IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TAMMY S. LEAB, Administratrix of the Estate of EDWARD L. LEAB, Plaintiff	:	CIVIL ACTION
	:	NO. 95-5690
v.	:	
THE CINCINNATI INSURANCE COMPANY, Defendant	:	

M E M O R A N D U M

JUDGE TULLIO GENE LEOMPORRA, U.S.M.J. DATED: JUNE ___, 1997

I. INTRODUCTION

Following a four day trial, a jury found that Defendant Cincinnati Insurance Company ("CIC") acted in bad faith when processing the underinsured motorist ("UIM") claim of Plaintiff Tammy Leab in violation of Pennsylvania's bad faith statute, 42 Pa. Cons. Stat. § 8371.[1] The jury awarded Leab $5.5 million in

[1] 42 Pa. Cons. Stat. § 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.

(continued...)

punitive damages. CIC now seeks judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, or, in the alternative, a new trial pursuant to Federal Rule of Civil Procedure 59 as well as remittitur of the punitive damages. Leab contends that the jury has spoken and the verdict should stand. Neither party has alleged any trial errors.

II. FACTS

Edward L. Leab was killed in an automobile accident on March 6, 1993, while driving a vehicle owned by his employer, Eastern Consolidated & Distribution Services, Inc. ("ECD"). ECD was insured by defendant CIC under which the deceased was covered and received benefits. By March 18, 1993, Stephen Herb, CIC's field claims representative who had been assigned to process Leab's anticipated UIM claim, recommended that CIC set aside a reserve of $35,000 in order to pay the claim. Pl. Exh. 1-A. Mr. Herb's recommendation was accepted and CIC set aside $35,000.

Within two weeks of the accident, Tammy Leab, wife of Edward Leab, retained Thomas Bright, Esquire. Attorney Bright wrote a letter to ECD dated March 19, 1993 seeking information concerning Mr. Leab's employment, including "the names and addresses of both your Workers' Compensation Insurance carrier and your motor vehicle insurance carrier, together with a copy of the

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[1](...continued)

(3) Assess court costs and attorney fees against the insurer.

declarations page regarding the tractor Mr. Leab was operating on the date of his death." Pl. Exh. 4. Attorney Bright also wrote a letter dated April 20, 1993 to Mr. Herb requesting a copy of the declarations page. Pl. Exh. 5. In a letter dated May 5, 1993, Keckler and Heitefuss, Inc., the agency that sold the insurance policy to ECD, sent Attorney Bright a copy of the declarations page. Pl. Exh. 6. That declarations page stated that the insurance policy at issue provided $1,000,000 in automobile liability coverage, and nonstacked, uninsured and underinsured motorist coverage of $35,000. Attorney Bright then wrote a letter to Mr. Herb dated May 19, 1993, requesting a copy of the signed election form in which ECD agreed to take underinsurance coverage that was less than the liability coverage.[2] Pl. Exh. 7.

On June 1, 1993, CIC paid ECD for the value of the truck that was damaged in the accident and learned that the party responsible for the trucking accident only had $50,000 in liability coverage for bodily injury. Pl. Exh. 8. Due to the severity of Edward Leab's accident, Mr. Herb noted in a status log report that CIC would surely be involved in an underinsured motorist claim "of which we have $35,000 limits." Id.

Having received no response to his May 19 letter, Attorney Bright followed-up with letters to Mr. Herb dated June 9,

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[2] Under Pennsylvania law, the amount of a person's UIM coverage is the same as their liability coverage unless the person makes an affirmative choice to take lower limits. The person purchasing the policy must sign an election or waiver form indicating that they are accepting lower UIM coverage.

and July 15, 1993, and a letter to ECD, the employer of Edward Leab, dated June 23, 1993 requesting copies of the signed election form. Pl. Exh. 9, 10, 11. Attorney Bright also wrote a letter dated July 21, 1993 to CIC's home office seeking a complete copy of the insurance policy, including a copy of the signed election form. Pl. Exh. 13. Having received no response, Attorney Bright once again requested the same information from CIC's home office by letter dated August 10, 1993. Pl. Exh. 14.

By letter dated August 23, 1993, Attorney Bright wrote again to CIC, stating that based on his investigation of the claim, which included the fact that a signed waiver form had not yet been produced, Leab was entitled to, and therefore was making, a demand for $1,000,000. Pl. Exh. 15. Mr. Herb responded to Attorney Bright in an August 31, 1993 letter enclosing a copy of the signed election form dated September 13, 1991. Pl. Exh. 16.

