DAMAGES, LIENS AND SUBROGATION IN SETTLEMENT NEGOTIATIONS

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October 19, 2018

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A. Assessing and Allocating Damages

1. Vehicle Damage and Diminished Value

- Vehicle Owner can claim vehicle lost value even after repair.
- Claim is based on diminished market value.
- If the vehicle is not a total loss (cost of repair is less than ~75% of the vehicle's value), the measure of damages is the difference between market value at the time of the crash and after the damaged vehicle has been repaired.
- Damages are measured by the cost of reasonable repairs necessary to restore the automobile to its original condition **together with the diminution in value of the injured property after repairs are made**. *Averett v. Shircliff*, 218 Va. 202, 206-208, 237 S.E.2d 92 (1977).
- Lay testimony is admissible to establish vehicle's value.
- By statute, value also established by NADA guide and "other published sources for vehicle values regularly used in the automobile industry".
- Expert testimony is a good idea if the claim is substantial. Va. Code Ann. *§ 8.01-419.1.*
- If vehicle is a total loss, damages are vehicle's fair market value immediately before crash.

2. Paid vs. Billed Medical Services - Collateral Source Rule

- Collateral Sources of payment are Inadmissible at Trial.
- Collateral sources are sources of payment other than the defendant or defendant's insurer.
- Collateral sources include health insurance, medicare, medicaid, worker's compensation, disability insurance, sick leave and vacation pay, comp time, personal time, and self-pay patients.
- For an opinion affirming the right of the plaintiff to submit the full bill despite health insurance write-offs, see *Radvany v. Davis*, 262 Va. 308, 551 S.E.2d 347, 348 (Va. 2001).
- Black letter law in Virginia that a party (usually the defendant) may not introduce evidence of sources of payment collateral to the tortfeasor.
- Collateral source rule excludes evidence of payment by health insurance, medical expense coverage, medicaid, medicare or workers compensation. *Acuar v. Letourneau*, 260 Va. 180, 189, 531 S.E.2d 316 (2000) (quoting *Schickling v. Aspinall*, 235 Va. 472, 474, 369 S.E.2d 172 (1988).
- It is well-settled that an injured person is entitled to recover all damages caused by a defendant's negligence. See *Lawrence v. Wirth*, 226 Va. 408, 309 S.E.2d 315, 318 (Va. 1983) (citing *Blair v. Eblen*, 461 S.W.2d 370 (Ky. 1970)).

PRACTICE POINTER:

> For HMO's which do not generate a bill, hire a certified medical billing specialist to create a bill. See, Va Code 8.01-413.01(B). The bill is admissible if submitted in the form of an affidavit from the preparer and submitted to the opposing party within 30 days of trial.

- A loss of earnings claim may not be diminished by evidence of such as sick leave, vacation pay, and short or long term disability. *See, Va. Code 8.01-35.*

3. Medical Bills

a. Past Medical Bills

- Can the injured Plaintiff offer admissible testimony about need for future care?
- Yes, if defendant does not object.
- No, where defendant objects to the introduction of medical bills and defendant's evidence will raise a substantial contest as to either the question of medical necessity or the question of causal relationship.
- The court may admit the challenged medical bills only with foundation expert testimony tending to establish medical necessity or causal relationship, or both, as appropriate. *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908, 914 (1989).
- *McMunn* held that proof of medical expenses by the introduction of bills through the sole testimony of the plaintiff requires consideration of four major components:

  (1) authenticity,

  (2) reasonableness in amount,

  (3) medical necessity, and

  (4) causal relationship.
- Whether a particular treatment is medically necessary and is causally related to a condition resulting from some act or omission on a defendant's part, can usually be determined only by a medical expert qualified in the appropriate field who has studied the plaintiff's particular case. See *McMunn*, 379 S.E.2d at 914.

b. Future Medical Bills

- See Virginia Model Jury Instruction 9:00(5) below.
- Best to use expert testimony to establish future medical bills.
- Can the injured Plaintiff offer admissible testimony about need for future care?
- I would not try unless the future care is *de minimus*.

4(a). Loss of Earning Capacity

- Earning capacity is to be distinguished from loss of earnings.

