No. 31226 - Barefield v. DPIC Companies, Inc.

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OF WEST VIRGINIA

Davis, J., concurring:

In this certified question proceeding the majority opinion has made two holdings. First, the majority opinion has concluded that a bad faith action under the unfair trade practices statute may be instituted against an insurer for misconduct occurring after litigation began in the underlying action. Second, consistent with the decision in *Rose v. St. Paul Fire & Marine Insurance Co.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 31317 June 25, 2004), the majority opinion has concluded that an insurer may be held liable for litigation misconduct of defense counsel when the insurer knowingly encourages, directs, participates in, relies upon, or ratifies such wrongful conduct. I concur in both holdings by the majority opinion. I have chosen to write separately to underscore several points.[1]

[1]I should point out that the majority opinion expressly ruled upon an issue that was implicitly decided in the *Rose* decision. In *Rose*, the Court recognized a bad faith cause of action under the West Virginia Unfair Trade Practices Act, against an insurer for misconduct by defense counsel under certain conditions. Implicit in the resolution of this issue in *Rose*, was a determination that a cause of action existed for misconduct occurring after litigation was commenced. This implicit holding has now been expressly addressed in the instant opinion. Thus, in West Virginia, an insurer's duty of good faith in resolving a claim extends to "any stage of the matter, before or after litigation is initiated, in or out of trial." *Texoma Ag-Prods., Inc. v. Hartford Accident & Indem. Co.*, 755 F.2d 445, 447 (5th Cir. 1985).

A. Bad Faith Action Premised on Post-litigation Conduct is an Exception to the Litigation Privilege

The parties did not brief the issue of "litigation privilege" as a defense to post-litigation misconduct that is attributed to an insurer. However, I believe this is an issue that was implicitly decided by the majority opinion.

Under the litigation privilege, "'[a]ny communication, oral or written, uttered or published in the due course of a judicial proceeding is . . . privileged and cannot constitute the basis of a civil action[.]'" *Jenevein v. Friedman*, 114 S.W.3d 743, 745 (Tex. App. 2003) quoting *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex.1942). *See also Collins v. Red Roof Inns, Inc*., 211 W. Va. 458, 461-66, 566 S.E.2d 595, 598-603 (2002) (discussing litigation privilege). "This privilege extends to any statement made by the judge, jurors, counsel, parties or witnesses, and attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits and any of the pleadings or other papers in the case." *James v. Brown*, 637 S.W.2d 914, 917-18 (Tex.1982). The public

> policies associated with the litigation privilege include: (1) promoting the candid, objective and undistorted disclosure of evidence; (2) placing the burden of testing the evidence upon the litigants during trial; (3) avoiding the chilling effect resulting from the threat of subsequent litigation; (4) reinforcing the finality of judgments; (5) limiting collateral attacks upon judgments; (6) promoting zealous advocacy; (7) discouraging abusive litigation practices; and (8) encouraging settlement."

Matsuura v. E.I. du Pont de Nemours & Co., 73 P.3d 687, 693 (Haw. 2003). "[T]he

litigation privilege extends beyond claims of defamation to claims of abuse of process, intentional infliction of emotional distress, negligent misrepresentation, invasion of privacy, . . . and . . . interference with contract and prospective economic advantage." *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1132 (1990) (citation omitted). *But see Baglini v. Lauletta*, 768 A.2d 825, 833-34 (N.J. Super. 2001) ("The one tort excepted from the reach of the litigation privilege is malicious prosecution, or malicious use of process.").

The application of the litigation privilege to a bad faith action against an insurer was squarely addressed by the Arizona appellate court in *Tucson Airport Authority v. Certain Underwriters at Lloyd's, London*, 918 P.2d 1063 (Ariz. App. 1996). In *Tucson Airport*, a class action was filed against the insured for harm caused when it released a toxic chemical into groundwater.[2] The insured subsequently filed a declaratory judgment action against its insurers to determine coverage in the underlying action. During the course of the litigation in the declaratory judgment action, the insured amended its complaint to state a bad faith claim against the insurers for engaging in misconduct during the declaratory judgment action. "The insurers moved to dismiss, arguing that the alleged misconduct did not constitute bad faith and that, if it did, it was absolutely privileged under Arizona law." *Tucson Airport*, 918 P.2d at 1065. The trial court granted the motion and dismissed the bad faith claim. On appeal, the court of appeals found that the litigation privilege did not bar the

