In The
Supreme Court of Virginia

RECORD NO: 160852

EBENEZER MANU,

Appellant,

v.

GEICO CASUALTY COMPANY,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
CASE NO. CL-2015-6367

BRIEF OF APPELLANT

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Ebenezer Manu filed a Complaint against GEICO Casualty Company (hereinafter "GEICO") alleging its handling of his October 30, 2010 uninsured motorist bodily injury claim amounted to bad faith in violation of Va. Code § 8.01-66.1(D)(1). (Joint Appendix (hereinafter "JA") p. 5, ¶[1] 29-30). The Complaint was filed in the Fairfax County Circuit Court on May 14, 2015. (JA p. 1-30). GEICO demurred to the Complaint, Mr. Manu opposed the Demurrer, and the matter was argued before Judge John Kloch on July 24, 2015. (JA pp. 34-47). Judge Kloch overruled the Demurrer, and discovery commenced. (JA p. 45.).

Mr. Manu served discovery requests to GEICO on August 20, 2015. GEICO filed partial answers and responses on October 21, 2015, but it failed to provide any relevant documents from its claim file despite Mr. Manu's request for the claim file. Mr. Manu filed a motion to compel the production of GEICO's claim file which was argued before Judge Ortiz on December 18, 2015. Among other things, Judge Ortiz ordered *in camera* review of the claim file and he deferred action on Mr. Manu's motion to compel until after he had completed his review. (J. Ortiz Order, 12/18/15).

[1] All references to paragraphs (¶) refer to Complaint found within the Joint Appendix, pages 1-30).

While the *in camera* review was pending, the Chief Judge of the Fairfax County Circuit Court assigned the entire case to Judge Ortiz by letter dated January 27, 2016. By letter dated January 28, 2016, Judge Ortiz again deferred decision on Mr. Manu's motion to compel and instead invited GEICO to move for reconsideration of Judge Kloch's ruling on the demurrer. Judge Ortiz heard argument on GEICO's motion for reconsideration and Mr. Manu's opposition on February 26, 2016. (JA pp. 48-84). He sustained the demurrer and dismissed Mr. Manu's action with prejudice by letter opinion and final order dated March 11, 2016. (JA p. 94). Mr. Manu now appeals entry of this final order.

STATEMENT OF FACTS

Mr. Manu was injured in a multi-car accident on October 30, 2010. (JA p. 2, ¶ 5-8). The crash occurred on northbound Interstate 495 near Springfield, Virginia. (Id.). A John Doe driver cut off a line of cars resulting in a four car pile-up. (Id.). Mr. Manu was a front-seat passenger in the fourth vehicle, operated by Benjamin Boateng. (Id.). Saman Kiani, driver of the first vehicle in the line managed to stop short of John Doe but he was subsequently rear-ended by Jedadiah Boone who operated vehicle two. (JA pp. 2-4, ¶¶ 7, 15, 21). Mr. Boone was then struck from behind by Donovan

Cozzens in vehicle three who was rear-ended in turn by Mr. Boateng in vehicle number four. (Id.).

Mr. Manu suffered multiple injuries, and his initial treatment included admission to the intensive care unit in a local hospital from November 2, 2010 to November 4, 2010 for evaluation of chest and heart complaints. (JA p. 2, ¶ 9). Upon discharge he received treatment from a cardiologist and orthopedic surgeon. (Id.). Due to his cardiac and orthopedic injuries, Mr. Manu was disabled from work for fifteen weeks. Mr. Manu incurred $27,189.12 in past medical expenses and $6,375.00 in lost wages as a result of the collision. (Id.).

Mr. Manu was insured by GEICO under a personal auto insurance policy. (JA p. 2, ¶ 4). His policy provided uninsured motorist (hereinafter "UM") coverage with a $25,000.00 per person limit. (JA p. 2, ¶ 10 & p. 7). Mr. Boateng was insured by Allstate Property and Casualty Insurance Company with per person liability limits of $25,000.00. (JA p. 3, ¶ 14). Allstate tendered its $25,000.00 limits to Mr. Manu no later than October 20, 2011. (JA p. 4, ¶ 22).

