

## [Pa. High Court Set To Weigh Insurer Bad Faith Standard](#)

Law360

The Pennsylvania Supreme Court will hear arguments on Tuesday over the proper standard to impose bad faith penalties against insurance companies, in a case over a cancer insurance claim that has garnered intense attention from insurers and policyholders alike.

Here, Law360 breaks down the history of the case in advance of the hearing.

### What's At Stake

Conseco Health Insurance Co. is seeking to reverse a state appellate court's decision ordering a new trial in a bad faith case brought by policyholder LeAnn Rancosky, who developed ovarian cancer in 2003.

Conseco says the appellate court, known as the Superior Court, flouted more than two decades of legal precedent by holding that an insurance carrier's "motive of self-interest or ill-will" is merely one factor that may be taken into consideration in determining whether the insurer acted in bad faith, rather than a mandatory prerequisite for such a claim.

The Superior Court reached the decision based on its reading of the appellate court's 1994 ruling in *Terletsky v. Prudential*, which stated that an insurance company's bad faith is established when the insured demonstrates that the insurer lacked a reasonable basis for denying benefits under the policy, and knew or recklessly disregarded its lack of a reasonable basis in denying the claim.

In Rancosky's case, the Superior Court found that a "dishonest purpose" or "motive of self-interest or ill will" is not a third element required for a finding of bad faith, but that it may be considered in determining the second prong of the *Terletsky* test.

A slew of insurance industry groups, including the Insurance Federation of Pennsylvania, American Insurance Association and Property Casualty Insurers Association of America, have warned in amicus briefs that a Pennsylvania high court ruling upholding the decision would vastly expand insurers' exposure to bad faith claims in the state. The trade groups argued that Pennsylvania's insurance bad faith statute, 42 Pa. C.S. Section 8371, doesn't contemplate punitive damages awards against carriers in the absence of proof of a nefarious motive.

"If this court demoted an insurer's 'motive of self-interest or ill will' to a mere discretionary bad faith consideration, it would necessarily mean that Pennsylvania would allow awards of punitive damages regardless of whether an insurer actually knew it lacked a reasonable basis for denying a claim," the trade groups wrote. "This would dramatically expand the scope of recovery of punitive damages in Pennsylvania and position the commonwealth outside of the legal mainstream."

On the other hand, the policyholder advocacy group United Policyholders asserted in its own amicus brief that, since *Terlesky*, no court has required a finding of a subjective "bad motive" to establish an insurer's bad faith and that introducing such a requirement would be unfair to insureds.

"The reasoning of those courts is consistent with the law of punitive damages in Pennsylvania, which likewise does not require proof of a bad motive," United Policyholders argued in its brief.

#### How We Got Here

Conseco made several benefit payments to Rancosky from 2003 to 2005. But Rancosky's cancer returned in 2006, and Conseco began denying claims, contending that she had failed to submit a proper waiver of premium based on disability.

Rancosky and her husband filed a lawsuit against the insurer in 2008. After Rancosky died in February 2010, her estate was substituted as plaintiff in the case. Her claims were ultimately separated, and in 2013, the estate won a \$31,000 jury verdict on its breach of contract claim. However, a judge ruled in favor of Conseco in a nonjury trial over Rancosky's bad faith claim in 2014.

On appeal to the Superior Court, Rancosky's estate focused on Conseco's conclusion that her policy had lapsed before she went on disability.

In a decision in mid-December 2015, a panel of the Superior Court said that the insurer failed to collect the necessary information to determine when Rancosky became disabled by her cancer. Consequently, the insurer did not have a proper basis to determine when she was disabled, and whether her payments lapsed, the panel held.

The appellate panel observed that the state Legislature did not provide a definition of bad faith, as that term is used in a section of state law that governs legal actions on insurance policies, nor did it set forth the manner in which a policyholder must prove bad faith. While the Terletsky ruling set forth a method of review for bad faith cases, the panel said, the Pennsylvania Supreme Court had never weighed the issues.

Last August, the Pennsylvania high court agreed to review the case to decide whether Terletsky concretely established a means of determining an insurer's bad faith, and if so, whether the Superior Court erred in holding an insurer's "motive of self-interest or ill-will" is merely a discretionary consideration rather than a prerequisite to proving bad faith.

#### Conseco's Stance

Conseco asserted in a brief filed with the state high court that the Superior Court's decision "rewrites" the Terletsky method and "flies in the face" of decades of case law applying the standard.

According to the insurance company, permitting punitive damages for bad faith without proof of a subjectively improper motive by the insurance company would raise "serious due process and other constitutional concerns" for insurers.

"Consideration of an insurer's knowledge or reckless disregard for the lack of an objectively reasonable basis for its actions informs the subjective intent inquiry — not the other way around, as the Superior Court erroneously held," Conseco argued.

Here, the insurer said, no bad faith exists because the trial court concluded that Conseco had a reasonable basis to deny Rancosky's claims on account of testimony and evidence relating to her compliance with policy terms.

#### Rancosky's Stance

Rancosky's estate countered that the Superior Court got it right, saying that once an insurer has unreasonably withheld payment, it has already demonstrated self-interest or ill will by violating Pennsylvania's Unfair Insurance Practices Act.

As such, the estate contended, there is no need to separately prove that an insurance company subjectively acted out of improper self-interest or ill will to maintain a bad faith claim. Instead, the insurer's mindset is a factor to be considered by a court when it is weighing an award of punitive damages, it said.

"It would be illogical and wrong to bootstrap these factors into the standards required for establishing bad faith in the first place," the estate argued.

#### Counsel

Conseco is represented by Jacob C. Cohn and Katharine J. Thompson of Gordon & Rees LLP and by Henry Sneath and Rod McCullough of Picadio Sneath Miller & Norton PC.

The Rancosky estate is represented by Kenneth Behrend and Kevin Miller of Behrend & Ernsberger PC.

The case is Rancosky v. Washington National Insurance Co., case number 28 WAP 2016, in the Supreme Court of Pennsylvania.

-Editing by Rebecca Flanagan and Emily Kokoll.