- Earning capacity is defined as the ability to earn money.
- One can experience an increase in earnings after an accident and still present viable evidence of lost earning capacity.
- This would be particularly true for someone whose education or experience would likely have lead to significant promotions or even a new career resulting in a significantly higher pay scale.
- Calculate loss of earning capacity by figuring out:
    a. Work life expectancy, and
    b. Loss of earnings over work life due to injury.
- Work-life expectancy is not measured by the date one departs from the labor market; instead, it examines the number of uninterrupted years an individual would be expected to participate in the labor force.
- Work-life expectancy considers contingencies for not working, including the probabilities of dying, becoming disabled, or leaving the labor market.

4(b). Factors to Consider in Quantifying Loss of Earning Capacity

i. Age and Life Expectancy of Plaintiff

- Age of the Plaintiff is an important consideration in many respects.
- The death of a young child, who is without a history of earnings, and whose earning capacity is speculative, is usually worth considerably less than the death of a working parent, particularly a high wage earner.
- But due to life expectancy and accumulation of healthcare expenses, a serious injury with lifetime medical needs is usually valued higher for a young person than for an older person.

8.01-419. Table of life expectancy

The following **table** (below is excerpted) shall be received in all courts and by all persons having

power to determine litigation as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the following columns:

AGE	BOTH SEXES	MALE	FEMALE
20	58.4	55.8	60.8
25	53.6	51.2	56.0
75	11.7	10.5	12.5
90	4.8	4.3	5.0

- These tables are admissible in court where the plaintiff has made a claim for permanent injury and loss of future earnings and/or loss of earning capacity.
- Most judges prefer that you mark only the line entry for the age of the plaintiff as the exhibit, as the other data is irrelevant.
- You may be able to secure a stipulation from your opponent and therefore you will not need this table as an exhibit.
- The defendant can attack the life expectancy projection by showing that the plaintiff's health, constitution and habits result in a diminished life expectancy.

- Once the life expectancy is admitted, the plaintiff may then argue for loss of earnings and loss of earning capacity up to the end of the plaintiff's "work life".
- Loss of earning capacity is case by case basis because some workers may never retire.

ii. Evaluation of Education and Work History

- These are considerations in evaluating vocational capabilities of a client, both pre-injury and post-injury.

- The individual client's education and professional training, along with their employment history, provides a basis for evaluating their pre-injury worker traits.
- Theses traits include skills, abilities, aptitudes, and characteristics that are relevant to the work place.
- The physical and intellectual requirements of the individual's past work can be assessed by creating a worker trait profile utilized for a Transferrable Skills Analysis in the vocational assessment.

iii. Potential Vocational Re-Training Costs

- If an injured worker is a candidate for a retraining program, the costs associated with the completion of the program, along with lost wages during the duration of the program can be assessed as damages.
- This would be relevant when a retraining program would mitigate loss of earning capacity.

REAL WORLD EXAMPLE OF DAMAGE CALCULATION WITH RETRAINING

Due to injury, a hands on construction supervisor was physically limited from performing his prior work. But with enrollment into and completion of a 9 month computer assisted drafting (CAD) program, he was employable as a CAD technician. Because his earnings as a construction supervisor had been somewhat variable, but his employment as a CAD drafter was full time, he was able to return to employment as a CAD technician earning as much as he had earned previously as a construction supervisor. Damages would be include the cost of tuition and supplies and 9 months of lost wages.

- See Virginia Model Jury Instruction 9:00(7) below for loss of earnings instruction.

5. Pain and Suffering

- Read *Kondaurov v. Kerdasha*, 271 Va. 646, 629 S.E.2d 181 (2006).
- Plaintiff and her dog were in a vehicle which overturned.
- Plaintiff suffered little physical injury.

