3. There is no Statutory Bad Faith Claim Absent the Denial of Benefits.

In Toy v. Metropolitan Life Insurance Company, 928 A.2d 186 (Pa. 2007), Pennsylvania's Supreme Court addressed the meaning and scope of the term "bad faith" in the context of section 8371. The Supreme Court observed that at the time of the Section 8371's enactment, "the term 'bad faith' concerned 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." Id. at 199 (citations omitted). "In other words, the term captured those actions an insurer took when called upon to perform its contractual obligations of defense and indemnification or payment of a loss that failed to satisfy the duty of good faith and fair dealing implied in the parties' insurance contract." [1] Id.

In distinguishing earlier Superior Court case law,[2] Toy identifies two distinct uses of the term "bad faith": "[T]he term 'bad faith' refers not only to [1] the claim an insured brings against his insurer under the bad faith statute, but also, [2] to the conduct an insured asserts his insurer exhibited and establishes that it is liable. These matters although related, are nonetheless, separate and distinct." Id. at 199 n.16. Toy makes clear that it is addressing the first meaning of "bad faith" in determining the scope of section 8371, i.e., what claims an insured can bring under the statute in the first instance. Id. By contrast, "[t]he question before the [Superior C]ourt in each of those

[1] After Toy, numerous state and federal court opinions have opined that statutory bad faith claims may include various kinds of poor claims handling, but these courts typically do not analyze Toy, and often do not even cite Toy. Rather, these cases ultimately rely upon case law that preceded Toy in permitting an overbroad range of cognizable claims under 42 Pa.C.S. § 8371, contrary to Toy.

[2] Condio v. Erie Ins. Exch., 899 A.2d 1136 (Pa. Super. 2006), appeal denied, 912 A.2d 838 (Pa. 2006); Brown v. Progressive Ins. Co., 860 A.2d 493 (Pa. Super. 2004); Zimmerman v. Harleysville Mutual Ins. Co., 860 A.2d 167 (Pa. Super. 2004), appeal denied, 881 A.2d 820 (Pa. 2005); O'Donnell v. Allstate Ins. Co., 734 A.2d 901 (Pa. Super. 1999).

[four] cases[3] was not whether the insured alleged ***a cognizable claim under the bad faith statute***. Rather, it was whether the evidence offered at trial by the insured as to the insurer's behavior was sufficient to prove the bad faith claim and/or admissible in a §8371 action."[4] Id. (Emphasis added).

In essence, Toy was deciding what kinds of claims can get through section 8371's gates, and the Supreme Court placed clear limits on the size of those gates. Thus, Toy states, "[i]t bears repeating that in this case, we determine the essence of the claim given to an insured under the bad faith statute." Id. at 199 n.16. It is only after a claim has entered the bad faith gate, that the Superior Court's "bad faith" conduct case law become relevant. The contrast is made clear in Justice Eakin's concurrence, which would go further: "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." Id. at 209 (Eakin, J., concurring). A few months later, in Ash v. Continental Ins. Co., 932 A.2d 877 (Pa. 2007), Pennsylvania's Supreme Court reaffirmed the basic principles set forth in Toy. "The bad faith insurance statute … is concerned with 'the duty of good faith and fair dealing in the parties' contract and the manner by which an insurer discharge[s] its obligation of defense and indemnification in the third party claim context or its obligation to pay for a loss in the first party claim context.'" Id. at 882 (quoting Toy v. Metropolitan Life Ins. Co., 928 A.2d 186, 199 (Pa. 2007)).

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[3] See footnote 2, supra.

[4] "As we observe in footnotes 17 and 18, we do not consider what actions amount to bad faith [conduct], what actions of an insurer may be admitted as proof of its bad faith, whether an insurer's violations of the UIPA are relevant to proving a bad faith claim or whether the standard of conduct the Superior Court has applied to assess an insurer's performance of contractual obligations in bad faith cases is the correct one." Toy, 928 A.2d at 199 n.16.