Attorney Bright then sent Mr. Herb letters dated September 20 and October 13, 1993, requesting a certified copy of the insurance policy, which presumably would include a copy of the signed election form. Pl. Exh. 18, 20. In a status log report dated October 4, 1993, Mr. Herb notified CIC's home office of Attorney Bright's request for a certified copy.[3] Pl. Exh. 19. CIC

[3] Martin Skidmore, CIC's regional casualty claims supervisor who worked at the home office, testified that part of the delay in sending Attorney Bright the certified copy was that he wanted to check with Thomas Brenner, Esquire, an attorney who did work on behalf of CIC, to make sure that it would be permissible to send a certified copy to Leab because the ECD policy contained confidential information regarding the insured. Trial Tr. (continued...)

Claims Supervisor Skidmore requested the certified copy in October 1993, but it was not sent to Joseph Roda, Esquire, until March 4, 1994.[4] Trial Tr. 10/22/96 at 119-20.

In the certified copy of the policy, the signature page for the election of lower UIM limits was not signed or dated. Id. at 130. On April 28, 1994, Plaintiff Leab filed a Writ of Summons against CIC in the Court of Common Pleas in York County, seeking discovery on whether a proper election of lower limits had been executed in connection with the insurance policy. Trial Tr. 10/24/96 at 103.

After CIC produced documents to Leab in the York County matter, Attorney Brenner spoke with Leab's counsel in July 1994 concerning the unresolved UIM claim. Def. Exh. 13. Attorney Roda's office stated that they needed more time to review the matter and then would get back to Attorney Brenner regarding a possible settlement. Id. In August or September of 1994 CIC offered to settle the UIM claim by paying Leab $35,000 in exchange for a release discharging CIC from paying any additional UIM

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[3](...continued)
10/22/96 at 115-19. In fact, in a letter dated August 4, 1993, Mr. Skidmore had requested that Mr. Herb check with Attorney Brenner about sending Attorney Bright a copy of the policy. Trial Tr. 10/23/96 at 66; Def. Exh. 29. After speaking to Attorney Brenner, Mr. Herb was to inform Mr. Skidmore so that he (Skidmore) could order a certified copy of the policy. Thus, Mr. Skidmore had begun the process of obtaining a certified copy of the policy approximately six weeks before Attorney Bright had formally requested it.

[4] Attorney Bright referred Leab's case to Attorney Roda in late 1993 or early 1994. Attorney Roda is Leab's counsel of record in this case.

benefits. Trial Tr. 10/22/96 at 148-49; Def. Exh. 14. CIC Attorney Brenner sent a letter dated September 6, 1994 to Attorney Roda and spoke with Attorney Roda on October 10, 1994, once again seeking Leab's position on the UIM claim. Def. Exh. 14. By letter dated October 12, 1994, Attorney Roda wrote that he needed to depose several people before addressing CIC's offer of $35,000 to resolve the matter. Def. Exh. 15. Through a variety of scheduling delays that were not the fault of either party, the depositions were not completed until May 1995.

On May 16, 1995, Attorney Brenner, while meeting with Doug Barry and Fred Heitefuss of Keckler and Heitefuss, Inc., the insurance agency, in advance of their depositions in the York County proceeding, found another signed election form that was dated January 1991. Trial Tr. 10/22/96 at 141. In a letter dated May 16, 1995, Attorney Brenner sent Ronald Messmann, Esquire, who was an attorney in Mr. Roda's office, a copy of the election form that was signed January 8, 1991, in which the name of the insured was listed as "Hugo Services, Inc." rather than ECD. Pl. Exh. 32, 32A; Trial Tr. 10/22/96 at 146. Mr. Skidmore testified that "ECD and Hugo's was all one name within the policy itself." Trial Tr. 10/22/96 at 147.

Leab commenced the instant action against CIC on September 9, 1995, alleging that CIC acted in bad faith in its processing of Leab's UIM claim. The plaintiff contended that a release was not required and defendant acted in bad faith requesting one. During the months of September and October 1995,

Attorney Brenner exchanged a series of letters with Attorneys Roda and Messmann, discussing whether a release needed to be signed before payment of the $35,000 in UIM benefits. See Pl. Exh. 40-46. Leab claimed that while it was unlikely she would pursue a claim for $1,000,000 (and she never, at any time, made any claim over the $35,000), CIC had no basis to condition payment of the $35,000 on the signing of a release for all present and future UIM claims. Pl. Exh. 46.