<u>OPINION</u> (Mental Anguish and Emotional Distress)

- *We have held, for well over a century that mental anguish may be inferred from bodily injury.*
- *It is not necessary to prove it with specificity.*
- *Mental anguish, when fairly inferred from injuries sustained, is an element of damages.*
- *In the present case, the plaintiff suffered physical injury, albeit remarkably slight.*
- *Plaintiff was clearly entitled to be compensated in damages for her emotional distress.*
- *Emotional distress can be inferred from the physical impact she sustained in the accident.*
- *Such distress might include shock and fright at being struck three times, turned over, left hanging upside down in her seatbelt and experiencing physical pain.*
- *It might also include anxiety as to the extent of her injuries, worry as to her future well-being, her ability to lead a normal life and to earn a living.*
- *It might include fear of disability, deformity, or death.*
- *Such factors were proper subjects for the jury's consideration because they might fairly be inferred from the physical impact of the collisions upon her person.*
- *They might also be taken into account as factors causing exacerbation of her pre-existing mental and physical conditions.*
- See Virginia Model Jury Instruction 9:00(2) below for what the jury will hear in the case.

Virginia Model Jury Instruction 9.000 (*General Personal Injury and Property Damage*)

- This Virginia model jury instruction summarizes the claim for compensatory damages.

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:

(1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;

(2) any physical pain [and mental anguish] he suffered in the past [and any that he may be reasonably expected to suffer in the future]

(3) any disfigurement or deformity and any associated humiliation or embarrassment;

(4) any inconvenience caused in the past [and any that probably will be caused in the future];

(5) any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future;

(6) any earnings he lost because he was unable to work at his calling;

(7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;

(8) any property damage he sustained.

Your verdict shall be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.

- This model jury instruction makes provisions for past and future losses, including wages and medical bills and pain and suffering/mental anguish/emotional distress.

B. Medical Provider Liens - Va. Code Section 8.01-66.2

Statutory Liens for Medical Providers:

- If perfected, must be paid from third party recovery.
- Hospitals & Nursing Homes- $2500.00
- Physicians, Chiropractors, Nurses, Physical Therapists, Pharmacies - $750.00
- Ambulance Services - $200.00

- Medical provider liens are inferior to the lien of the attorney. See: 8.01-66.3.
- To perfect its lien, a provider must provide written notice to the injured person or his attorney and name the provider and assert a lien.
- Written notice is not required for Medicaid (8.01-66.9) or Medicare, which have what are considered "super liens".
- Must honor assignment even if attorney has not endorsed the assignment so long as client signed.

Query:

1. Can a hospital claim that each physician or nurse is entitled to $750 on top of the hospital's $2500?

2. And if one has two separate trips to the same emergency room for the same accident, does the hospital get to claim $5,000?

C. ERISA (Subrogation) Liens

- ERISA stands for Employee Retirement Income Security Act.
- Ascertain if client's health insurance is a qualified, self-funded healthcare plan.
- Self-funded means that the medical bills are paid from funds contributed by the company and its workers, and not by insurance purchased by either the company or the employee.
- Medical bills paid by qualifying self-funded plans are required to be reimbursed from a

personal injury settlement.

- Free Erisa assists in determining if plan is self funded http://www.freeerisa.com/.
- Best to secure the fund's plan documents from the plan administrator to verify plan is self funded.
- Ask for Summary Plan Description and relevant annual reports and form 5500 tax forms.
- Section 1024(b)(4) requires plan administrator to furnish plan documents on request
- Penalty for failure to provide plan documents when requested.
- Large employers like hospital corporations, banks and grocery store chains use self funded plans.
- Local government plans are excluded from ERISA.
- *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 133 S. Ct. 1537 (2013).
- *McCutchen* confirmed an ERISA compliant plan's right to collect from third party recovery.
- *McCutchen* also held that if the ERISA plan did not address attorney fees, as a matter of equity the plan must share in the costs of litigation, including counsel fees.
- Unfortunately, since *McCutchen,* almost every plan does address attorney fees and requires reimbursement without sharing cost of attorney fees.
- Self funded (ERISA) plans request reimbursement by letter to the insured.
- Advise client to look for a letter from a 3rd party collector, such as The Rawlings Company.

D. Mandatory Insurer Reporting - Medicare

- Federal law requires all insurance companies issuing settlement checks to secure the SSN of the plaintiff and report that information to Medicare. If the liability insurer does not report the SSN of the plaintiff to Medicare, the insurer can be liable to Medicare if the settling party thereafter wrongfully uses Medicare to pay for accident-related

medical care.

- Be on the lookout for a letter from the liability insurer requesting the SSN for Medicare.
- Complete the enclosed Medicare reporting form and return it to the insurer.
- But do not consent to adding Medicare as a payee on the settlement check, even if your client is an eligible recipient.