In Buck v. Geico Advantage Insurance Company, No. 18-5148, 2019 WL 318262 (E.D. Pa. Jan. 23, 2019), a copy of which is attached as Exhibit 2, Judge DuBois addresses the governing law as found in Toy. "Even assuming that the bad faith denial of the benefits claimed by plaintiff was properly alleged in the Complaint, plaintiff's argument fails because plaintiff does not allege the denial of any benefits within the meaning of the statute. '[B]ad faith' as it concern[s] allegations made by an insured against his insurer ha[s] acquired a particular meaning in the law.'" Id. at *2 (quoting Toy v. Metro. Life Ins. Co., 593 Pa. 20, 928 A.2d 186, 199 (Pa. 2007)). Thus, "[c]ourts in Pennsylvania and the Third Circuit have consistently held that '[a] plaintiff bringing a claim under [§ 8371] must demonstrate that an insurer has acted in bad faith toward the insured through 'any frivolous or unfounded refusal to pay proceeds of a policy.'" Id. (citations omitted). In Buck, the plaintiff could not state a claim because "[n]one of the 'benefits' that defendant allegedly denied plaintiff concern the refusal to pay proceeds under an insurance policy. To the contrary, plaintiff concedes that he 'does not allege bad faith for refusal to pay benefits.'" Id.

Judge Dubois distinguished O'Donnell v. Allstate Ins. Co., 734 A.2d 901 (Pa. Super. 1999),[5] in addressing the Superior Court's statement that "'[S]ection 8371 is not restricted to an insurer's bad faith in denying a claim. An action for bad faith may also extend to the insurer's investigative practices.'" Buck, 2019 WL 318262 at *2. Judge DuBois observes this proposition simply means that bad faith claims "'need not be limited to ***the literal act*** of denying a claim.'" Id. (citing UPMC Health Sys. v. Metro. Life Ins. Co., 391 F.3d 497, 506 (3d Cir. 2004)) (emphasis added). Rather, "the essence of a bad faith claim must be the unreasonable and intentional (or reckless) denial of benefits." Id. (citation omitted). "Thus, plaintiff must allege the denial of

[5] This is one of the four Superior Court cases specifically addressed in Toy and limited to determining "bad faith" conduct, not cognizable "bad faith.

benefits to state a claim under § 8371." Id. In sum, (1) while proving bad faith is not limited to the literal act of denying a claim, and (2) other conduct can be considered to show the denial was made in bad faith, (3) the predicate existence of a claim denial remains a *sine qua non* of statutory bad faith, as it goes to the essence of a cognizable statutory bad faith claim.

In Boring v. State Farm Fire & Cas. Co., No. CV 19-1833, 2019 WL 3774191, *5 (E.D. Pa. Aug. 9, 2019) (Kearney, J.), a copy of which is attached as Exhibit 3, this Court observed that "Pennsylvania's bad faith statute does not extend to conduct unrelated to the denial of a claim for benefits." Further, "[b]ad faith claims do not remedy an insurer's allegedly insufficient performance of its contractual obligation or to indemnify losses." Id. & n.42 (citing *Toy v. Metro. Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186, 198-200 (Pa. 2007)). This Court also observed that "[o]ur Court of Appeals has affirmed 'legislative intent. . . makes clear that the [bad faith] statute was intended specifically to cover the actions of insurance companies in the denial of benefits.'" Id. & n.43 (citation omitted). See also Purvi, LLC v. National Fire & Marine Ins. Co., No. CV 19-4250, 2019 WL 6117356, at *3 (E.D. Pa. Nov. 18, 2019) ("Though 'Courts have extended the concept of 'bad faith' beyond an insured's denial of a claim in several limited areas,' Nw. Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 137 (3d Cir. 2005) (collecting cases), 'the essence of a bad faith claim must be the unreasonable and intentional (or reckless) *denial of benefits*,'" UPMC Health Sys. v. Metro. Life Ins. Co., 391 F.3d 497, 506 (3d Cir. 2004) (emphasis added [by Judge Beetlestone])"). A copy of Purvi is attached as Exhibit 4.