By letter dated November 1, 1995, CIC stated that it would pursue arbitration if Leab did not sign a release in exchange for the $35,000.[5] Pl. Exh. 47. Leab claimed there was no dispute as to the amount owed so no arbitration was necessary but would not sign a release. Pl. Exh. 54. Since Leab refused to select an arbitrator, CIC filed a petition with the York County court requesting that Leab appoint an arbitrator. Trial Tr. 10/24/96 at 27-28. A hearing was held on February 21, 1996, in which the York County court ordered Leab to appoint an arbitrator within ten days of the hearing date. Id. at 30-32. That same day, after learning of the York County court's decision, Attorney Roda faxed Attorney Brenner a letter accepting CIC's offer to pay Leab $35,000 in exchange for a release absolving CIC of any future UIM claim. Def.

[5] The insurance policy had an arbitration provision stating, "If we and an 'insured' . . . do not agree as to the amount of damages, either party may make a written demand for arbitration. Each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction." Pl. Exh. 23.

Exh. 1(D). After receiving the release, CIC paid Leab $35,000 on March 4, 1996. The bad faith action that is the subject of these post-trial motions was tried in October 1996, at which time the jury awarded Leab $5.5 million in punitive damages. No compensatory damages were alleged or claimed and none were awarded.

III. LEGAL STANDARD

A. MOTION FOR JUDGMENT AS A MATTER OF LAW

A Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50 "should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993) (citation omitted). The Motion for Judgment as a Matter of Law is denied. See detailed discussion in the text of this opinion.

B. MOTION FOR A NEW TRIAL

"In general, . . . a new trial [pursuant to Federal Rule of Civil Procedure 59] is committed to the sound discretion of the district court." Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802, 812 (3d Cir. 1984); see also Garrison v. United States, 62 F.2d 41, 42 (4th Cir. 1932) ("Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice."). In cases where a party is requesting a new trial based upon the weight of the evidence, a district court should grant a new trial only if "a miscarriage of justice would result if the verdict were to stand." Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1352 (3d Cir. 1991). "A court may also grant a new

trial if the verdict was the result of erroneous jury instructions, was excessive or clearly unsupported by the evidence, or was influenced by extraneous matters such as passion, prejudice, sympathy or speculation." Rush v. Scott Specialty Gases, Inc., 930 F. Supp. 194, 197 (E.D. Pa. 1996) (citations omitted), rev'd on other grounds, 1997 WL 249175 (3d Cir. May 14, 1997).

CIC makes a myriad of arguments in support of its motions. Essentially, CIC argues:

1. The evidence was legally insufficient to support the jury's finding that CIC acted in bad faith. Alternatively, a new trial should be granted because the finding of bad faith was against the weight of the evidence.

2. A new trial should be granted because an important defense witness, Stephen Herb, was unable to testify at trial. CIC's ability to present an effective defense was severely prejudiced by Mr. Herb's absence and the court failed to allow a continuance of the trial for his appearance.

3. The evidence was legally insufficient to support an award of punitive damages. Alternatively, a new trial should be granted because the jury's award of punitive damages was against the weight of the evidence and/or grossly excessive. Even if punitive damages are warranted, the amount awarded by the jury shocks the court's conscience so a remittitur is required.[6]

[6] CIC also argues that a new trial must be ordered because the court, not the jury, should have decided the issue of whether it acted in bad faith. CIC had previously raised this issue before Judge Robert S. Gawthrop, III, who presided over this case before it was assigned, by consent of the parties, to the undersigned for trial. In an August 2, 1996 Order, Judge Gawthrop denied CIC's motion, and CIC has not raised any arguments in the instant motion that merit reconsideration of this issue.

Neither defendant CIC in its post-trial motions, nor Leab in her opposition thereto, has made any objection to the admission or exclusion of evidence during the trial, the court's jury instructions, or the conduct of the court or opposing counsel in this case.