E. Tips for Successful Mediation

- Mediation is voluntary.
- Mediation involves a neutral person who attempts to convince the parties to reach a settlement.
- Prepare the client for a potentially frustrating "back and forth" over many hours.
- Insist that the claims adjuster with the money attends the Mediation. Best to have a pre-mediation settlement offer to gauge the position of the insurance company.
- Make sure you and your client are on the same page with the value of the case.
- Do not reveal everything up front to the Mediator. Keep some of your aces close to your vest.
- Understand that you may not reach a settlement.
- Make sure that you and your client are aware of any requests for confidentiality regarding the identity of the defendant and the amount paid BEFORE you conclude the settlement discussions.
- If you reach a settlement, draft a preliminary settlement confirmation and add that the check must be delivered within whatever time period you feel is reasonable.

F. Addressing Pending Liens in Settlement Negotiations

- Determine all of your client's outstanding bills and liens prior to the Mediation.
- Do not forget you may have to deal with Medicare, ERISA, FEHBA, Medicaid, and out of state providers who are not subject to Virginia's anti-subrogation statute.
- Calculate your costs.

- Using unpaid bills, your costs and attorney fee, review the realistic range of settlement with client prior to the Mediation.
- Calculate the client's "net" based on a range of numbers representing possible settlements.
- Once the claim settles, attempt to negotiate reductions of the unpaid amounts and liens.
- Make sure that you have written confirmation of any lien reduction.

G. Subrogation

- Subrogation is the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to the loss covered by the policy.
- Simply stated, it is the right of an insurer to claim reimbursement from a third party settlement or verdict for payments made to its insured.
- Subrogation is commonly encountered in auto litigation with uninsured (UM) and underinsured motorist (UIM) claims. Here, the at-fault party is either unknown, uninsured or has less insurance than the injured party ("underinsured"). If there is a known individual (not a John Doe), the UM or UIM carrier will make a payment to its insured, conditioned on the right to "subrogate" or stand in the shoes of the plaintiff and file suit against the uninsured or underinsured defendant. *See, Va. Code § 38.2-2206 (G)*.

PRACTICE POINTER:

Never settle a claim against an underinsured defendant without following the procedures set forth in *Va. Code § 38.2-2206 (K) and (L)*, which require communication and paperwork between the plaintiff, defendant and UIM insurance carrier. Likewise, never take any payment from an uninsured motorist without the consent of the UM carrier if you intend to make a UM claim.

- Virginia's anti-subrogation statute applies to health insurers - Virginia Code Section 38.2-3405.
- This statute prevents many health insurers from attempting to recoup monies paid for treatment related to a liability claim.
- Virginia also prevents the medical expense auto carrier from claiming subrogation rights.
- The anti-subrogation statute has limits - Medicaid, Medicare, ERISA, FEHBA or where the medical care was provided out of state are all excluded.
- The anti-subrogation statute also excludes disability policies.

H. Practical Tips for Restarting Stalled Negotiations

- If your demand did not include information about the defendant pleading guilty to a traffic charge stemming from the crash, review the traffic court records of the jurisdiction where the crash occurred. If indeed the defendant pleaded guilty, provide proof to the adjuster.
- If you have subpoena power, subpoena the other party's criminal record from the Va. State Police. If you do not have subpoena power, then search the criminal conviction records in the local courts to look for convictions and also prior alcohol-related offenses.
- Provide evidence of structural damage to you client's vehicle in cases where the visible damage appears minor.
- If the adjuster harps on the minor property damage or notes there were not many visits to doctors or therapists after the crash, provide the insurance adjuster with excerpts from *Kondaurov v. Kerdasha*, 271 Va. 646, 629 S.E.2d 181 (2006) cited above.
- If your client has incurred at least $12,500 in combined loss of earnings and medical bills, send them to the adjuster.
- Va. Code §8.01-417(C) requires the claims adjuster to provide you the defendant's policy limits and the current addresses of the driver.
- If the policy limits are low in relation to the damages, send a demand letter noting you

will settle within the policy limits.