Mr. Manu filed a lawsuit against Benjamin Boateng, Jedadiah Boone, Donovan Cozzens and John Doe on October 19, 2012. (JA p. 3, ¶ 13). Discovery ensued, and Mr. Boone served sworn answers to the Plaintiff's

interrogatories on September 3, 2013. (JA p. 3, ¶ 15, & pp. 10-22). Therein, Mr. Boone blamed John Doe as a cause of the collision. (JA p. 19). Mr. Manu's counsel provided a copy of these interrogatory answers and the complaint to the GEICO claims adjuster on September 9, 2013. (JA p. 3, ¶ 16, & p. 24). Counsel also sent written notice of Mr. Manu's demand for the $25,000.00 UM limits. (Id.). GEICO's claims adjuster declined to make a settlement offer as outlined in a letter dated September 24, 2013. Curiously, the adjuster wrote that, "Bodily injury and uninsured motorist [sic] cannot be claimed on the same loss based on joint and several liability." No settlement offer was made at the time. (JA p. 3 & p. 26).

Mr. Manu subsequently served process upon GEICO as the UM carrier for John Doe. GEICO answered Mr. Manu's complaint on May 28, 2014, and trial was set for February 9, 2015. (JA p. 4, ¶ 20). GEICO defended the case by claiming that John Doe was not negligent. (JA p. 3, ¶ 18, & p. 26). GEICO did not proffer any evidence to contradict Mr. Boone's sworn interrogatory answers at any time during the litigation. (JA pp. 3-4, ¶¶ 19, 21). Mr. Boone and Saman Kiani were deposed on January 21, 2015, and their testimony conclusively established the presence and negligence of John Doe. (JA p. 4, ¶ 21). There was no impeachment of their testimony, and GEICO had no evidence to contest these eyewitness accounts of the

October 30, 2010 crash. (JA p. 3, ¶ 19). Mr. Manu made a reduced settlement demand of $12,500.00 by letter dated January 30, 2015 to GEICO's staff counsel. (JA p. 4, ¶ 23, & p. 27). GEICO's counsel offered $5,000.00, which was rejected. (JA p. 4, ¶ 23). Mr. Manu accepted Boateng's policy limits, dismissed him[2] from the lawsuit on February 3, 2015, and proceeded to trial by jury against John Doe on February 9, 2015. (JA p. 4, ¶ 22).

At trial, GEICO intended to present a defense of superseding/intervening causation, arguing that Mr. Boateng's independent negligence broke the causal connection between John Doe's negligence and Mr. Manu's injury. (JA p. 4, ¶ 24). The trial judge struck GEICO's liability defense after Mr. Manu offered testimony from the four known drivers involved in the collision; Saman Kiani, Jedadiah Boone, Donovan Cozzens and Benjamin Boateng. (Id.). The trial proceeded on damages alone, and Mr. Manu's evidence was largely uncontested. (JA p. 4, ¶ 25). His cardiac injuries were unrebutted in GEICO's case in chief, and GEICO presented one medical expert witness, an orthopedic surgeon. (Id.). However, GEICO's medical expert did not contest the length, nature or cost of Mr.

[2] Party Defendants Jedadiah Boone and Donovan Cozzens were nonsuited prior to the dismissal of Benjamin Boateng.

Manu's orthopedic treatment. (Id.). Nor did he dispute causation of Mr. Manu's injuries. (Id.). The jury returned a verdict in the amount of $68,528.24 plus costs and prejudgment interest from October 30, 2010, and on February 10, 2015, the Fairfax County Circuit Court entered judgment against John Doe for that amount. (JA pp. 4-5, ¶ 26, & pp. 29-30). Mr. Manu subsequently filed his Complaint alleging bad faith against GEICO on May 14, 2015. (JA See Complaint).

ASSIGNMENT OF ERROR

The Trial Court erred by sustaining GEICO Casualty Company's Demurrer to Mr. Manu's Complaint which alleged a cause of action under Virginia Code § 8.01-66.1(D)(1). Specifically, the Trial Court erred in ruling that Virginia Code § 8.01-66.1(D)(1) did not provide Mr. Manu a remedy against GEICO Casualty Company for its alleged bad faith conduct in adjusting his uninsured motorist bodily injury claim.