CIC's Motion for a New Trial is based on four different grounds:

1. The jury's finding of bad faith was against the weight of the evidence;

2. The unavailability of Stephen Herb;

3. The award of punitive damages was against the weight of the evidence; and

4. The punitive damages award was grossly excessive and therefore unconstitutional.

IV. DISCUSSION[7]

A. BAD FAITH

The Pennsylvania Legislature did not define bad faith when it passed the statute at issue in this case, 42 Pa. Cons. Stat. § 8371, but its meaning has since been expounded upon in the case law:

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[7] It should be emphasized that the court's following discussion of the bad faith and punitive damages issues are necessarily limited by the evidence that was presented at trial. The court is of the opinion that Stephen Herb's testimony, had he been available at trial, could have changed the court's (and presumably the jury's) perception of several key events that are at the heart of this case. The medical absence of Mr. Herb will be discussed herein.

> 'Bad faith' on [the] part of [the] 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 & Casualty Ins. Co., 649 A.2d 680, 688 (Pa. Super. 1994), citing Black's Law Dictionary 139 (6th ed. 1990) (emphasis added). To recover on a bad faith claim, a plaintiff must prove by clear and convincing evidence that (1) the insurance company did not have a reasonable basis for denying benefits under the policy; and (2) that the insurance company knew or recklessly disregarded its lack of a reasonable basis for refusing payment. Id. (citations omitted).

CIC asserts that the evidence presented at trial is insufficient as a matter of law to support a finding that it acted in bad faith when processing Leab's claim. In the alternative, CIC seeks a new trial on the ground that the jury's finding of bad faith was against the weight of the evidence. In essence, Leab responds that CIC's insistence on a release before paying the $35,000, its decision to seek arbitration to resolve the UIM claim, and its delay in turning over requested policy information are all sufficient grounds to support the jury's finding that CIC acted in bad faith. As will be discussed in detail below, the court finds that CIC did not act in bad faith by requiring a release and pursuing arbitration.

1. Requiring A Release

CIC argues that since the amount of insurance benefits that Leab was entitled to was the subject of a dispute, it was reasonable for CIC to ask for a release to resolve the UIM claim. Leab contends there was no dispute and that as a minimum, CIC owed $35,000 which was an agreed figure of the parties on the UIM claim. Thus, Leab argues, CIC should have paid this amount without requiring a release for a potentially higher UIM claim of $1,000,000. Leab also claims that this court has already ruled that it is a jury question as to whether it was reasonable to require a release and that the jury has spoken. The court will address Leab's second argument first.

It is clear that the jury has not specifically spoken on the question of whether CIC's insistence on a release constitutes bad faith. Rather, the written jury interrogatories asked, inter alia, "Did the Cincinnati Insurance Company act in bad faith?" Jury Interrog. No. 1. The jury answered "Yes" to this question, but was not asked to give the basis for its decision. Thus, Leab's claim that the jury has already spoken on the "release issue" must be rejected.

Leab also asserts that this court need not reconsider the release issue since it previously denied CIC's motion for summary judgment as well as CIC's motion for judgment as a matter of law made at the close of Leab's case in chief and renewed before the case was submitted to the jury. This argument is unpersuasive and plaintiff cites no authority to support it.

Judge Gawthrop's decision denying CIC's summary judgment motion stated that it was a jury question as to whether CIC acted in bad faith by withholding undisputed benefits from an insured in order to elicit a release. Judge Gawthrop's decision did not have the benefit of the testimony presented at trial, in which it was made clear that there was a dispute over the amount CIC owed. Accepting Leab's sweeping argument that Judge Gawthrop's decision forecloses this court's consideration of this issue at the post-trial stage would mean that judgment as a matter of law could never be granted to a party whose motion for summary judgment was denied, assuming that the two motions relied on similar grounds. In effect, Leab is arguing that since defendant's motion for summary judgment was denied, the issues of fact are necessarily decided in her favor. This is not the law.

This court's denial of CIC's motion for judgment as a matter of law made at the close of Leab's case in chief and before the case was submitted to the jury also does not foreclose the court's consideration of this issue at the post-trial stage. When the court denied CIC's motion at the close of Leab's case, it did not have the benefit of CIC's testimony concerning the reasonable and customary use of releases. Furthermore, "[i]f, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." Fed. R. Civ. P. 50(b) (emphasis added). Thus, the Federal Rules of Civil

Procedure have specifically spoken on the issue that the court faces in the instant action, i.e., a court's denial of a motion for judgment as a matter of law made at the close of all the evidence does not foreclose it from considering the issue at the post-trial stage. Consequently, it is this court's duty to see if the evidence is sufficient to support the jury's bad faith finding.