[2]The litigation in this matter was far more complex and involved several actions. However, I will only discuss the relevant aspects of the litigation.

bad faith claim. The appellate court reasoned as follows:

> The insurers . . . contend that even if the [insured's] complaint stated a cause of action, the claim is based on privileged statements made during pending coverage actions by the insurers' counsel. Whether the defense of privilege exists is a question of law. Assuming, without deciding, the privilege even applies in bad faith proceedings, we conclude it does not apply in the circumstances of this case. We are persuaded by the reasoning of the California Supreme Court in *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 221 Cal. Rptr. 509, 710 P.2d 309 (1985). There, the court recognized the difference between a bad faith claim "based squarely on a privileged communication, such as an action for defamation, and one based upon an underlying course of conduct evidenced by the communication." *Id*. at 888, 221 Cal. Rptr. at 518, 710 P.2d at 318. Applying that distinction, the litigation privilege would preclude the former action but would not bar evidence of the communications to prove the latter.
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> The *White* court noted that
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> > it is not unusual for an insurance company to provide policy benefits, such as the defense of litigation, while itself instituting suit to determine whether and to what extent it must provide those benefits. It could not reasonably be argued under such circumstances either that the insurer no longer owes any contractual duties to the insured, or that it need not perform those duties fairly and in good faith.
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> *Id*. at 885-86, 221 Cal. Rptr. at 517, 710 P.2d at 317.
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> The gravamen of [the insured's] bad faith claim is not a communication, but a course of "wrongful and tortious" conduct evidenced by the insurers' actions and communications during the coverage action[]. Furthermore, [the insured's] claim does not assail a pleading but instead alleges that its insurers followed a course of conduct in which they failed to perform their duties fairly and in good faith. To be sure, the insurers in this case . . . do not contend that the filing of the coverage action[] erased their duties of good faith and fair dealing. The duties nonetheless would be rendered meaningless if, as we understand these insurers to argue, the litigation privilege could be employed to excuse a breach of those duties, which occurs as part of the conduct of a coverage action.
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> We hold, therefore, that in the circumstances presented in this case, [the

> insured] sufficiently pled a bad faith claim that is based on unprivileged conduct by its insurers. Accordingly, the trial court erred by dismissing [the insured's] bad faith claim in its second amended complaint.

Tucson Airport, 918 P.2d at 1066. *See also Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 107 Cal.App.4th 54, 78 (2003) ("[T]he litigation privilege does not shield LaBelle from liability for fraud."); *Matsuura*, 73 P.3d at 694 (holding that litigation privilege does not "limit[] liability in a subsequent proceeding where there is an allegation of fraud committed in the prior proceeding").

As I have indicated, the majority decision in the instant case implicitly found that, for the exclusive purpose of a bad faith action, there is no litigation privilege defense to misconduct occurring in an underlying claim.

B. Aggressive Defense Tactics do not Equal Bad Faith Misconduct

The decisions in this case and the *Rose* opinion are not to be interpreted as permitting a cause of action based upon mere aggressive tactics by defense counsel. That is, "an aggressive defense of the insurer's interest is not bad faith." *Jung v. Nationwide Mut. Fire Ins. Co.*, 949 F. Supp. 353, 360 (E.D. Pa. 1997). When general "improper litigation conduct is at issue, . . . the . . . Rules of Civil Procedure provide adequate means of redress, such as motions to strike, compel discovery, secure protective orders, or impose sanctions." *Timberlake Const. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 341 (10th Cir. 1995). *See*

