**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

**CIVIL TRIAL DIVISION**

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| PATRICIA M. EGGER, Administratrix of the Estate of CHARLES EGGER, Deceased, | : | MAY TERM, 2001 |
| Plaintiff, | : | No. 1908 |
| v. | : | Commerce Program |
| GULF INSURANCE COMPANY | : | |
| Defendant. | : | |

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**FINDINGS OF FACT**
**DISCUSSION**
**AND CONCLUSIONS OF LAW**

**Albert W. Sheppard, Jr., J. ……..…….. March 10, 2004**

This is an insurance bad faith case. A two day hearing was conducted on November 6 and November 7, 2003. In accord with the Findings of Fact and analysis set forth, this court finds in favor of defendant, Gulf Insurance Company ("Gulf"), and against plaintiff, Patricia M. Egger, Administratrix of the Estate of Charles Egger ("Egger"), on the issue of bad faith.

## FINDINGS OF FACT

1. The alleged bad faith occurred during Gulf's involvement in a lawsuit filed by plaintiff, Patricia Egger, against, *inter alia* Foulke Associates Inc. ("Foulke") in connection with her husband's death on September 6, 1997 (the "Underlying Action"). The complaint asserted multiple theories of liability based upon allegations that Mr. Egger died as a result of, *inter alia*, Foulke's negligence.

2. At the time of Mr. Egger's accident, Foulke was insured through a primary general liability policy issued by Security of Hartford, Inc., with primary limits of $1 million (the "Primary Policy").

3. At the time of Mr. Egger's accident, Gulf provided excess insurance to Foulke under policy no. CU5849363 (the "Gulf Policy"), with liability limits of $10 million. Under its terms, the Gulf Policy would not be triggered until the $1 million Primary Policy was exhausted. Exh. Gulf-7, Sec. I (1); Sec. II (1)(a). Moreover, the Gulf Policy specifically disclaimed Gulf's duty to "investigate, negotiate, settle or defend" any claim brought against Foulke until the Primary Policy was exhausted. Id. at Sec. II (3)(a).

4. Gulf was first notified of the Egger claim by a letter dated January 7, 2000 and at the same time received a copy of the complaint in the Underlying Action.

5. Joyce Poff, a vice president for Gulf, handled the claim on behalf of Gulf. Ms. Poff testified at the trial of this matter on November 7, 2003.

6. In July 2000, counsel for Gulf was given access to and began reviewing Foulke's defense file, which consisted of over 7000 pages and contained, *inter alia*, copies of depositions, expert reports and other documents pertinent to the Underlying Action. Counsel for Gulf regularly communicated with Poff about the information contained within the defense file. N.T.

(11/7/03) at 115-117.

7. Poff testified that, in addition to Gulf's counsel's reports on the defense file, she reviewed the Foulke Insurance Application, Foulke's Plant Protection Service Purchase Order and also spoke with members of Gulf's Underwriting and Legal Departments. N.T. (11/7/03) at 42-8, 143-9.

8. On September 21, 2000, Gulf forwarded a Reservation of Rights Letter to Foulke, indicating that there was question whether coverage under the Gulf Policy existed for Mr. Egger's accident. Exh. Gulf-11. In the letter, Gulf expressed the "primary concern…that the emergency services provided to Foulke that give rise to this action may be excluded under the Policy's Professional Liability Exclusion." Id. Gulf further stated that its review of the complaint, depositions and expert reports demonstrated that the claim did "not arise out of Foulke's security guard or investigative operation" and instead arose out of "the alleged negligent provision of emergency medical services." Id.

9. The Underlying Action was tried before a jury from February 5, 2001 through February 9, 2001.

10. The Primary Policy limits were not tendered until just prior to trial. As of January 30, 2001, Hartford, the Primary Carrier, had still not exhausted, nor even offered, its policy limits. Exh. Gulf-4 at 00035.

11. Shortly after the Primary Policy limits were officially tendered, Gulf denied coverage on the basis of the Professional Liability Exclusion contained within the Gulf Policy. The reasons proffered for the denial were the same as those set forth in the Reservation of Rights Letter.

12. On February 9, 2001, the jury returned a verdict against Foulke in the amount of

$3.5 million. On March 26, 2001, judgment was entered against Foulke in the amount of $3,837,965.75.

13. During the trial, but before verdict, Foulke negotiated a settlement with plaintiff and PECO, a co-defendant that had a cross-claim pending against Foulke. The settlement included the payment of the primary insurance limits of $1 million, and the assignment by Foulke to plaintiff of all of Foulke's rights under the Gulf policy. Of the $1 million settlement, plaintiff received $825,000.00 and PECO received $175,000.00.

14. Thereafter, plaintiff filed the instant case, which included both a breach of contract and bad faith claim against Gulf.

