[J-6A&B-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

GEORGINA TOY,	:	Nos. 33 & 34 WAP 2005
	:	
Appellant/Cross-Appellee	:	Appeals from the Order of the Superior
	:	Court entered October 20, 2004 at No. 7
	:	WDA 2004 affirming in part and reversing
v.	:	in part the Order of the Court of Common
	:	Pleas of Allegheny County dated
	:	December 8, 2003 at No. GD-95-17627.
METROPOLITAN LIFE INSURANCE:		
COMPANY AND BOB MARTINI,	:	863 A.2d 1 (Pa. Super. 2004)
	:	
Appellees/Cross-Appellants	:	ARGUED: February 28, 2006

CONCURRING OPINION

MR. JUSTICE EAKIN **DECIDED: JULY 18, 2007**

I join Part I, Part II (B), and Part II (C). While I agree with the result of Part II (A), I write separately because I find 42 Pa.C.S. § 8371 is not limited to actions for an insurer's wrongful failure to pay an insurance claim or disposal of its obligations of defense and indemnification. The majority finds support for a narrow interpretation of "bad faith" in our case law prior to the enactment of § 8371, arguing:

> [T]he term "bad faith" as it concerned allegations made by an insured against his insurer, had acquired a particular meaning in the law … concern[ing] the duty of good faith and fair dealing in the parties' contract and the manner by which an insurer discharged its obligations of defense and indemnification in the third-party claim context or its obligation to pay for a loss in the first party claim context.

Majority Slip Op., at 19-20. However, the plain language of § 8371 is not so limited as it provides a court may grant relief whenever an insurer has acted in bad faith toward an insured, so long as the "action aris[es] under an insurance policy…." See 42 Pa.C.S. § 8371 ("In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions …."). Had the General Assembly intended to limit § 8371 to case law limiting claims to an insurer's bad faith refusal to pay or dispose of claims, it could have used more restrictive language to limit § 8371 to "actions arising under an insurance claim" as opposed to those "under an insurance policy." See Commonwealth v. Rieck Investment Corporation, 213 A.2d 277, 282 (Pa. 1965) (The "legislature must be intended to mean what it has plainly expressed." (citation omitted)).

The majority argues because § 8371 permits a court to award interest on the "amount of the claim from the date the claim was made by the insured," the section does not provide a private remedy for the deceptive or unfair practices of insurance companies. See Majority Slip Op., at 14 (quoting § 8371(1)). However, § 8371 also provides an award of punitive damages or the assessment of court costs and attorney's fees against the insurer. See 42 Pa.C.S. § 8371(2-3). While the award of interest under the wording of § 8371(1) may apply exclusively to an insurer's bad faith failure to pay a claim, the plain language of § 8371(2) and § 8371(3) is not limited in this manner and thus may provide a remedy for any other "bad faith" conduct. Therefore, I cannot join the inference that the remedial provisions of § 8371 in any way restrict the meaning of "bad faith."

The majority's reliance on Cowden v. Aetna Casualty and Surety Co., 134 A.2d 223 (Pa. 1957), and D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co., 431 A.2d 966 (Pa. 1981), to establish a "peculiar and appropriate meaning" of the

term "bad faith" in the insurance context is equally unpersuasive, as neither expressly limited the notion of "bad faith." In fact, D'Ambrosio employed the term "bad faith" according to the trade practices determined to be unfair methods of competition or unfair or deceptive acts or practices under the Unfair Insurance Practices Act (UIPA):[1]

> Although the seriousness of "bad faith" conduct by insurance carriers cannot go unrecognized, our Legislature has already made dramatic, sweeping efforts to curb the bad faith conduct.
>
> * * *
>
> There is no evidence to suggest, and we have no reason to believe, that the system of sanctions established under the [UIPA] must be supplemented by a judicially created cause of action.... Surely it is for the Legislature to announce and implement the Commonwealth's public policy governing the regulation of insurance carriers. In our view, it is equally for the legislature to determine whether sanctions beyond those created under the Act are required to deter conduct which is less than scrupulous.
>
> Our conclusion that the [UIPA] serves adequately to deter bad faith conduct applies not only to appellant's attempt to recover punitive damages but also to his attempt to recover damages for "emotional distress."