O'Donnell ex rel. Mitro v. Allstate Ins. Co., 734 A.2d 901, 909 (Pa. Super. 1999) ("If a party believes it is subject to improper discovery, the . . . Rules of Civil Procedure provide an exclusive remedy[.]"). Consequently, "[t]here is no need to penalize insurers when their attorneys represent them zealously within the bounds of litigation conduct. To allow a jury to find that an insurer acted in bad faith by zealously defending itself is to impose such a penalty." *Federated Mut. Ins. Co. v. Anderson*, 991 P.2d 915, 922 (Mont. 1999). To sustain a bad faith cause of action premised on post-litigation misconduct, a plaintiff must allege "conduct sufficiently egregious to be considered [grossly] reckless or otherwise committed with the [specific] intent of improperly avoiding payment of [a] claim." *O'Donnell*, 734 A.2d at 910. Viewed in this light, "cases in which an insurer may be held liable [for post-litigation misconduct] will be rare indeed." *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 396 (Tenn. 2002).

The decision in *Givens* illustrates the type of egregious defense tactics that could support a third-party bad faith action against an insurer based upon post-litigation conduct. During the plaintiff's action against a tortfeasor for injuries sustained in an automobile accident, substitute defense counsel engaged in the following egregious discovery misconduct:

> According to the plaintiff, as soon as Allstate hired the Richardson Firm, the Firm began the discovery process anew to harass her, to cause her to suffer unnecessary expense, and to "weaken [her] resolve to pursue the suit to the extent that she [would] abandon it." The Richardson Firm is first alleged, as an agent of Allstate [and the tortfeasor], to have submitted an excessive

> number of interrogatories, totaling about 237 questions and subparts, even though it already possessed much of the information requested by the interrogatories. Although the plaintiff asserts that she objected to the initial submission of interrogatories by the Richardson Firm, she relates that the trial court overruled her objection.
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> The plaintiff also alleges that the Richardson Firm deposed her for a second time, subjecting her to "intense questioning about every aspect of her social, educational, employment, and medical history." Lasting about eight hours, this second deposition is alleged to have inquired as to whether the plaintiff "had been sleeping with the Defendant McElwaney," and as to "every ailment with which [she] has ever been beset, no matter how trivial." The plaintiff was also called upon to furnish the names of every doctor, dentist, and other healthcare professional who treated her for these ailments.
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> Further, the Richardson Firm is alleged to have issued more than seventy discovery subpoenas to various records custodians. Despite knowing that many of these records possessed no relevance to the issues in the plaintiff's suit, the Richardson Firm is alleged to have sent subpoenas to (1) "every custodian for every healthcare professional who was suspected . . . to have rendered treatment to the plaintiff at any time during her life," including her psychologist, her obstetrician/gynecologist, and others; (2) every "hospital in Memphis and Chattanooga (where the plaintiff once lived), even though in many instances[,] the Richardson Firm had no reason to believe that the Plaintiff had received treatment there"; (3) every employer for whom the plaintiff has ever worked; (4) every automobile repair agency to which the plaintiff's automobile has ever been taken; and (5) every insurance company that has written a policy of insurance for the plaintiff.

Givens, 75 S.W.3d at 391-392. The Supreme Court of Tennessee held that the above conduct could support a bad faith claim against the insurer to the extent that the insurer had knowledge of the conduct.[3]

[3]During my research I was unable to find any other judicial decision addressing the issue of misconduct by an insurer in a third-party bad faith action. This is no doubt attributable to the fact that only a very few states recognize a statutory third-party bad faith cause of action.

In the instant case, we were not asked to determine whether Mr. Barefield's allegations of misconduct by defense counsel, in the underlying legal malpractice action, could support a bad faith claim against the insurer. Because this case is before this Court on a certified question, the majority opinion simply recognized a cause of action, without examining the merits of Mr. Barefield's evidence. In my judgment, the purported misconduct by defense counsel falls extremely short of conduct that would support a bad faith cause of action against the insurer. The record presented in this matter did not contain a scintilla of evidence showing any type of misconduct by defense counsel, let alone egregious misconduct. All that occurred in this case was routine settlement negotiations. This situation is exactly the type of situation wherein trial courts must grant summary judgment.

The instant case and the *Rose* opinion involved third-party bad faith actions against insurers. However, nothing in either decision limits this new cause of action to third-party litigants, which suggests that the cause of action is also maintainable as a first-party bad faith action. With this point in mind, I will present a few case illustrations of conduct that has been deemed sufficient or insufficient to support a first-party bad faith action against an insurer for defense counsel misconduct.