15. On July 16, 2003, this court issued an Order and Opinion granting plaintiff's Motion for Summary Judgment, holding that coverage existed due to ambiguous policy language. On August 11, 2003, judgment was entered against Gulf in the amount of $3,352,320.57.

16. Having determined that coverage existed[1], a two day hearing was conducted on November 6 and November 7, 2003 to determine whether Gulf's denial of the claim constituted bad faith.

1 The court bifurcated the issues. The coverage issued was decided first on the paper submissions and oral argument.

## DISCUSSION

In Pennsylvania, bad faith actions against an insurance company are governed by 42 Pa.C.S.A. § 8371. Margaret Auto Body, Inc. v. Universal Underwriters Group, 2003 WL 1848560 * 1 (Pa.Com.Pl. Jan 10, 2003). This statute (42 Pa.C.S.A. § 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: (1) award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%; (2) award punitive damages against the insurer; (3) assess court costs and attorney fees against the insurer.

42 Pa.C.S.A. § 8371. Because the statute does not define bad faith, Pennsylvania courts (and federal courts applying Pennsylvania law) have adopted the following Black's Law Dictionary definition of bad faith in the insurance context:

> 'Bad faith' on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e. good faith and fair dealing), through some motive of self-interest or ill-will; mere negligence or bad judgment is not bad faith.

Terletsky v. Prudential Property and Casualty Ins. Co., 437 Pa. Super. 108, 649 A.2d 680, 688 (1994)(*quoting* Black's Law Dictionary 139 (6th ed. 1990)). To succeed at trial, the plaintiff must prove bad faith by clear and convincing evidence. Id.; Klingler v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997). Under this heightened standard, the plaintiff must show that: 1) the insurer lacked a reasonable basis for denying benefits under the policy; and 2) that the insurer knew or recklessly disregarded its lack of a reasonable basis. Terletsky, 649 A.2d at 688; Booze v. Allstate Ins. Co., 750 A.2d 877 (Pa. Super. 2000).

As noted, on July 16, 2003, this court granted summary judgment in favor of plaintiff and against Gulf, holding that, due to ambiguities within the Gulf Policy, coverage existed for the Egger claim. Madison Construction Co. v. The Harleysville Ins. Co., 557 Pa. 595, 735 A.2d 100 (1999) (where a provision of a policy is ambiguous, the law requires that the ambiguities in the policy be construed against the insurer). However, it is important to note that where an insurance policy is susceptible to more than one reasonable interpretation, as here, the fact that the policy is found to be ambiguous and therefore construed against the insurer is insufficient, in and of itself, to establish bad faith. See e.g. Lawson v. Fortis Ins. Co., 301 F.2d 159, 167 (3d Cir. 2002).

In support of its allegations of bad faith, plaintiff asserts that Gulf failed to demonstrate that it investigated and analyzed coverage issues regarding the "non-medical allegations" of the complaint, which plaintiff defines as follows:

1) improperly allowing Mr. Egger access into an OSHA defined "confined space" without first insuring that an appropriate rescue plan was in effect and staging appropriate rescue and first-aid equipment at the confined space;

2) improperly failing to train its employees to perform their duties;

3) inappropriately taking at least twenty (20) minutes or more to respond to an emergency which was less than five (5) minutes from their location at the time Foulke's employees were notified; and

4) failing to properly prioritize Mr. Egger's situation such that emergency first aid was performed before attempting to remove Mr. Egger from the confined space.

Exh. Plaintiff-73. Plaintiff differentiates these "non-medical allegations" from the "medical claims" which she asserts are the basis for Gulf's denial of coverage. Id. Plaintiff urges that Gulf never reserved its rights for these "non-medical" claims and that it was "reasonable, therefore, for Foulke to believe that there was coverage for the non-medical claims and that it

need not debate the reservation of rights regarding the medical claims." Pl. FFCL ¶ 57.

This court finds this argument to be unpersuasive to establish bad faith in this instance. Plaintiff's characterization of "medical" verses "non-medical claims" draws a distinction which, at least in this instance, is immaterial in determining the ultimate issue. The relevant evidence this court must consider is that which relates to whether Gulf had a reasonable basis to deny coverage at the time it actually did so.[2] While this court disagrees with Gulf's interpretation of the application and breadth of the Professional Liability Exclusion, it is apparent that Gulf's interpretation was consistent with the Reservation of Rights letter which expressly stated Gulf's opinion that the depositions and expert reports "clearly demonstrated" that the claim did "not arise out of Foulke's security guard or investigative operation," but instead arose out of "the alleged negligent provision of emergency medical services." Id. There was no uncertainty surrounding the fact that Gulf was considering denying coverage for the Egger claim as a whole. Gulf never expressed an intention or indication that it was considering the allegations of the complaint piecemeal.

