

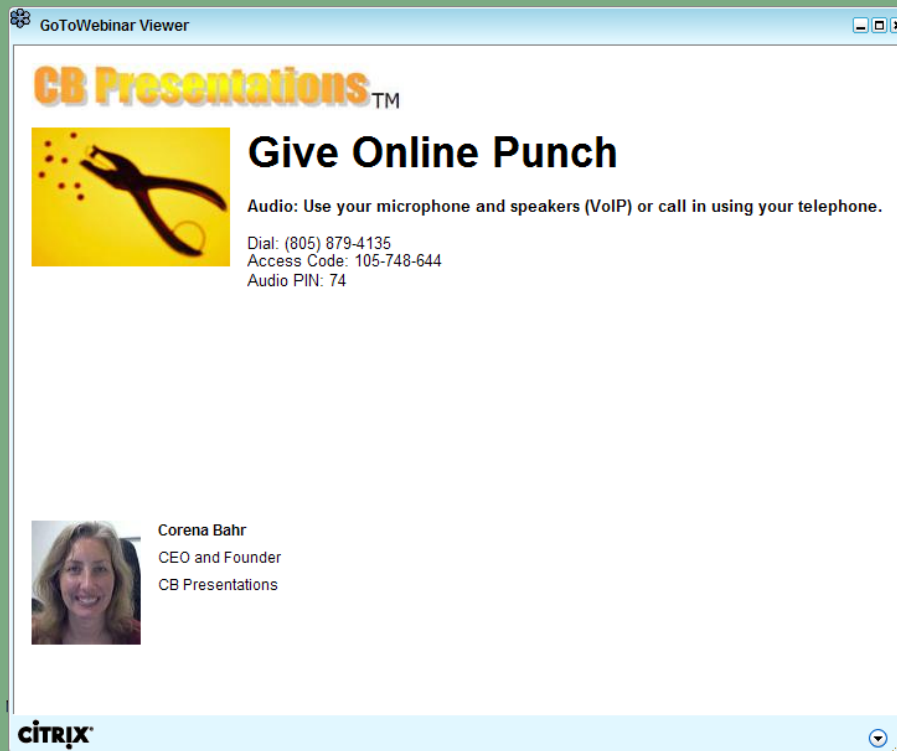


# BAD FAITH LITIGATION

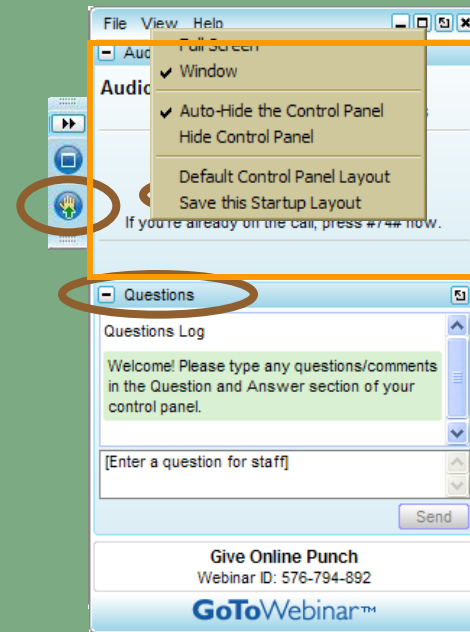
Presented By  
Douglas W. Lehrer  
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## 1. Viewer Window



## 2. Control Panel





# BAD FAITH LITIGATION

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# TYPES OF BAD FAITH CASES

- **Excess Verdict Cases**
  - Whether the insurer made a honest and intelligent decision to litigate the claim rather than to settle.
- **First-Party Cases**
  - Failure to pay an insured money due and owing under the policy.
  - Failure to defend.



# JUSTIFICATION FOR FIRST-PARTY BAD FAITH CASE

- To prevent baseless denials.
- An insurance company should have more to lose than the contract payment interest if it intentionally denies a claim it knows it should pay (damages should not then be limited by contract).







# ELEMENTS OF BAD FAITH

1. The terms of policy obligated the insurance company to pay the claim;
2. The absence of a reasonable basis for denying benefits under the policy; and
3. The insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

*Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (1978).



# BAD FAITH STANDARDS

- Bad faith cannot be unintentional (intentional tort).
- An insurer's position is "fairly debatable" when it has a reasonable basis or coverage is arguable.
- Even when the insurance company should have paid, the company is not necessarily found to be in bad faith. *Rhiel v. Wisconsin County Mutual Ins. Corp.*, 212 Wis.2d 46, 568 N.W.2d 4 (Ct. App. 1997).
- An insurance company is entitled to debate or litigate a claim if it reasonably believes a question of law or fact must be decided before the insurance company is required to pay on the claim. *Duir v. John Alden Life Ins. Co.*, 573 F.Supp. 1002 (W.D. Wis. 1983).

# OBJECTIVE VS. SUBJECTIVE TEST

- Before *Anderson*, Wisconsin courts used a two-prong test:
  1. Objective Test: The insured must show the absence of a reasonable basis for denying benefits of the policy.
  2. Subjective Test: The insured must show the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.