D'Ambrosio, at 969, 970. Thus, even if our jurisprudence prior to D'Ambrosio established a "particular and appropriate meaning" of the term "bad faith" in the insurance context, D'Ambrosio significantly expanded the meaning of the term.[2]

---

[1] See 40 P.S. §§ 1171.1-1171.15.

[2] The Superior Court and the U.S. District Court for the Eastern District of Pennsylvania have interpreted D'Ambrosio to allow consideration of alleged UIPA violations in determining "bad faith" conduct under § 8371. See The Brickman Group, Ltd. v. CGU Ins. Co., 865 A.2d 918, 930 (Pa. Super. 2004) ("[C]onduct which constitutes a violation of the UIPA may also be considered when determining whether an insurer acted in bad faith under [§ 8371]."); O'Donnell v. Allstate Ins. Co., 734 A.2d 901, 906 (Pa. Super. 1999) (same); Romano v. Nationwide Mut. Fire Ins. Co., 646 A.2d 1228, 1233 (Pa. Super. 1994) ("While the UIPA does not specifically refer to an insurer's 'bad faith,' [D'Ambrosio] utilized that term to describe conduct within the UIPA's reach."); see also MacFarland v. U.S. Fidelity & Guar. Co., 818 F. Supp. 108, 110 (E.D. Pa. 1993) (continued…)

Subsequently, we held the duty of good faith in the insurance context "includes the duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies along with all requirements, including any time limitations for making a claim." Dercoli v. Pa. Nat'l Mut. Ins. Co., 554 A.2d 906, 909 (Pa. 1989). Moreover, the Superior Court has not followed the majority's restrictive view. See Condio v. Erie Ins. Exch., 899 A.2d 1136, 1142 (Pa. Super. 2006) (considering whether insurer acted in bad faith in selecting neutral arbitrator, securing witness testimony, and permitting attorney to delay litigation); Brown v. Progressive Ins. Co., 860 A.2d 493, 500-01 (Pa. Super. 2004) ("Bad faith encompasses a wide variety of objectionable conduct…. [It] also includes 'lack of good faith investigation into facts, and failure to communicate with the claimant.'" (citation omitted)); Zimmerman v. Harleysville Mutual Ins. Co., 860 A.2d 167, 173 (Pa. Super. 2004) ("The scope of [§] 8731 has been extended to the investigatory practices of an insurer during litigation initiated by an insured to obtain the proceeds of his or her insurance policy."); O'Donnell v. Allstate Ins. Co., 734 A.2d 901, 909-10 (Pa. Super. 1999) (same).

Therefore, I disagree with the majority that in promulgating § 8371 the General Assembly intended "bad faith" to have a "peculiar and appropriate meaning" constrained by the particular fact situations in Cowden and D'Ambrosio. Instead, "bad faith" concerns any breach of an insurer's "implied covenant of good faith and fair dealing" in the parties' contract. An insurer must refrain from any act that would injure the insured's right to receive the benefit of the contract.

(…continued)
(considering alleged conduct constituting violations of UIPA in determining bad faith); Rottmund v. Continental Assurance Co., 813 F. Supp. 1104, 1109 (E.D. Pa. 1992) (examining other statutes on similar subjects to describe bad faith under § 8371); Coyne v. Allstate Ins. Co., 771 F. Supp. 673, 678 (E.D. Pa. 1991) (utilizing provisions of UIPA to describe bad faith conduct).