Plaintiff has failed to demonstrate by clear and convincing evidence that Gulf lacked a reasonable basis to deny coverage or that it handled the claim improperly or that it was motivated by self-interest or ill will. The court found the testimony of Joyce Poff relative to the efforts undertaken by Gulf in both handling and investigating the claim to be credible and persuasive. Following its investigation, including its review of the applicable contracts, purchase orders and plaintiff's expert reports, Gulf had taken the position that Foulke had contracted to provide two different sets of services (*i.e.*, security guard services and Plant

[2] The insurer's decisions must be evaluated in light of the facts it knew or should have known at the time it actually denied coverage. Evidence which is obtained after the denial of

Protection Services). Based on the foregoing, Gulf determined that the activities of the Foulke personnel performing Plant Protection Services were not activities which were performed in connection with security guard or investigation activities and therefore were excluded under its interpretation of the Professional Liability Exclusion. In its opinion of July 16, 2003, this court described the Professional Liability Exclusion as follows:

> The Policy at bar problematically fails to define certain key terms, such as "security guard services," "investigative services" or "professional nature." While the "Incidental Malpractice" section of the Policy lends some limited guidance, it fails to offer a clear demonstration as to what constitutes being "in the business or occupation of providing medical services," a seminal point in this coverage analysis . . . The determination as to whether ambiguity exists can not be resolved
> in a vacuum; it must instead be considered in reference to a specific set of facts (citations omitted). Specifically, the issue of whether the medical services provided by Foulke to Mr. Egger were so fundamentally different than the security guard services so as to be excluded under the Policy is subject to differing yet reasonable interpretations under the Policy, particularly when viewed in light of the facts of this case, as well as the particularities of security guard services provided at an industrial plant generally. Because of these ambiguities, this court is compelled to find that coverage exits here.

See July 16, 2003 Order and Opinion (Sheppard, Jr., J.).

Admittedly, this court disagrees with Gulf's interpretation of the Policy; however, it finds Gulf's interpretation to be reasonable, in light of the facts of the Underlying Action and given the ambiguities within the Policy. Moreover, this court finds that Gulf conducted an appropriate investigation and did in fact have (or reasonably believed it had) a reasonable basis for denying benefits under the Gulf Policy. This court does not believe that Gulf acted in bad faith in doing so.

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coverage is irrelevant. Greco v. The Paul Revere Life Ins. Co., 1999 WL 95717 (E.D. Pa. 1999).

Parenthetically, we should keep in mind that Gulf was the excess carrier, not the primary carrier and therefore, its obligations differed to a certain extent from those of the Primary Carrier. Under its express terms, the Gulf Policy would not be triggered until the $1 million Primary Policy was exhausted. Exh. Gulf-7, Sec. I (1); Sec. II (1)(a). Moreover, the Gulf Policy specifically disclaimed Gulf's duty to "investigate, negotiate, settle or defend" any claim brought until the Primary Policy was exhausted. Id. at Sec. II (3)(a). Here, Gulf undertook its investigation concerning the claim, including the coverage issue, ***prior*** to the exhaustion of the Primary Policy, even though it had no contractual obligation to do so. Gulf denied coverage promptly after the Primary Carrier tendered its limits, which was not until the eve of trial.[3]

3 It causes this court some concern that the Primary Carrier did not tender its policy limits sooner in the Underlying Action, especially in light of plaintiff's arguments and the available correspondence which indicated that the excess would likely be reached in this matter. But, for whatever reason, the Primary Carrier did not do so and therefore, the Gulf Policy was not implicated sooner because the Primary Policy was not "exhausted." These facts also lend credence to Gulf's argument that it acted reasonably in denying coverage.

No credible evidence was presented to support plaintiff's allegation that Gulf was using its denial of coverage to influence settlement. Therefore, the court declines to address this allegation.

## CONCLUSIONS OF LAW

Based on the foregoing findings of fact and analysis:

1. This Court finds that plaintiff has not proven by clear and convincing evidence that Gulf did not have a reasonable basis for denying benefits under the policy or that Gulf knew or recklessly disregarded its lack of reasonable basis in denying the claim.

2. Judgment is entered in favor of Gulf and against plaintiff on the bad faith claim.

This Court will enter a contemporaneous Order consistent with these Findings of Fact, Discussion and Conclusions of Law.

**BY THE COURT,**

**ALBERT W. SHEPPARD, JR., J.**

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**O R D E R**

AND NOW, this 10th day of March 2004, upon consideration of the evidence presented at a two-day bench trial, the respective proposed findings of fact and conclusions of law and responses of the parties, all matters of record, and in accord with the Findings of Fact, Discussion and Conclusions of Law being filed contemporaneously with this Order, it is **ORDERED** that judgment is entered in favor of defendant, Gulf Insurance Company, and against plaintiff, Patricia M. Egger, Administratrix of the Estate of Charles Egger, on plaintiff's claim of bad faith.

**BY THE COURT,**

**ALBERT W. SHEPPARD, JR., J.**