# OBJECTIVE VS. SUBJECTIVE TEST

- After *Anderson*, the test used is as follows:
  - “[Would] a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances?” *Anderson*, 85 Wis.2d at 692.

In summary, *Anderson* now requires the insured to show the “absence of a reasonable basis for denying benefits of the policy” and “the insurer’s knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.”



# INVESTIGATION

1. A determination of bad faith may also involve a review of the insurance company's investigation of the claim:
  - “[T]o determine whether the insurer acted in bad faith the trier of fact measures the insurer's conduct against what a reasonable insurer would have done under the particular facts and circumstances to conduct a fair and neutral evaluation of the claim.”

*Weiss v. United Fire & Casualty Co.*, 197 Wis.2d 365, 378, 451 N.W.2d 753 (1995).



# INVESTIGATION

2. An insurance company dealing with whether it has to pay its insured's policy benefits is required to conduct a neutral, detailed investigation. *Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 347 N.W.2d 595 (1984).



# INVESTIGATION

3. The duty of good faith exists at all times during the investigation, evaluation and processing of a claim. *Danner v. Auto-Owners Ins.*, 245 Wis.2d 49, 629 N.W.2d 159 (2001).



# CONTRACT CLAIM VS. BAD FAITH CLAIM

- Although a first-party bad faith claim may arise out of a contract (insurance policy), the bad faith is not a breach of contract but rather a separate tort.
  - “[T]he tort of bad faith is not a tortious breach of contract (but rather) a separate intentional wrong which results from a breach of duty imposed as a consequence of the relationship established by contract”. Anderson, 85 Wis.2d at 687.





# APPLICATION OF THE STANDARD

- Issue of Law Fairly Debatable
  - If the state of the law at the time that an insurer denied a claim was fairly debatable, the insured has no basis for a bad faith claim. *Samuels Recycling Co. v. CAN Ins. Co.*, 223 Wis.2d 233, 588 N.W.2d 385 (Ct. App. 1998).



# APPLICATION OF THE STANDARD

- Expert Shopping

- Wisconsin courts have held that an insurance company who hires an expert, and then disregards the expert's opinion simply because the opinion would establish coverage "did not investigate in good faith or hire an expert to prepare an opinion in accordance with the good-faith investigation, as it should have done." *Benke v. Mukwonago-Vernon Mutual Ins. Co.*, 110 Wis.2d 356, 329 N.W.2d 243 (Ct. App. 1982).





# APPLICATION OF THE STANDARD

- **Change of Position By Company**
  - An insurance company must be careful not to change its position or reasons for denying a claim as the court has held that such a change can support a finding of bad faith. *Poling v. Wisconsin Physicians Service*, 120 Wis.2d 603, 357 N.W.2d 293 (Ct. App. 1984).
- **Discarding Evidence**
  - If an insurer loses, mislays or destroys evidence this can raise an inference of wrongdoing by the insurance company. *Upthegrove Hardware, Inc. v. Pennsylvania Lumbermen's Mutual Ins. Co.*, 146 Wis.2d 470, 431 N.W.2d 689 (Ct. App. 1988).

# DAMAGES ALLOWED



- Emotional Distress
  - Recoverable only when the distress is severe and when the insured suffers substantial other damage apart from the loss of the contract benefits and the emotional distress. *Musa v. Jefferson County Bank*, 240 Wis.2d 327, 620 N.W.2d 797 (2001).
- Damages Caused By the Breach of Contract (Other than Contract Damage)
  - This could include interest incurred in the borrowing of money to replace the funds not available from the insurance company.

# DAMAGES ALLOWED



- **Punitive Damages**

- Before May 17, 1995, the insured was required to show wanton, willful or reckless disregard by the insurance company. *Weiss v. United Fire & Casualty Co.*, 197 Wis.2d 365, 541 N.W.2d 753 (1995).
- After May 17, 1995, punitive damages only apply when the insurance company “acts maliciously or with intentional disregard of the plaintiff’s rights.” Wis. Stat. 895.043.

- **Attorneys’ Fees**

- “When an insurer acts in bad faith denying benefits, it is liable to the insured in tort for any damages which are the proximate result of that conduct.” *Dechant v. Monarch Ins. Co.*, 200 Wis.2d 559, 547 N.W.2d 592 (1996).



# STATUTE OF LIMITATIONS

- Bad faith is an intentional tort with a two (2) year statute of limitations. *Warmka v. Hartland-Cicero Mutual Ins. Co.*, 136 Wis.2d 31, 400 N.W.2d 923 (1987).



# BIFURCATION AND STAY

- If requested, the trial court must bifurcate and stay the underlying breach of contract claim from the bad faith claim. *Dahmen v. American Family Mutual Ins. Co.*, 247 Wis.2d 541, 635 N.W.2d 1 (2001).



# EXPERT TESTIMONY REQUIRED

- The court has held that the bad faith standard is a matter “beyond the ken of the ordinary juror” and, therefore, requires expert testimony. *Heyden v. Safeco Title Ins. Co.*, 175 Wis.2d 508, 498 N.W.2d 905 (Wis. App. 1993).



# BAD FAITH LITIGATION

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