Pursuant to Virginia Supreme Court Rule 5:17(c)(1), preservation of the error can be found in the following:

(1) Plaintiff's Opposition to Defendant's Demurrer, dated July 17, 2015, (JA pp. 33.1-33.3).

(2) Transcript ("proofed and revised") of July 24, 2015 hearing on Defendant's Demurrer before Judge Kloch, (JA p. 43).

(3) Plaintiff's Opposition to Defendant's Motion for Reconsideration of the Prior Ruling on Defendant's Demurrer, dated February 19, 2016, (JA pp. 47.1-47.3).

(4) Transcript of February 26, 2016 hearing on Defendant's Motion for Reconsideration of the Prior Ruling on Defendant's Demurrer before Judge Ortiz, (JA pp. 65-67; JA pp. 76-77).

STANDARD OF REVIEW

Mr. Manu's claim under Va. Code § 8.01-66.1(D)(1) was decided on demurrer by the trial court without reaching the merits of case. When the trial court disposes of an action on demurrer, this Court reviews the case under a *de novo* standard of review. "Because appellate review of the sustaining of a demurrer involves a matter of law, we review the trial court's judgment *de novo.*" Glazebrook v. Bd. of Supervisors, 266 Va. 550, 554 (2003). This Court accepts as true all facts properly pleaded in the Complaint and all reasonable inferences from those facts. Id.

ARGUMENT

1. THE UNAMBIGUOUS LANGUAGE USED IN VA. CODE § 8.01-66.1(D)(1) INCLUDES UNINSURED MOTORIST (UM) CLAIMS

The matter on appeal before the Court is a determination of the scope and effect of Va. Code § 8.01-66.1(D)(1) in the context of a UM claim. Any question of statutory interpretation begins with the question of whether an ambiguity exists.

> "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).

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. The statute provides in relevant part as follows:

> 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 . . . Virginia Code § 8.01-66.1(D)(1) (emphasis added) (JA pp. 100-101).

By using such direct language, it is clear the General Assembly intended to provide insureds a remedy against their insurers. This statutory language 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 in Virginia. 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 intent 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." It is axiomatic that a UM claimant is the "insured" of the UM insurer.

In further support of Manu's interpretation of this statute, § 8.01-66.1(D) has subparts (1) and (2). Because § 8.01-66.1(D)(2) serves only to bring medical expense claims within the bad faith statute, § 8.01-66.1(D)(1) has to refer to some other first party claims. This leaves only collision, comprehensive and UM claims. In the absence of specific language excluding UM claims, it is inescapable that § 8.01-66.1(D)(1) applies to UM insurers.

2. THE LEGISLATIVE HISTORY SUPPORTS MANU'S VIEW THAT THE LEGISLATURE INTENDED VA. CODE § 8.01-66.1(D)(1) TO INCLUDE UM CLAIMS.

In the face of a purported statutory ambiguity, this Court routinely relies on legislative history to determine the General Assembly's intent in enacting a given statute. See generally, REVI, LLC v. Chi. Title Ins. Co., 290 Va. 203 (2015). Although § 8.01-66.1(D)(1) is unambiguous, the legislative history provides significant, additional evidence of the General Assembly's intent in enacting the subsection.

Subsection (D)(1) was passed in 1991. It 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). Prior to the enactment of subsection (D)(1), the protections of § 8.01-66.1 were only available to those with claims totaling $1,000.00 or less. Final Report Joint Subcommittee, at 12. The Joint Subcommittee conducted a thorough investigation, which included public hearings, presentations by the Attorney General, insurance industry representatives, and the Virginia Trial Lawyers Association. Quoting the legislative history:

> The Joint Subcommittee found that with regard to first party claims, the insured should have a statutory civil remedy against his insurer who in bad faith fails to properly settle a claim totaling more than $1000 and should be able to seek a penalty from the insurer.
> Final Report Joint Subcommittee, at 11.

Following the investigation, the Joint Subcommittee 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).

Regardless of whether a true "fiduciary" relationship exists between a UM carrier and its insured, the General Assembly was concerned enough about the conduct of first party insurers that it enacted the Joint Subcommittee's proposed amendment to Va. Code § 8.01-66.1 without alteration. (JA p. 96, 1991 Va. Acts 155).

