

# Insurance Coverage Update Pennsylvania

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## Viability of Contractual Bad Faith Claim For First Party Benefits Is In Dispute

Federal district courts in Pennsylvania have issued contrary opinions regarding whether a contractual bad faith claim is viable in a first party benefit type claim. Both cases involved statutory and contractual bad faith claims filed after arbitration awards resulted in payment of the policies' uninsured motorist limits and both cite *Birth Center v. St. Paul Co., Inc.*, 787 A.2d 376 (Pa. 2001). Judge Lancaster of the Western District held that the contract claim could go forward while Judge Kelly of the Eastern District dismissed the contractual claim.

In *McCrory v. State Farm Mut. Auto. Ins. Co.*, 2007 U.S. Dist. LEXIS 20981 (W.D. Pa. Mar. 23, 2007), the insured was injured in a car accident and recovered \$200,000 from the drivers' insurance policies and then sought uninsured motorist coverage under her own policy. (The court refers to the claim as an uninsured motorist claim rather than an underinsured motorist claim.) State Farm refused to pay or make an offer of payment and the UM claim went to arbitration resulting in an award of the policy limits. State Farm paid its policy limits and then the insured filed suit alleging State Farm handled her claim in bad faith in violation of 42 Pa. C.S. § 8371 and in breach of the insurance contract. State Farm filed a motion to dismiss the contract claim, arguing its payment of the arbitration award precluded recovery for breach of contract and that attorney fees, interest and costs are not recoverable for breach of contract. The court refused to dismiss the contract claim because it could not state that no possibility of recovery existed. The court's discussion was very brief and succinct:

The Pennsylvania Supreme Court has found that breach of contract actions stemming from bad faith handling of insurance claims are viable, even when combined with a claim under Pennsylvania's bad faith statute. *The Birth Ctr. v. The St. Paul Cos.*, 567 Pa. 386, 390, 787 A.2d 376 (2001). The Pennsylvania Supreme Court also recognized that compensatory damages, in order to return the parties to the position that they would have been in but for the breach, are appropriate in such cases. *Id.* at 400.

*Id.* at \*4-5. Although the court acknowledged that attorney fees are not normally compensable for breach of contract, it could not say that the plaintiff would not be able to prove any compensatory damages. See also *Prime Medica Assocs. v. Valley Forge Ins. Co.*, 2007 Phila. Ct. Com. Pl. LEXIS 122 (Apr. 26, 2007), where a common pleas judge, in an opinion written for appeal, briefly stated that the insured should be allowed to recover consequential damages for breach of contract even though the judge found that the insurer did not violate the bad faith statute:

These considerations presented the court with a difficult and important issue -- that is, whether in a first-party insurance claim, the insured-plaintiff is to be denied the right to obtain consequential damages. Defendant urges that this is the law and that the insured is relegated to the statutory claim for bad faith damages. This court submits that this should not be so. Here, this court, somewhat reluctantly did not find bad faith. But, the court agreed with the jury that the carrier was negligent and plain wrong in its decision, thereby causing damages to the insured. Under these conditions consequential damages should be recoverable. A comprehensive study of this carrier's conduct leads to a conclusion that the carrier was so close to

acting in bad faith that it was teetering with one leg hanging over the bad faith abyss. This court submits that there exists no appropriate policy reason to deny this plaintiff in this case the right to sue for consequential damages.

Id. at \*10-11.

In Kakule v. Progressive Cas. Ins. Co., 2007 U.S. Dist. LEXIS 26678 (E.D. Pa. Apr. 11, 2007), the insured filed an uninsured motorist claim after being injured in an accident with a hit and run driver. The insured rejected Progressive's \$18,000 offer of settlement and the claim went to arbitration for an appraisal. The arbitrators entered an award of \$500,000, then Progressive paid the insured the \$100,000 policy limits. The insured then sued Progressive in a three-count complaint—breach of the contractual duty of good faith and fair dealing, bad faith under 42 Pa. C.S. § 8371 and Unfair Trade Practices—for failing to pay the policy proceeds earlier. The District Court granted Progressive's motion to dismiss the contract claim and the UTPCPL claim. The court held that a contractual bad faith claim is not available for a claim involving first-party benefits, distinguishing Birth Center v. St. Paul Co., Inc., 787 A.2d 376 (Pa. 2001), and following Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881 (Pa. Super. 2000).

The court read Birth Center narrowly, stating that the Pennsylvania Supreme Court's distinguishing of D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co., 431 A.2d 966 (Pa. 1981), a first party case, indicated that its recognition of a contractual bad faith case did not extend to first party cases. Instead, the court held that the Williams case was still good law and was directly on point. In Williams, the insured also sued its insurer for breach of contract and statutory bad faith based on a failure to pay uninsured motorist benefits sooner. The Superior Court held that only the statutory bad faith claim was viable.

### **Pennsylvania Senate Considering Bill To Amend Bad Faith Statute To Allow Jury Trials**

A bill, SB 745, has been introduced in the Pennsylvania Senate by Senator Stewart Greenleaf to counter the Pennsylvania Supreme Court's Mishoe decision that the bad faith statute does not allow a jury trial. This is unlikely to progress in this legislative session as the Senate is in Republican control while the House is controlled by the Democrats and the House Democrats are focused on health care and property tax reform. ♦

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For any questions on the topics addressed in this newsletter, please call Alan S. Miller at 412-288-4004 or Bridget M. Gillespie at 412-288-4017. ♦

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