- Include an extra copy the settlement demand letter for the defendant so that he/she is on notice that you will settle within the limits and if there is an excess verdict.
- Potentially, if the liability insurance company does settle within the policy limits, and you receive a verdict for more than the policy limits, the defendant will be on the hook for the excess. This opens the liability insurer to a claim of bad faith, which it will want to avoid.

I. Structuring Settlements

- A structured settlement is one that invests some or all of the settlement proceeds.
- There can be substantial tax benefits to structuring the settlement.
- The earnings on the amount invested in the structured settlement accumulate tax free.
- However, with the very low interest rates we have experienced in the recent past, the earnings on the structured settlement are modest.
- A structured settlement is good for clients, who for any number of reasons, cannot manage money.
- The financial entity which invests the settlement money should be triple rated for financial security.
- The financial entity which takes your money to invest in the structured settlement will usually sell the structure to a related entity which then holds it and must pay out as agreed.
- The payout can be structured any way you wish.
- You can combine periodic payments with lump sum payments and configure the payout schedule as works best for the client.
- Once the funds are invested, the client no longer controls the money.
- Once the client agrees to a structured settlement and the money is invested, it will be nearly impossible to then reverse course.

- There are firms which will purchase the client's stream of income for a discounted lump sum, a practice which is fraught with potential headaches.

AUTO INSURANCE BAD FAITH CLAIMS IN VIRGINIA

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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 M.D. was a pediatrician practicing in Arlington, Virginia
- Dr. Price was insured for malpractice by Aetna with limits of 50/150.
- Dr. Prince injured a child as a result of the failure to conduct blood testing.
- After an investigation, Aetna's counsel deemed the case one of "no liability".
- 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's lawsuit 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.
- Prior to the med mal trial, settlement negotiations were sponsored by the DC court and during those negotiations Aetna's counsel advised he would recommend a $45,000 settlement.
- The Plaintiff agreed to accept $45,000, but Aetna/Dr. Price's counsel then advised "his client would not pay that much".
- Trial ensued.
- 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.

- Aetna's 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.
- *Aetna v Price* addressed whether an insured could sue its liability insurer for conduct which resulted in an excess verdict.
- Question of first impression in Virginia.
- The *Price v Aetna* court surveyed common law throughout nation and concluded the rule is 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 why the reason for the rule is obvious.

(1) 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.

Components of "Bad Faith Rule"

- The *Aetna v Price* Court defined 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.

Application of law to facts in *Aetna v Price*

- 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), and

   b. Counsel hired by Aetna should have filed a third party complaint against another physician to reduce Dr. Price's exposure. VSC ruled 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 for $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.

5. 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.

Although Aetna was aware a verdict would exceed policy limits if liability was established:

a) Aetna conducted an accurate and complete investigation,

b) Aetna was heedful of its insured's interests as much as its own,

c) Aetna honestly and intelligently weighed the probabilities of success in a trial, and

d) Aetna was therefore not acting in bad faith in refusing to settle within policy limits.

Aetna v Price 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. *Floyd* Rejected both the plaintiff's definition based on "fairness" and State Farm's definition requiring fraud, deceit, dishonesty, malice or ill-will, *Floyd* 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." *Floyd*, 235 Va. 136,143-144.

2. *Floyd* states 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.

3. Standard of proof requires "clear and convincing evidence" of bad faith. *Floyd* 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 POINTER:

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. STATUTORY BAD FAITH CLAIMS - Virginia Code §8.01-66.1

1. Statutory Bad Faith Liability Claims

- Virginia Code §8.01-66.1(B) and (D)(2).
- Statutory bad faith liability claims are limited to a claim of $3,500 or less against a liability carrier.
- To be successful, a judge must find that such denial, refusal or failure to pay was not made in good faith.
- Damages include:

(I) The amount due.

(ii) Double the amount of the judgment awarded the third party claimant,

(iii) Reasonable attorney's fees, and

(iv) Expenses.

2. Statutory Bad Faith Failure to Pay Medical Expense Claim

- Virginia Code §8.01-66.1(A) and (D)(2) specifically mention medical expense claims.
- Subsection A refers to first party (including medical expense) claims of $3,500 or less.

Damages under subsection A include **double the amount due plus attorney fees and expenses**.

