other than the Commission. . . ." *Id.* at §§ 38.2-510(A)–(B).

statutory authorization for recovery of multiplied damages, together with attorneys' fees and expenses, the expense of litigation to recover such claims would preclude that course of action in many cases." *Id.* Even so, *St. John* is distinguishable from the case before the Court because it did not involve an allegation of bad faith conduct on the part of an underinsured motorist carrier before a judgment was rendered against the uninsured motorist in accordance with Virginia Code § 38.2-2206(A). *See id.* at 74.

As the Supreme Court explained in *United Services Automobile Ass'n v. Nationwide Mutual Insurance Co.*, 218 Va. 861 (1978),[6] "The liability carrier has the duty to defend the insured and to exercise good faith to settle meritorious claims within the policy limits, *an undertaking which is not required of the uninsured motorist carrier.*" *Id.* at 866 (emphasis added). Moreover, on a number of occasions the Supreme Court has noted, "When tort litigation ensues, the liability insurer is the insured's defender; the uninsured motorist insurer is the insured's adversary." *Seals v. Erie Ins. Exch.*, 277 Va. 558, 563 (2009). This distinction was further illustrated in *Maxey v. Doe*, 217 Va. 22 (1976):

> [A]fter the uninsured motorist claim was asserted, insurer and insured assumed an adversary relationship. In such a posture, the insurer was under no duty to inform the insured that, should their dealings and negotiations fail to resolve the claim, it would rely on insured's failure to file the SR-300 report as required by statute.

Id. at 25–26.

The weight of Supreme Court of Virginia precedent signals that Virginia Code § 8.01-66.1(D)(1) does not impose a pre-trial duty upon an uninsured motorist carrier to evaluate, adjust, and settle its insured's claim in good faith. Furthermore, several other circuits have come to the same conclusion.[7] *See Conner v. Glasgow*, CL-13-754 (Spotsylvania Nov. 5, 2015) (unpublished) (concluding that Virginia Code § 8.01-66.1 does not apply to uninsured motorist carriers); *Mills v. Va. Mut. Ins. Co.*, 70 Va. Cir. 412 (Richmond 2006) (holding that an uninsured

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[6] The Court notes that *United Services* was decided after the Virginia General Assembly first approved Virginia Code § 8.01-66.1 on April 1, 1977. *See* 1977 Va. Acts. ch. 621.

[7] The Court recognizes that one circuit reached a contrary decision. *See generally Chevalier-Seawell v. Mangum*, 90 Va. Cir. 420 (Norfolk 2015) (holding that Virginia Code § 8.01-66.1(D)(1) provides for relief to an insured for the failure of an uninsured motorist carrier to act in good faith relating to a claim before trial).

motorist carrier has not duty to settle in good faith before a judgment is rendered against the uninsured motorist). As Mr. Manu's adversary, GEICO had no pre-trial duty to evaluate, adjust, and settle his claim in good faith. Consequently, the Complaint fails to state a cause of action under Virginia law.

V. Conclusion

For the foregoing reasons the Court grants GEICO's Motion to Reconsider, vacates the Order overruling GEICO's Demurrer, sustains GEICO's Demurrer with prejudice, and denies Mr. Manu's Motion to Compel Discovery as moot. An order consistent with the Court's decision is enclosed.

Sincerely,

Daniel E. Ortiz
Circuit Court Judge

§ 38.2-510. Unfair Claim Settlement Practices

A. No person shall commit or perform with such frequency as to indicate a general business practice any of the following:

1. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

2. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

3. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

4. Refusing arbitrarily and unreasonably to pay claims;

5. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

6. Not attempting in good faith to make prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

7. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

8. Attempting to settle claims for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

9. Attempting to settle claims on the basis of an application that was altered without notice to, or knowledge or consent of, the insured;

10. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;

11. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

12. Delaying the investigation or payment of claims by requiring an insured, a claimant, or the physician of either to submit a preliminary claim report and then

requiring the subsequent submission of formal proof of loss forms, when both contain substantially the same information;

13. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

14. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement;

15. Failing to comply with § 38.2-3407.15, or to perform any provider contract provision required by that section;

16. Payment to an insurer or its representative by a repair facility, or acceptance by an insurer or its representative from a repair facility, directly or indirectly, of any kickback, rebate, commission, thing of value, or other consideration in connection with such person's appraisal service; or

17. Making appraisals of the cost of repairing a motor vehicle that has been damaged as a result of a covered loss unless such appraisal is based upon a personal inspection by a representative of the repair facility or a representative of the insurer who is making the appraisal. Notwithstanding the requirement that an appraisal be based upon a personal inspection, the repair facility or the insurer making the appraisal may prepare an initial, which may be the final, repair appraisal on a motor vehicle that has been damaged as a result of a covered loss either from the representative's personal inspection of the motor vehicle or from photographs, videos, or electronically transmitted digital imagery of the motor vehicle; however, no insurer may require an owner of a motor vehicle to submit photographs, videos, or electronically transmitted digital imagery as a condition of an appraisal. Supplemental repair estimates that become necessary after the repair work has been initiated due to discovery of additional damage to the motor vehicle may also be made from photographs, videos, or electronically transmitted digital imagery of the motor vehicle, provided that in the case of disputed repairs a personal inspection is required.

B. No violation of this section shall of itself be deemed to create any cause of action in favor of any person other than the Commission; but nothing in this subsection shall impair the right of any person to seek redress at law or equity for any conduct for which action may be brought.