In *O'Keefe v Safeco Insurance Co. of America*, 639 P.2d 1312 (Or. App. 1982), the insured filed a bad faith action against her insurer based upon defense counsel's conduct

in defending the insured in a personal injury case.[4] Specifically, the insured argued that defense counsel: (a) failed to take the plaintiff's deposition; (b) failed to obtain the plaintiff's medical records; (c) failed to obtain the plaintiff's financial records; (d) failed to take the deposition of the plaintiff's doctors; and (e) failed to secure adequate medical consultation for the benefit of the insured. A jury returned a verdict for the insured, and the insurer appealed. The appellate court found that a cause of action could be maintained against the insurer for defense counsel's conduct. However, the appellate court reversed the verdict based upon an erroneous jury instruction. In remanding the case for a new trial the appellate noted that "[t]here was . . . adequate evidence of [the insurer's] negligence." *O'Keefe*, 639 P.2d at 1315. *See Boyd Bros. Transp. Co., Inc. v. Fireman's Fund Ins. Cos.*, 729 F.2d 1407, 1410 (11th Cir. 1984) ("[W]e are dealing with an attorney who, no doubt aware that his client the insurer apparently owed nothing under the policy, accordingly elected to perform his duty to his client the insured at best haphazardly."); *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472, 478 (Wis. 1997) ("Other than obtaining medical records, the defense did little investigation or discovery with respect to what [plaintiff's] medical experts were going to say in the case.").

Similarly, *Sims v. Travelers Insurance Co.*, 16 P.3d 468 (Okla. Civ. App. 2000), the insureds brought an action against the insurer to recover underinsured motorist and

[4]The insured died, and her estate prosecuted the action against the insurer.

medical benefits. During that action, the insureds filed a bad faith cause of action for litigation misconduct. The trial court entered partial summary judgment in favor of the insurer on the bad faith claim. The court of appeals affirmed as follows:[5]

> The [insureds'] complaints were that the lawyers for [the insurer] had treated [them] as adversaries; filed motions to dismiss; objected to discovery; did not take depositions at the times the [insureds] offered to produce witnesses for deposition; misdocketed meetings; and, rejected the [insureds'] request for mediation. . . . [W]e find the litigation conduct alleged here cannot be the basis for a bad faith action.

Sims, 16 P.3d at 471.

Additionally, in *Zurich American Insurance Co. v. ABM Industries, Inc*., 265 F. Supp. 2d 302 (S.D.N.Y. 2003), an insurer filed a declaratory judgment action seeking a determination of the extent of coverage for business interruption losses suffered by the insured–a janitorial service that had serviced premises in the World Trade Center. The insured filed a counterclaim. Subsequent to discovery, the insured filed a motion to amend its pleadings to state a bad faith cause of action for post-litigation misconduct. The district court judge denied the motion to amend and gave the following reasons:[6]

> [the insured's] motion to amend its counterclaim to add a claim that [insurer] engaged in bad faith during the course of the litigation must be denied. The purported claim is simply a hodge podge of untimely, immaterial, and/or futile nit-picks. It asserts, for example, that [the insurer] has improperly asserted insurance coverage positions inconsistent with the interpretation of the Policy

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[5]Other issues were involved in the case that are not relevant to my discussion.

[6]Other issues not relevant here were also decided in the opinion.

> offered by [the insurer's] own witnesses . . . whereas, assuming arguendo this were true, it would be entirely permissible. The proposed counterclaim also alleges that [the insurer] improperly obtained discovery before the lawsuit commenced under the guise of seeking to adjust its claim, . . .whereas, assuming arguendo any such behavior occurred and was improper, it should properly have been addressed by [the insured] bringing a motion for preclusion and sanctions at the outset of the litigation. . . .
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> Without multiplying examples further, the conclusion is obvious that [the insured's] belated attempt to dress up its discovery and other pre-trial disputes as a new counterclaim must fail. Moreover, even if the potpourri of allegations that [the insured] includes in its proposed new counterclaim had greater merit than they do, their joinder at this stage with this otherwise straightforward insurance coverage dispute could only create confusion and consequent prejudice, and thus the Court would still be obliged to deny the motion to amend.