This history confirms that the legislature enacted subsection (D)(1) with the intent of providing a remedy for an insurer's failure to adjust, settle and pay first party claims in good faith. For over 100 years, the Court has followed the "mischief rule" of statutory construction. Rector & Visitors of University of Virginia v. Harris, 239 Va. 119, 124 (1990). "Remedial statutes are to be 'construed liberally, so as to suppress the mischief and advance the remedy' in accordance with the legislature's intended purpose. All other rules of construction are subservient to that intent." Id. (citations omitted). This venerable rule of statutory construction would need to be cast aside if the legislative purpose behind § 8.01-66.1(D)(1) is found to be ineffective for UM claimants.

GEICO attempts to dismiss the relevance of the legislative history by focusing upon House Bill 1771, which was offered in January 2015. The failed Bill proposed adding a Section E that specifically referenced UM and UIM coverages. One could speculate endlessly about why that Bill did not make it

out of Committee. One plausible interpretation would be a Committee determination that the new section was unnecessary given the unambiguous language in § 8.01-66.1(D)(1). Given the absence of information as to why the Bill failed, GEICO's favored interpretation should merit no more weight than Mr. Manu's or the myriad of other plausible explanations.

This Court's decision in Nationwide Mut. Ins. Co. v. St. John, 259. Va. 71 (2000) further supports an expansive interpretation of this remedial statute. Although the insured in that case relied upon § 8.01-66.1(A), 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.

This view has been adopted at the circuit court level in Copenhaver v. Davis, 29 Va. Cir. 121 (Louisa 1992) and 31 Va. Cir. 227 (Louisa 1993);

Olson v. Allstate Ins. Co., 44 Va. Cir. 379 (Hampton 1998); Ballard v. State Farm Mut. Auto. Ins. Co., 1997 Va. Cir. LEXIS 584 (Va. Beach 1997) and most recently in Chevalier-Seawell v. Mangum, 90 Va. Cir. 420 (Norfolk 2015). These cases held that § 8.01-66.1(D)(1) granted a remedy to insureds for pre-trial bad faith actions by insurance carriers providing coverage under § 38.2-2206. None of these trial judges held an insurer's duty to act in good faith was triggered only after entry of a final judgment 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. The Copenhaver Court went on to find that § 8.01-66.1 was intended to create a remedy for an insured when her own insurance company breaches its "duty to act in good faith in handling an insured's claim." Copenhaver, 31 Va Cir 227 – 28. No other result can be reached upon reading the language of the statute and its legislative history.

3. "LEGALLY ENTITLED TO RECOVER" AS USED IN § 38.2-2206(A) DOES NOT CONFLICT WITH A REQUIREMENT TO ADJUST UM CLAIMS IN GOOD FAITH, BUT EVEN IF IT DOES CONFLICT, THE LEGISLATIVE MANDATE THAT FIRST PARTY CLAIMS BE ADJUSTED IN GOOD FAITH MUST CONTROL

The Trial Court's decision and GEICO's arguments in this case 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 Trial Court and GEICO read the operative phrase of § 38.2-2206(A), requiring an insurer "pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle," as the trigger for any duty owed by an insurer to its insured. 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 dealings with an insured, pre-trial. See Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 75 (2000). 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.

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. Under that statute, the UM insurer has to pay on an entered judgment, even if the UM insurer did not participate at trial or thinks the case was frivolous or the verdict is excessive. However, § 8.01-66.1(D)(1) imposes a duty of good faith on a UM insurer which does participate or is put on notice of a claim and thereafter denies, refuses or fails to pay the claim in bad faith. Even if this Court were to find that Va. Code § 38.2-2206(A) does conflict with the imposition of a

duty of good faith claims adjusting, rules of statutory interpretation dictate that the specific language of Code § 8.01-66.1(D)(1) will control.