The key issue to be determined is whether there was a dispute between the parties as to the amount owed to Leab under the UIM claim. Leab claims that at a minimum, she was owed $35,000 and she should have been paid this amount without having to sign a release.[8] CIC argues that it was reasonable and customary to

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[8] Leab relies on Klinger v. State Farm Mutual Auto. Ins. Co., 895 F. Supp. 709 (M.D. Pa. 1995) and Orangeburg Sausage Co. v. Cincinnati Ins. Co., 450 S.E.2d 66 (Ct. App. S.C. 1995) to support her claim that failure to pay an undisputed amount of a claim (in her case, $35,000) constitutes bad faith. However, neither Klinger nor Orangeburg can be read to support such a per se rule and are factually distinguishable from the present action. Klinger held, in ruling on cross-motions for summary judgment, that it was for a jury to decide if an insurance company's failure to make an offer of settlement prior to arbitration was bad faith. Klinger, 895 F. Supp. at 715. In the instant action, CIC's offer of settlement (payment of $35,000 in exchange for a release) was on the table long before arbitration was even proposed. In Orangeburg, the court upheld the punitive damages award based on numerous actions by the defendant, including the fact that the defendant delayed, without explanation, in paying an undisputed amount even though the defendant had set aside reserves for nearly seven times as much. Orangeburg, 450 S.E.2d at 70, 72. By contrast, CIC always claimed the limit on the UIM policy was $35,000, did not set aside reserves in excess of $35,000, and made its position quite clear to Leab--a release must be signed in order for payment to be made. Furthermore, this case does not have elements of fraud and deceit as in the above cases.

On appeal of Klinger v. State Farm Mutual Auto. Ins. Co., No. 96-1702, 1997 WL 307778 (3d Cir. June 10, 1997), the court (continued...)

require a release given the fact that Leab had made a formal demand for $1,000,000 under the UIM policy, a demand made in August 1993 and which had never been formally withdrawn until February 1996.[9] See Pl. Exh. 15, 46; Def. Exh. 1(D). CIC has consistently taken the position that the UIM limit was $35,000. Thus, there was a dispute over the amount owed under the policy and CIC had the right to try to resolve the dispute. Such action is not bad faith delay. If so, all cases could be charged with mutual bad faith.

When there is a dispute as to the money owed, it is reasonable, customary, and prudent for an insurer of anyone to get a release as part of the settlement of the disputed claim.[10] See

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[8](...continued)
listed the various delays which it felt justified the punitive damage award. CIC's conduct in the instant action is far less blameworthy than State Farm's conduct in Klinger. Unlike State Farm's attorney, CIC's defense counsel promptly advised CIC of Ms. Leab's demands for payment of the UIM claim. As discussed previously, CIC, unlike State Farm, made a reasonable settlement offer (payment of $35,000 in exchange for a release). Moreover, CIC's decision to seek arbitration reflected its intention to resolve the disputed claim once and for all rather than let the claim drag on indefinitely. Thus, a punitive damages award against CIC of the magnitude upheld in Klinger would be unjustified.

[9] Even after taking the depositions that were intended to resolve the question of whether CIC owed $35,000 or $1,000,000, it still was not clear to Leab's counsel that the limit on the policy was $35,000. See Trial Tr. 10/24/96 at 112, 121-122, 124.

[10] Leab claims that "evidence of custom and practice may not prevail over the unambiguous language of a contract." Pl.'s Post-Trial Motion at 23, citing Weston Services, Inc. v. Halliburton NUS Envtl. Corp., 839 F. Supp. 1144, 1148 (E.D. Pa. 1993). As such, Leab argues, CIC could not in good faith require a release because it was not specifically provided for in the insurance policy. Leab's argument misses the point. Whether or not CIC could ask for a release is not contingent upon the
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Trial Tr. 10/24/96 at 146-149 (testimony of CIC's expert, Jeffrey Rettig, Esquire). Moreover, even Attorney Roda's testimony[11] supports CIC's position of seeking a release when settling a disputed claim:

> Q: In those cases that have been resolved before there is arbitration, have they been resolved with the execution of releases?
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> A [Roda]: In many cases, yes; in some cases, no.
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> Q: What are those cases that you can recall where they haven't been resolved with releases?
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> A: Payment of limits, I have said to the counsel for the insurance company that while I know their knee jerk reaction is to say, pay limits, give a release for anything, that the release is unnecessary where the company is paying the undisputed portion of what it owes because what would be released? Nobody claims there is anything higher.
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> Q: And that's right, there is no question in those cases, there was no issue about the limits?
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> A: That's right.