Zurich, 265 F. Supp. 2d at 309-10.

Moreover, in *Krisa v. Equitable Life Assurance Soc.*, 109 F. Supp. 2d 316 (M.D. Pa. 2000), the insurer denied disability benefits to the insured. The insured thereafter filed a complaint against the insurer. When that case was resolved, the insured filed a bad faith action against the insurer based upon litigation conduct in the first case.[7] The insurer moved to strike and dismiss the bad faith claim. The district judge denied the motion as follows:

> In the instant case, [the plaintiff] is advancing bad faith claims based on more than discovery abuses. Specifically, [the plaintiff] "alleges that [the defendant] wrongly responded to plaintiff's Complaint in [the first action] with a counterclaim asserting, among other things, that plaintiff had committed fraud in his applications to [the defendant] for disability insurance." [The plaintiff] "further alleges that [the defendant's] allegations were false, baseless and fraudulent. . . ." [The plaintiff] has asserted more than just discovery abuses on the part of [the defendant]. Moreover, in light of the policy of

[7]There were other causes of action stated, but only the bad faith claim is presented here.

> liberal construction of statutes so as to effectuate the statute's purpose and the Pennsylvania Superior Court's determination "that the conduct of an insurer during the pendency of litigation may be construed as evidence of bad faith under . . ." [the plaintiff's] claims are not barred by Pennsylvania law. Accordingly, because [the plaintiff] has asserted facts from which a jury could conclude that [the defendant] used litigation in bad faith to avoid insurance obligations, [the defendant's] motion to strike and dismiss Count II will be denied.

Krisa, 109 F. Supp. 2d at 321.

Finally, in *General Refractories Co. v. Fireman's Fund Ins. Co.*, 2002 WL 376923 *(E.D. Pa.), aff'd in part and rev'd in part*, 337 F.3d 297, 302 (3d Cir. 2003), the insureds filed a bad faith action against the insurer based upon conduct in an earlier coverage action.[8] Some of the conduct alleged in the complaint included: (1) a pattern of delay, stonewalling, deception, obfuscation and pretense; (2) intentionally withholding critical documents; (3) ignoring court orders; (4) testifying falsely at depositions, with litigation counsel fully aware of the false testimony; (5) misrepresenting facts to the trial court and opposing counsel; (6) providing incomplete responses, unreasonable objections, unfounded claims of privilege and intentionally incomplete privilege logs in response to reasonable and relevant requests; (7) using an overly broad, clearly untenable theory of privilege to conceal the knowledge, activity and intent which formed the basis of the insurance coverage action; (8) actively hiding highly probative documents while moving for summary judgment on the issues to which the hidden documents related; (9) using hidden documents during a deposition; (10)

[8]Other parties and issues were involved, but are not relevant here.

continuing to locate hundreds of documents that should have been produced or put on privilege logs, each time claiming that they had just been found; (11) engaging in obdurate conduct, including actions demonstrating an attempt to obstruct the discovery process and (12) encouraging witnesses to provide false and misleading testimony.[9] The insurer moved to dismiss the bad faith claim as failing to state a cause of action. The district court judge denied the motion and stated the following:

> Plaintiffs . . . base their insurance bad faith claim on more than just discovery abuses. The Complaint also alleges that Fireman's Fund made misrepresentations to the court and filed abusive motions during the Insurance Coverage Action. Since Plaintiff's cause of action for insurance bad faith is not entirely founded on Defendants discovery tactics, the Court cannot say, at this time, that Plaintiffs cannot prove any set of facts which would entitle them to relief on Count I of the Complaint. Consequently, the Motion to Dismiss will be denied with respect to Count I of the Complaint.

General Refractories, 2002 WL 376923 at*3.