Further support for this interpretation can be found in other sections of the Virginia Code. Va. Code § 38.2-510(A)(6) prohibits insurers from "[n]ot attempting **in good faith** to make prompt, fair and equitable settlements of claims in which liability has become reasonably clear." (emphasis added). Similarly, Va. Code § 38.2-510(A)(7) proscribes insurers from "[c]ompelling 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." These statutes[3], along with § 8.01-66.1(D)(1), provide unmistakable evidence of the legislature's desire for UM claims to be evaluated fairly, promptly, and in good faith. The legislative history makes clear the General Assembly enacted § 8.01-66.1(D)(1) due to "special concern about the lack of civil sanctions available to the *insured* when the insurance company refuses to settle in good faith." Final Report Joint Subcommittee, Appendix 8, subpart II-C ("Proposals of the Office of the Attorney General"). This

[3] Although these statutes only provide a cause of action for the Commissioner of Insurance, they support the proposition that an UM insurer's legal duty to act in good faith does not begin after a judgment has been entered. It calls into question the Trial Court's assertion that UM insurers have no "pre-trial duty to evaluate, adjust and settle. . . claim[s] in good faith." J. Ortiz Opinion, page 9 (March 11, 2016).

legislatively mandated duty to act in good faith is nowhere limited to all first party claims other than UM claims.

The Trial Court and GEICO rely on a string of cases, mostly from the 1970's and 1980's, before the 1991 enactment of § 8.01-66.1(D)(1). None of those cases analyze or even discuss § 8.01-66.1. Nor do those cases mention an insurer's duty to act in good faith vis-à-vis its insured. Although these cases do not address either § 8.01-66.1(D)(1) or any issue of bad faith, it bears mentioning that even the pre-1991 case law is not uniform.[4] Most importantly, the case law prior to 1991 cannot be helpful in interpreting 8.01-66.1(D)(1) a remedial statute enacted in 1991.

The Trial Court relied upon United Services Automobile Ass'n v. Nationwide Mutual Insurance Co., 218 Va. 861 (1978) and quoted as follows:

[4] In a 1988 decision, the Court held an insured is "legally entitled to recover" under § 38.2-2206 from an UM carrier so long as there is a "legally enforceable right to recover", without regard to a judgment. Aetna Casualty & Surety Co. v. Dodson, 235 Va. 346, 351, footnote 6, (1988). The Dodson Court rejected the argument that the phrase "legally entitled to recover" is synonymous with reducing an uninsured motorist claim to judgment. Id. The Dodson Court distinguished Midwest Mutual Ins. Co. v. Aetna Cas. & Sur. Co., 216 Va. 926 (1976), to its facts holding that case 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." Id. The exclusivity provision of the Workers Compensation Act is a clear example of an impediment to an insured's legally enforceable right to recover under an uninsured motorist policy. Id. Mr. Manu did not face any equivalent legal bar to his right to recover from GEICO in the underlying personal injury case.

"[T]he 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 by Trial Court). United Services v. Nationwide did not involve a claim of bad faith and the quote is dicta. While a UM insurer may not have owed a duty of good faith to its insured in 1978, the law changed in 1991 with the enactment § 8.01-66.1(D)(1). Although the Trial Court's opinion states that the United Services v. Nationwide decision was rendered after the enactment of the earlier version of § 8.01-66.1, in fact the accident occurred in 1973[5], four years before the original 1977 enactment of § 8.01-66.1. (JA p. 95, 1977 Va. Acts 621). To the extent that dicta from these prior cases conflicts with the mandate of § 8.01-66.1(D)(1), those decisions and such dicta must be overruled.

The one case cited by the Trial Court which was decided after the effective date of this subsection, Seals v. Erie Ins. Exch., 277 Va. 558 (2009), was an appeal of a declaratory judgment action deciding whether liability and UIM benefits were excluded from a garage-keeper's policy. The Court held "[w]hen tort litigation ensues, the liability insurer is the insured's defender; the uninsured motorist insurer is the insured's adversary." 277 Va. 558, 563.

[5] United Services v Nationwide, 218 Va. 861, 862 (1978).