- Subsection (D)(2) refers to first party (including medical expense) claims in excess of $3500.

Damages under subsection (D)(2) include **the amount due (not double) plus attorney fees , expenses and interest at double the rate provided in §6.2-301.**

Claims under §8.01-66.1 must be heard by a judge and not a jury. 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. DECLARATORY JUDGMENT TO DETERMINE COVERAGE

- 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.

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 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.
- Aetna's duty to defend Goins and pay any judgment was dependent upon coverage under the policy.
- VSC held that "advance determination of the coverage question served to remove the clouds from the legal relations of the parties."
- Court 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).

VSC 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.*

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

This was decided in 2017 in ***Manu v. GEICO Cas. Co.*, 293 Va. 371 (2017).**

- Manu stemmed from a 4 car pile-up.
- Manu was a passenger in the 4th car.
- The crash was 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 demanded a sum within Geico's UM limits.

- 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 (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.*
- Geico demurred and an appeal to the VSC followed.
- Manu argued Virginia *Code 8.01-66.1(D)(1)* is remedial and is to be broadly interpreted.
- Manu argued the legislative history included studies showing consumers were unhappy with their insurers.
- Manu argued that *8.01-66.1(D)(1)* unambiguously references first party claims, which include UM and UIM.

Decision in *Manu v. GEICO Cas. Co.*, 293 Va. 371 (2017).

- Va. Code *§ 38.2-2206(A)* is the Uninsured Motorist Statute.
- 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.
- UM carrier is under no duty to pay until a judgment.
- Judgment is what triggers “legal entitlement to recover” from UM/UIM carrier.
- Geico cannot be sued bad faith for pre-judgment UM claims handling.
- *Manu* was a UM claim.
- Argued jointly with *Manu* was a claim against Liberty Mutual for failure to settle a UIM in good faith. *See: Conner v. Glasgow*, 2017 Va. Unpub. LEXIS 10 (decided April

27, 2017).

- *Conner* is an unpublished opinion issued the same day as *Manu*
- *Conner's* holding was identical to *Manu.*
- *Connor says* no claim for bad faith adjusting of a UIM claim prior to a judgment.

Remedy: New legislation to establish cause of action for bad faith handling of UM/UIM claims.

E. WHAT IS NECESSARY TO PROVE BAD FAITH 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.
- A common law bad faith 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:

1. Sloppy investigation, such as incomplete or inadequate witness interviews.
2. Inadequate discovery, such as the failure to depose relevant witnesses.
3. Ignoring expert testimony and failing to hire experts of its own.
4. Ignoring lay testimony.
5. 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.
6. Failing to communicate a settlement offer within policy limits.
7. 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).

Unfair Claim Settlement Practices Act - Va Code § 38.2-510.

- Contains a list of prohibited practices.
- May be relevant to a bad faith claim against an auto insurer.
- Unfortunately, subsection B of the act eliminates a private cause of action.
- The Act assigns enforcement to the State Corporation Commission.
- 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.

For Bad Faith Liability Claim, Go Statutory or Common Law?

With the lower burden of proof for statutory bad faith claims under 8.01-66.1(preponderance of the evidence), chances of success are greater than a common law action. Unfortunately, the jurisdictional limit for third party (liability) bad faith claims under 8.01-66.1 is capped at only $3,500.00.

F. ADJUSTER CASE EVALUATION STRATEGIES: EXCESS VERDICT

- Most claims adjusters are averse to being hit with an excess verdict.
- Should excess verdicts occur 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.

APPENDIX

EXHIBIT A - PERSONAL INJURY SAMPLE COMPLAINT

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF _____

	:	
Plaintiff,	:	
	:	
v.	:	Case #:

:

Defendant. :