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[10](...continued)
language of the insurance policy. Rather, the request for a release was made in order to settle a disputed claim. As CIC's expert, Jeffrey Rettig, Esquire, testified, it is reasonable and customary for a release to be used in this situation.

[11] The presence of Attorney Roda as a witness was the result of pre-trial discussions at which both attorneys advised that they had several trial matters to discuss. Attorney Roda requested that no mention be made of Mrs. Leab's new marital status. Attorney Shipman agreed. Attorney Shipman stated that he intended to call Attorney Roda as a witness. Attorney Roda objected because it would be inconvenient and expensive to bring another attorney into the case. The Court asked both attorneys if it would satisfy the law if the Court would explain to the jury the different posture of Attorney Roda, the witness, and Mr. Roda, the attorney. The attorneys were satisfied with that explanation. When Attorney Roda was called as a witness, the jury was advised of the agreement and the explanation. Mrs. Leab's marital status was never mentioned, as agreed.

Trial Tr. 10/24/96 at 101-102 (emphasis added). Attorney Roda's testimony denying the use of releases in settling claims is simply not credible. As discussed above, in the instant action, there was a dispute over whether the UIM limits were $35,000 or $1,000,000. It was an issue which both parties had to pursue and settle.

Leab also claims that CIC should have paid the $35,000 without requiring a release because the payment would not have prejudiced CIC had Leab later made a claim for $1,000,000. Nor would a release prejudice the plaintiff since she never, at any time, had a legitimate claim over the $35,000 that was offered. To the contrary, CIC certainly would have been prejudiced because it would have had an unresolved coverage claim on its books that it might someday have to defend against.[12] Signing a release was the only means by which to put an end to the UIM coverage dispute. Without such a release, the dispute could have dragged on even longer, with no finality in sight for either party. Leab was not coerced into signing the release. She was represented by able counsel; and, had she felt she was entitled to $1,000,000 under the policy, she could have refused to release her UIM claim and pursued arbitration, as was required by the insurance policy in cases where there is a dispute over the amount owed.

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[12] The bad faith statute does not require an insurer to disregard its own interests when processing an insurance claim. See generally, Jung v. Nationwide Mutual Fire Ins. Co., 949 F. Supp. 353 (E.D. Pa. 1997) (summary judgment granted in favor of insurer in bad faith action when insurer had reasonable basis to deny insured's claim).

As discussed above, to succeed on a bad faith claim Leab needed to prove by clear and convincing evidence[13] that CIC did not have a reasonable basis for insisting on a release before paying out money, and that CIC knew or recklessly disregarded its lack of a reasonable basis. Given this high burden for Leab to meet, the fact that there was a dispute over the amount owed, and given the testimony concerning the reasonableness of using a release when settling a disputed claim, CIC did not act in bad faith by requiring a release. Furthermore, Leab's insistence on not signing a release unduly prolonged the settlement which plaintiff eventually signed.[14]

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[13] Clear and convincing evidence has been defined as follows:

> "[The witnesses'] testimony [must be] so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue . . . ."

In re Estate of Fickert, 337 A.2d 592, 594 (1975) (quoting La Rocca Trust, 192 A.2d 409, 413 (1963).

[14] Attorney Bright was retained on or about March 19, 1993. In July, 1994, CIC attempted to settle but was advised the plaintiff needed more time. Finally, not having heard of settlement from the plaintiff, CIC, on or about August or September, 1994, offered to settle the claim for $35,000 upon the signing of the release. This offer was rejected because the plaintiff wished to conduct additional discovery and did not wish to sign a release. CIC did not act in bad faith in requesting a release. Finally, after court action by the defendant seeking arbitration, plaintiff did sign the release and received the $35,000 which was the limits under the policy. Whatever delay that was caused by plaintiff needing to satisfy herself that the release was required and that a court proceeding was necessary to accomplish that fact should not be attributable to CIC since its position on settlement had remained the same.

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2. Seeking Arbitration

Leab contends that CIC's decision to seek arbitration rather than pay the $35,000 that was owed to her was additional evidence of bad faith. CIC claims that under the policy, it had a right to pursue arbitration to resolve the limits of the UIM claim. The arbitration provision in the insurance policy provided, inter alia, that if CIC and the insured "do not agree as to the amount of

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[14](...continued)

Included in plaintiff's argument about the release was the fact that it included releasing any claim on the demand for $1,000,000. By this time, plaintiff had exhausted every avenue of discovery that could be found and found no evidence that a $1,000,000 coverage was included in the policy and she made no claim on that amount.