C. Use of Post-litigation Misconduct that is not Actionable as Evidence in Pre-Litigation Conduct Bad Faith Case.

The final issue I wish to address concerns the admissibility of post-litigation misconduct evidence that is insufficient to sustain an independent bad faith cause of action. The general rule in other jurisdictions on this issue is that, "while evidence of an insurer's litigation conduct may, in some rare instances, be admissible on the issue of bad faith, such evidence will generally be inadmissible, as it lacks probative value and carries a high risk of

[9]The complaint allegations are set out in the appellate decision. *See General Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 302 (3d Cir. 2003).

prejudice."[10] *Timberlake Const. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 341 (10th Cir. 1995). The decision in *Palmer v. Farmers Insurance Exchange*, 861 P.2d 895 (Mont. 1993), fully addressed the general rule as follows:

> Several courts have considered whether evidence of an insurer's conduct during litigation of the underlying suit is admissible in a subsequent bad faith action. After examining the reasoning of courts that have considered the issue, we conclude that the continuing duty of good faith does not necessarily render evidence of an insurer's post-filing conduct admissible. Indeed, courts rarely should allow such evidence and we have adopted a balancing test for those rare circumstances.
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> Public policy favors the exclusion of evidence of an insurer's post-filing litigation conduct in at least two respects. First, permitting such evidence is unnecessary because during the initial action, trial courts can assure that defendants do not act improperly. Next, and more importantly, the introduction of such evidence hinders the right to defend and impairs access to the courts.
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> The Rules of Civil Procedure control the litigation process and, in most instances, provide adequate remedies for improper conduct during the litigation process. Once the parties have assumed adversarial roles, it is generally for the judge in the underlying case and not a jury to determine whether a party should be penalized for bad faith tactics.
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> An attorney in litigation is ethically bound to represent the client zealously within the framework provided by statutes and the Rules of Civil Procedure. These procedural rules define clear boundaries of litigation conduct. If a defense attorney exceeds the boundaries, the judge can strike the answer and enter judgment for the plaintiff, enter summary judgment for the plaintiff, or impose sanctions on the attorney. . . . The most serious policy consideration in allowing evidence of the insurer's post-filing conduct is that it punishes insurers for pursuing legitimate lines of defense and obstructs their right to contest coverage of dubious claims. . . .

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[10]Obviously this general rule has no application to a bad faith action that is based exclusively on post-litigation misconduct. In the latter situation such evidence is presumptively admissible.

Allowing evidence of litigation strategies and tactics would expose the insurer's entire defense in a coverage action to scrutiny by the jury, unless the insurer won the underlying suit. The jury then, with the assistance of hindsight, and without the assistance of insight into litigation techniques, could "second guess the defendant's rationales for taking a particular course." In addition, the jury could consider evidence of the defendant's litigation strategy and tactics without any showing that the insurer's conduct was technically improper. Thus, insurers would be reluctant to contest coverage of questionable claims.

. . . .

To permit evidence of insurers' litigation strategies and tactics is to impede insurers' access to the courts and right to defend, because it makes them reluctant to contest coverage of questionable claims. . . . Public policy dictates, therefore, that courts must use extreme caution in deciding to admit such evidence even if it is relevant to the insurer's initial decision to deny the underlying claim.

This brings us to another crucial point, the relevance of the insurer's post-filing conduct. In general, an insurer's litigation tactics and strategy in defending a claim are not relevant to the insurer's decision to deny coverage. Indeed, if the insured must rely on evidence of the insurer's post-filing conduct to prove bad faith in denial of coverage, questions arise as to the validity of the insured's initial claim of bad faith....

After the onset of litigation, an insurer begins to concentrate on supporting the decisions that led it to deny the claim. The insurer relies heavily on its attorneys using common litigation strategies and tactics to defend against a debatable claim. Consequently, actions taken after an insured files suit are at best marginally probative of the insurer's decision to deny coverage.

In some instances, however, evidence of the insurer's post-filing conduct may bear on the reasonableness of the insurer's decision and its state of mind when it evaluated and denied the underlying claim. Therefore, we do not impose a blanket prohibition on such evidence.

We believe the correct approach is to strike a balance between deterring improper conduct by the insurer and allowing insurers to defend themselves against spurious claims. Rule 403 provides for that balance. When the insurer's post-filing conduct has some relevance, the court must weigh its probative value against the inherently high prejudicial effect of such evidence, keeping

in mind the insurer's fundamental right to defend itself.