This adversarial relationship which develops with a UM claim is not relevant or determinative as to the whether the legislature spoke unambiguously in 1991 when it enacted the remedial statute, § 8.01-66.1(D)(1). Furthermore, good faith claims adjusting and an adversarial relationship are not mutually exclusive.[6]

With the 1966 decision in Aetna v. Price, 206 Va. 749, an insured acquired a legal remedy for its insurer's bad faith refusal to settle third party claims within the policy limits. With the enactment in 1991 of § 8.01-66.1(D)(1), the legislature determined that insureds also needed protection from bad faith adjusting of first party claims. See subsection 2, *supra*. The logic of the legislative action is apparent because in both UM and third party claims, the insurer controls the investigation, negotiation and settlement of any claim or suit as it deems expedient.

[6] The standard of reasonableness requires the consideration of the following issues when determining whether an insurer acted in bad faith under *§ 8.01-66.1(A)*: whether reasonable minds could differ in the interpretation of policy provisions defining coverage and exclusions; whether the insurer had made a reasonable investigation of the facts and circumstances underlying the insured's claim; whether the evidence discovered reasonably supports a denial of liability; whether it appears that the insurer's refusal to pay was used merely as a tool in settlement negotiations; and whether the defense the insurer asserts at trial raises an issue of first impression or a reasonably debatable question of law or fact. Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 75-76 (2000).

The insurer's bad faith has grave consequences to its insured regardless of whether the insurer is defending a third party claim or a first party UM claim. Fair dealing is not an onerous impediment to claims adjusting. This Court recognized the insured's predicament in Nationwide v. St. John, and held that § 8.01-66.1 is both remedial and punitive and is designed to punish an insurer whose bad faith dealings force an insured to incur the expense of litigation. St. John, 259. Va. 71, 75 (2000). None of the cases cited by the Trial Court or GEICO suggest that this reasoning in St. John does not apply to the facts of Mr. Manu's case. It is clear § 8.01-66.1 was enacted to force insurers to act in good faith, and one of its goals was to prevent the insured from incurring unnecessary litigation fees. This goal can only be met by imposing a duty upon UM insurers to act in good faith during pre-trial settlement negotiations.

4. THE LEGISLATURE IMPOSED LIABILITY FOR DENYING, REFUSING, OR FAILING TO PAY A "CLAIM" WITHOUT REFERENCE TO A "JUDGMENT"

GEICO reasons that "assuming, *arguendo*, that Va. Code § 8.01-66.1(D)(1) establishes a remedy when an uninsured motorist carrier does not act in good faith, the statute does not create a duty of good faith on the part of an uninsured motorist carrier in adjusting a claim before it is reduced to judgment." (Brief in Opposition to Petition, hereinafter "Opposition" - pp. 6-7).

GEICO goes on to argue that because the statute does not include the terms "negotiate" or "settle", and instead uses the language "denies, refuses or fails to pay a claim to its insured", this must mean the legislature focused only on an insurer's refusal to pay a claim. (Opposition p. 7). GEICO then reasons that "claim" really means "judgment" because § 38.2-2206 does not impose a duty to pay prior to judgment. This interpretation is flawed in several respects.

The first flaw is that the legislature demonstrated its understanding of the difference between a "claim" and a "judgment" by inserting "judgment" in § 8.01-66.1(B) and using "claim" in § 8.01-66.1(D)(1). Subsection (B) makes insurers "liable to the third party claimant in an amount double the amount of the *judgment* awarded the third party claimant, together with reasonable attorney's fees and expenses." (JA p. 100) (emphasis added). Subsection (D)(1) makes insurers liable "to the insured in the amount *otherwise due and payable under the insured's policy of motor vehicle insurance*, plus interest on the amount due at double the rate provided in § 6.2-301. . . ." (JA p. 101) (emphasis added). The remedies available under subsection (D)(1) are not contingent upon reducing a claim to a judgment, whereas the specified remedy in subsection (B) requires reducing the claim to judgment. This stark contrast in legislative language within the same statute, strongly suggests the General Assembly

intended to impose a duty of pretrial good faith claims handling upon UM insurers.

GEICO supposes the legislature meant something it did not say, namely that that § 8.01-66.1(D)(1) applies only to a failure to pay a judgment. It would have been easy enough for the legislature to have so stated by inserting "judgment" in § 8.01-66.1(D)(1). A claim is not a judgment. Black's Law Dictionary (7th Edition) defines a claim as 1) the aggregate of operative facts giving rise to a right enforceable by a court, 2) the assertion of an existing right, and 3) a demand for money or property to which one asserts a right. A judgment is defined as 1) a court's final determination of the rights and obligations of the parties in a case. There is no longer a "claim" after entry of judgment, but instead there is a decision of the court. This Court offered clear instruction regarding the perils of assuming legislative intent which contradicts the plain meaning of statute.