Therefore, because the release was signed and proper, because no claim could be made for $1,000,000 coverage and, furthermore, because plaintiff presented no legitimate claim on the $1,000,000 coverage because she had none, the plaintiff had incurred extensive discovery, disputes and delays with no results. She received what had been promised to her and defendant litigating those issues was pursuing a proper issue which it won; it was not acting improperly, maliciously or with fraud and without conscience.

The next question in parsing this litigation is whether the defendant, in pursuing what it had a right to do, prolonged the dispute enough to be charged with acts of bad faith. Was CIC negligent? Was there fraud? Was there bad faith? CIC admits it was negligent. The negligence that is admitted refers to its poor response to some very simple requests regarding the terms of the policy which covered this situation. It is true that the home office had to contact an insurance agent and the agent had to contact the insurance agency that issued the policy and that the insured had several corporate names and the names represented the same business. Nevertheless, even conceding with the utmost generosity that the handlers of this claim may have botched up its administration more than was necessary for an uncomplicated claim, we must conclude that good faith support was not given to a legitimate claim. See infra.

damages, either party may make a written demand for arbitration." Pl. Exh. 23.

As discussed in the previous section, Leab made a written demand for $1,000,000 while CIC took the position that only $35,000 was owed. To be sure, Leab certainly had a right to pursue the claim for $1,000,000, if she had such a claim, but her course to prove a claim completely failed. Her decision to sign the release proved she did not have a basis for a $1,000,000 claim. On the other hand, it was reasonable for CIC to take the position that it only owed $35,000 since the initial election of lower limits form that had been produced was dated September 13, 1991, which was a year and a half before Mr. Leab's death. Since the positions taken by both parties were reasonable, and given that the parties' negotiations as well as Leab's York County lawsuit attempting to resolve the question of UIM limits had not settled the issue, either party had a right to pursue arbitration to resolve the disputed claim.

In addition, on February 21, 1996, York County Judge John Uhler held a hearing on CIC's petition requesting Leab to appoint an arbitrator pursuant to the requirements of the insurance policy. At that hearing, Judge Uhler ruled in favor of CIC. Judge Uhler's ruling provides further support for the court's conclusion that CIC's decision to seek arbitration was not made in bad faith. See Leo v. State Farm Mutual Auto. Ins. Co., 939 F. Supp. 1186, 1191 (E.D. Pa. 1996) (no bad faith if defendant makes reasonable request of plaintiff that was proper under terms of insurance policy);

Kauffman v. Aetna Casualty & Surety Co., 794 F. Supp. 137, 141 (E.D. Pa. 1992) (since arbitrators awarded plaintiffs less than plaintiffs asked for, no reasonable factfinder could conclude that defendant acted in bad faith in seeking arbitration). Consequently, the court finds that the evidence was legally insufficient for a jury to find, by clear and convincing evidence, that CIC acted in bad faith in seeking arbitration to determine the limits of the UIM claim. Having concluded that Leab was unable to prove her claim for $1,000,000 and that the release issue was won by the defendant, we now face the damages which Leab did suffer during the exercises in reaching the above results.

3. Delay in Turning Over Requested Documents

The most troubling aspects of CIC's conduct in this case are its repeated delays in turning over documents that were requested by Leab, and that CIC was only able to provide feeble explanations for why three different election of lower-limit forms were produced -- two with different dates, and one that was completely blank.

CIC's failure to respond to Leab's correspondence began with Attorney Bright's letter to Mr. Herb dated May 19, 1993, in which Attorney Bright requested a copy of the signed election form in which ECD agreed to take lower UIM limits. No response was forthcoming from CIC, despite repeated requests from Attorney Bright, until August 31, 1993, more than three months later.

Moreover, CIC did not send this election form to Leab until after Attorney Bright made a formal demand for $1,000,000

While Attorney Bright requested a certified copy of the insurance policy on September 20, 1993, it took CIC until March 4, 1994 to produce a copy. Mr. Skidmore, defendant's regional casualty claims supervisor who was responsible for obtaining the certified copy, attributed the delay due to the file being out for a "variety of reasons." Trial Tr. 10/22/96 at 120. Mr. Skidmore tried to locate the file during this time period, id. at 121, and claimed he was "trying to get it." Id. at 122. That Mr. Skidmore was supposedly unable to obtain a simple certified copy of an insurance policy for over five months despite the fact that he was "trying to get it" defies logic and common sense. The jury's verdict suggests that it did not accept Mr. Skidmore's explanation and the court finds no reason to rule to the contrary. See Polselli v. Nationwide Mutual Fire Ins. Co., 23 F.3d 747, 752 (3d Cir. 1994) (delay in responding to communications is one factor to consider to determine if defendant acted in bad faith).