COMPLAINT

1. Plaintiff (insert name) is an adult resident of , Virginia.
2. Upon information and belief, defendant (insert name) is an adult resident of , Virginia.
3. On or about , at approximately .m., plaintiff was proceeding in the right lane of westbound of Old Keene Mill Road.
4. At that time and place defendant pulled out of a shopping mall and attempted to cross plaintiff=s westbound lane=s to travel east on Old Keene Mill Road.
5. At said time and place plaintiff blew her horn and attempted to worn defendant proceeding into her lane of travel.
6. Despite blowing her horn, defendant proceeded into the path of plaintiff=s vehicle.
7. Plaintiff was unable to avoid colliding with defendant=s vehicle.
8. Defendant had a duty to operate her vehicle with due care and regard for others using the highway, including plaintiff.
9. Notwithstanding said duty, defendant did then and there operate her automobile in a careless, negligent and reckless manner in that she:
    a) failed to pay full time attention to her driving duties;
    b) operated her vehicle at an excessive speed under the circumstances and conditions then and there existing;
    c) failed to keep a proper lookout;
    d) failed to yield the right of way;
    e) failed to keep his automobile under proper control;
    f) followed too closely behind Plaintiff; and
    g) was otherwise negligent.
10. As a direct and proximate result of defendant=s joint and several negligence, plaintiff has suffered property damage and permanent bodily injury, and has suffered and will continue to suffer pain of body and mind and inconvenience, has incurred and will continue to incur medical expenses and has suffered and will continue to suffer loss of earnings and earning capacity.

WHEREFORE, plaintiff _____ demands judgment against defendant _____ , in the amount of ____DOLLARS ($___) compensatory damages, costs, interest, prejudgment interest and such other relief this Court deems just and proper.

Plaintiff demands trial by jury on all issues in this case.

Respectfully submitted,

By:_____

Name, address, telephone and bar #

Counsel for Plaintiff

APPENDIX
EXHIBIT B - SAMPLE RULE 4:10 ORDER

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF _____:

Plaintiff, :
:
v. : LAW NO.
Defendants. :

ORDER ON MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF

Defendant's Motion of Physical Examination of Plaintiff is GRANTED as follows:

1) Time:

2) Place:

3) Manner of the examination:(I) The physical examination shall consist of visual assessment by the examiner, manual palpation or measurement, if desired by the examiner, and directed questioning by the examiner about the results of in-session physical tests. (ii) There shall not be any invasive testing, films, nerve conduction studies or other intrusive or painful requirements or stimuli.

4) Conditions to the examination: (I) Counsel for the Defendant are responsible for all Plaintiff's transportation costs [if the examination is not conducted in the city where Plaintiff is currently residing/ within __ miles of Pl's residence], which costs shall be paid in advance if requested by Plaintiff. (ii)
Counsel for Defendant is responsible for providing the examiner with any medical history, medical records, or radiographic studies requested by the examiner. Plaintiff shall have no responsibility to furnish any such materials. Plaintiff need not complete any questionnaire or history forms upon arrival at the examiner's office. (iii) The examiner is not permitted to conduct interview of Plaintiff. Rule 4:10 is not a substitute for a deposition. The oral exchange shall be limited to affirmative or negative responses to elicited testing questions. (iv) Plaintiff is permitted to have a court reporter and/or videographer present during any interchange between Plaintiff and the examiner in connection with the examination. (v) Plaintiff's counsel or his designee is allowed to be present to object to any attempted oral exchange initiated by the examiner that exceed the scope of this Order. (vi) This examination is by agreement. Plaintiff is voluntarily appearing for the examination. Neither the examiner nor defense counsel will be permitted to state, suggest, argue or imply during the examination, in the report, or at trial that the examination was in any way limited by the Plaintiff's refusal to allow an examination.

5) Scope of the examination: The examination is limited to the plaintiff's physical condition as raised by the pleadings in this action and as authorized by this Order. The examiner shall be provided a copy of the Order at least 72 hours in advance of the examination, and must agree to abide by its terms.

6) The person or persons by whom it is made: (Name of examiner), a physician who has been

selected by the defendant(s); and

7) The time for filing the report and furnishing the copies: A copy of Dr. [insert name of DME doc] report, his CV, all raw data generated by the examination, including any x-rays, and a copy of his charges will be furnished to counsel for plaintiff (I) five (5) days after the examination or (ii) the first date than any information about the examination is furnished to the defendants' counsel. The results of the examination and a copy of the Rule 4:10 report shall be filed with the Clerk . "Raw data" shall include all clinical notes and other documents generated by the examination of plaintiff.

_____ _____

ENTERED JUDGE

WE ASK FOR THIS:

_____

Counsel for Defendant

_____

Counsel for Plaintiff