Palmer, 861 P.2d at 913-16 (internal citations omitted). *See Southerland v. Argonaut Ins. Co.*, 794 P.2d 1102, 1106 (Colo. App. 1990) (permitting post-litigation conduct by insurer to be used as evidence to prove a bad faith claim); *Gooch v. State Farm Mut. Auto. Ins. Co.*, 712 N.E.2d 38, 42 (Ind. App. 1999) (same); *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1527 (11th Cir. 1985) (same).

In my judgment, the decision in *Palmer* presents the approach that should be used by trial courts in West Virginia when deciding whether to admit evidence of post-litigation misconduct in a bad faith action premised upon pre-litigation conduct. That is, trial courts should apply "Rule 403 to determine whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice." *Coleman v. Sopher*, 201 W. Va. 588, 600, 499 S.E.2d 592, 604 (1997).[11]

The final point I wish to make is that trial courts must distinguish allegations of an insurer's post-litigation misconduct from post-litigation conduct. As I have suggested, a balancing test should be used when considering the introduction of evidence of post-

[11]Rule 403 of the West Virginia Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

litigation misconduct. This balancing test is inapplicable to mere post-litigation conduct of an insurer. Evidence of an insurer's post-litigation conduct that does not demonstrate any impropriety is irrelevant and should not be admitted in a claim for bad faith. A case illustrating this final point is *O'Donnell ex rel. Mitro v. Allstate Ins. Co.*, 734 A.2d 901 (Pa. Super. 1999).

In *O'Donnell*, the plaintiff's home was allegedly burglarized. The plaintiff submitted a claim to the insurer to recover the cost of items allegedly stolen from her home and damaged. During the insurer's investigation of the claim, the insurer found numerous inconsistencies in the information pertaining to lost and damaged items. As a result of the insurer's delay in providing coverage for her claim, the plaintiff filed a breach of contract and bad faith action against the insurer. The case went to trial, and the jury returned a verdict in favor of the insurer. In her appeal, the plaintiff assigned error to the trial court's refusal to instruct the jury that it could consider the insurer's misconduct after the litigation commenced.

The opinion in *O'Donnell* set out the following misconduct evidence that the plaintiff wanted the jury to consider:

> At trial, Appellant claimed that Allstate's bad faith conduct in investigating her claim involved "dilatory tactics, requesting unnecessary and frivolous information and requesting information which had previously been submitted." Appellant raises two instances occurring during the process of discovery which, she argues, should have been considered by the jury.

> Specifically, without much more elaboration, Appellant claims that Allstate acted in bad faith by propounding interrogatories requesting information "regarding repairs and renovations to [the] property, its foundation and the plumbing contained therein." These inquiries, according to Appellant, are "frivolous" and fail to further Allstate's investigation of her claim. She also characterizes as bad faith Allstate's failure either to accept or deny her claim after she "submitted to a lengthy deposition."
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> Appellant baldly asserts that because "Allstate had everything it needed in its possession to either accept or deny the claim, yet never did . . . [t]his conduct is in bad faith." This argument seems to suggest that because Allstate failed to accept or deny her claim after conducting a lengthy investigation prior to the commencement of Appellant's suit, any action on the part of Allstate in requesting additional information during the pendency of trial is in bad faith.

O'Donnell, 734 A.2d at 907.

After reviewing the above evidence of purported misconduct, the opinion in *O'Donnell* held:

> As a matter of law, the evidence presented by Appellant of Allstate's conduct during the course of litigation does not constitute bad faith and, therefore, such evidence was properly excluded from the jury's consideration.
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> . . . .
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> In the absence of any evidence which demonstrates that Allstate was motivated by a dishonest purpose or ill motive, or otherwise breached it[s] fiduciary or contractual duty by utilizing the discovery process to conduct an improper investigation, we must reject Appellant's attempt to equate the propounding of interrogatories with the type of bad faith investigative practices actionable [for a bad faith claim].

O'Donnell, 734 A.2d at 907-909.

In view of the foregoing, I concur in the majority opinion.