Nevertheless, I must conclude appellant does not have a remedy under § 8371 for the alleged bad faith conduct committed by appellees in soliciting the purchase of appellant's policy. Extending the insurer's duty of good faith to conduct occurring prior to the making of the insurance policy is contrary to the plain language of § 8371. In my opinion, an insurer's duty of good faith begins only after the creation of an insurance policy. Before the insured receives and signs the policy, there is no legal relationship between the insurer and insured, and neither party has undertaken any obligation regarding the future agreement. Thus, misrepresentations or false statements made by an insurer regarding an insurance policy, while falling under the broad meaning of "bad faith" conduct, do not breach any duty of good faith towards the insured before the creation of the policy. See Brickman Group Ltd., at 930. They do not arise "under an insurance policy."

Because a bad faith claim is a statutory creation, the extent of an insurer's duty to an insured must be resolved by the rules of statutory interpretation. See 1 Pa.C.S. § 1921. Section 8371 provides, "In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions …." 42 Pa.C.S. § 8371 (emphasis added). In addressing whether the scope of the duty of good faith under § 8371 extended to conduct of the insurer during the litigation of a bad faith claim, Chief Justice Cappy noted:

> The obvious problem in looking at the words is the lack of clarity on the question of where the line should be drawn on the scope of the "action arising under an insurance policy" when assessing whether the insurer acted in bad faith. Is the scope of the conduct limited to the conduct of the insurer on the underlying policy[,] … or does it extend to the entire litigation that resulted from the initial claim under the insurance policy ….

Hollock v. Erie Ins. Exch., 903 A.2d 1185, 1189 (Pa. 2006) (plurality) (Cappy, C.J., dissenting). In concluding the scope of bad faith conduct under § 8371 does not cover an insurer's conduct during litigation, Chief Justice Cappy stressed that an insurer's

duty of good faith and fair dealing arises from the contractual relationship between the insurer and insured. See id., at 1191. In his words, "[t]he relationship between the parties is defined by the insurance policy. Once that policy has been terminated, the claim paid, or the claim denied the relationship is over." Id. Thus, once the relationship has been severed, the duty of good faith between the parties is extinguished. See id.

While § 8371 may not provide a clear answer to whether it extends to the conduct of parties during the litigation of a bad faith claim, its plain language clearly precludes the imposition of a duty of good faith preceding the execution of insurance coverage. The plain language "arising under an insurance policy" clearly contemplates the existence of an insurance policy at the time of the alleged wrongful conduct. Without a contractual relationship between the parties, the duty of good faith cannot exist. See id. Further, in order to "arise under an insurance policy," the action must bear some relation to the policy itself. Thus, the Superior Court dismissed a claim under § 8371 for an insurer's failure to pay a judgment against it because the plaintiff merely brought the action as a judgment creditor, not as a wronged insured. See Ridgeway v. U.S. Life Credit Life Ins. Co., 793 A.2d 972, 976-77 (Pa. Super. 2002). Similarly, appellant cannot allege appellees' conduct misrepresented the terms of her actual policy, but only her application for life insurance.

Accordingly, I agree that § 8371 cannot extend to claims relating to the conduct of insurers before the formation of an insurance contract. See Brickman Group Ltd., at 930 ("Neither O'Donnell nor any other case interpreting § 8371 extends that section's protection to conduct preceding the execution of insurance coverage."); Kilmore v. Erie Ins. Co., 595 A.2d 623, 626 (Pa. Super. 1991); see also Weisblatt v. Minn. Mut. Life Ins. Co., 4 F. Supp. 2d 371, 380 (E.D. Pa. 1998) ("The duty of good faith and fair-dealing … 'applies only to the enforcement and performance of [insurance] contracts and not to

their formation'…." (citation omitted)). However, this does not preclude appellant from all relief and does not grant a license to insurance companies to mislead customers during solicitations. The Insurance Commissioner may still bring an action against the insurance company to enforce the unfair practices outlined in the UIPA. See 40 P.S. § 1171.8. Further, as appellant alleged in her complaint, an insured may bring a private claim under the Consumer Protection Laws. See 73 P.S. § 201-9.2.

Mr. Justice Baer joins this concurring opinion.