> Had the General Assembly intended to create an exception to the uninsured motorist mandate for the benefit of a garage keeper and its insurer, it could have done so in language such as that employed in other subsections from the predecessor statute…. It did not do so. We will not assume that the omission was inadvertent. Rather, we conclude the legislature was consciously and deliberately selective. Seals v. Erie Ins. Exch., 277 Va. 558, 564 (2009).

Likewise, had the General Assembly intended to exclude uninsured motorist coverage from § 8.01-66.1(D)(1), it could have done so.

Second, the use of the phrase "denies, refuses or fails to pay to its insured a *claim*" effectively incorporates the claims handling and adjusting associated with evaluating and paying a claim. In the legal context, a "judgment" is not interchangeable with a "claim". Even if a "claim" were to be broadened to include a judgment, a "claim" would not be limited to a judgment. If the remedy were limited to punishing bad faith conduct post-judgment, presumably the General Assembly would have used the more specific term "judgment" as opposed to the more general term "claim."

Third, there was no need for a remedial statute to enforce payment after judgment, as there already existed remedies, such as interest for unpaid judgments (See Va. Code Ann. § 6.2-302). More importantly, there is no indication that the General Assembly was concerned with insurers failing to pay entered judgments when it enacted § 8.01-66.1(D)(1). The legislative history cited above makes clear that the complaints received in support of this statute were driven by a failure to negotiate and settle claims, not a failure to pay a final judgment. The phrase "denies, refuses or fails to pay" fits claims adjusting like a glove, but it is difficult to understand how a judgment can be "denied or refused". And, this practitioner is unaware of any instances where a UM carrier failed to pay a final judgment. GEICO's unreasonably narrow interpretation of

§ 8.01-66.1(D)(1) would have the General Assembly enacting legislative solutions to problems which simply do not exist.

Fourth, rules of statutory construction militate in favor of Manu's interpretation of the statute. This Court has long held that when an ambiguity exists in the UM statute, it should be resolved in favor of providing coverage to the injured person. "We have recognized that the statute governing UM insurance 'was enacted for the benefit of injured persons, is remedial in nature, and is liberally construed so that the purpose intended may be accomplished.'" USAA Casualty Ins. Co. v. Alexander, 248 Va. 185, 194 (1994) (internal citations omitted). Any ambiguity in this statute should be resolved in the manner which inures to the "benefit of injured persons." Id. In this case, that means an interpretation in which an insurance company's duty to act in good faith towards its insured starts from the date the claim is submitted, and not the date the insured secures a judgment against the uninsured motorist.

After exhausting all the possible scenarios in support of GEICO's argument, the only logical interpretation remains a finding that § 8.01-66.1(D)(1) encompasses pre-judgment claims adjusting by UM carriers. The Trial Court erred when it created an exclusion for UM coverage which appears nowhere in the statute.

CONCLUSION

The plain meaning of § 8.01-66.1(D)(1) and its legislative history demonstrate the Trial Court erred in finding that GEICO did not owe Mr. Manu a pre-trial duty to evaluate, adjust and attempt to settle his UM claim in good faith. Mr. Manu's bad faith action against GEICO is permissible under Va. Code § 8.01-66.1(D)(1) and the Trial Court erred in vacating Judge Kloch's original Order and sustaining GEICO's Demurrer. Mr. Manu respectfully requests this Court reverse and remand the case to the Trial Court, at which time the Trial Court should rule on Manu's motion to compel discovery from GEICO.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 5:26(h), that on this 28th day of October, 2016, I electronically filed the foregoing Brief of Appellant with accompanying Appendix via VACES, with the required paper copies set to be delivered within the prescribed one business day. I further certify that on this 28th day of October, 2016, the Brief and Appendix were served, via e-mail, upon the following:

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Exclusive of the portions exempted by Rule 5:26(h), this brief contains 5,648 words.

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