Furthermore, as discussed in Section II, supra, the signature line of the election of lower limits form on the certified copy of the insurance policy was blank. The blank form undoubtedly raised a question in Leab's mind as to the actual limits of the policy for the UIM claim. As a result, plaintiff filed a Writ of Summons in York County against CIC seeking discovery on whether a proper election of lower limits had been executed. The York County proceeding was the source of further

delay in the settlement of the UIM claim because of the difficulty the parties had in scheduling depositions.[15] Prior to the completion of the depositions, a third election of lower limits form, this one dated January 1991, was found and produced to Leab. Again, CIC was not able to offer a solid explanation as to why it took over two years after Mr. Leab's death to uncover this form. Notwithstanding the delay, the fact remains, and it was never proven otherwise, that the defendant's standing offer to pay $35,000 in exchange for a release had been rejected by Leab until the result of CIC's York County action persuaded her to sign the release as originally offered.

CIC's tardiness in responding to Leab's requests contributed in part to the lengthy period of time between the date of the first demand and the final payment of the $35,000. While CIC admits that there "was a delay in producing certain requested documents and there were copying errors in some of the documents produced" it characterizes this conduct as negligent, which is legally insufficient to support a bad faith finding. Def. Br. in Supp. of Post-Trial Mots. at 17. Taken together, however, these instances of delay on CIC's part and its inability to explain why three different election forms were produced provide sufficient evidence for a jury to conclude that CIC's conduct constituted bad faith rather than negligent behavior. As such, CIC's Motion for Judgment as a Matter of Law is denied.

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[15] The delay in scheduling the depositions, however, cannot be attributed to any bad faith on CIC's part.

B. UNAVAILABILITY OF DEFENSE WITNESS

CIC argues that a new trial is required because a key witness in this case, Stephen Herb, was unavailable to testify at trial because of documented illness. Therefore, CIC claims, its ability to present a defense was severely prejudiced.

During the pre-trial conference, CIC's counsel, F. Lee Shipman, Esquire, requested a continuance of the trial because Mr. Herb, CIC's field claims representative who was responsible for investigating Leab's insurance claim, would be medically unable to testify at trial.[16] In support of its request for a continuance, CIC argued that Mr. Herb was CIC's representative most familiar with the investigation of Leab's claim. Furthermore, although Mr. Herb had been deposed twice, these depositions were for plaintiff's discovery purposes only, and therefore, CIC did not question Mr. Herb about the events at issue in this case. In opposition to a continuance, Attorney Roda claimed that Mr. Herb was just a low level claims adjuster who did not make any of the decisions that formed the basis of the bad faith claim. Mr. Herb's actions, Attorney Roda argued, were not in dispute and could be

[16] Just a few days before the pre-trial conference, Attorney Shipman became aware that Mr. Herb was on a medical leave of absence and not participating in cases for CIC. Subsequently, Attorneys Shipman and Roda spoke by telephone to Mr. Herb's doctor, Dr. Theresa Burick, to see if Mr. Herb would be able to testify or sit for a pretrial deposition. Dr. Burick told counsel for both parties that Mr. Herb had severe hypertension and was suffering from depression. Apparently, Dr. Burick found that Mr. Herb was unable to testify. CIC asked for a continuance of the trial until Mr. Herb was available to testify, but the court denied this request.

reconstructed based on the documents to be introduced at trial. Prior to trial, this court denied CIC's motion for a continuance relying on Attorney Roda's explanation.

The evidence presented at trial, however, has convinced this court that CIC suffered severe prejudice by not being able to rely on Mr. Herb's testimony in refuting Leab's allegations. Mr. Herb was the person who initially corresponded with Attorney Bright in attempting to process Leab's claim and who requested CIC's home office to send information to Leab's counsel. For instance, Attorney Bright wrote letters to Mr. Herb on May 19, June 9, and July 15, 1993 seeking copies of the signed election form in which Edward Leab's employer agreed to take the lower insurance limits of $35,000 for UIM coverage. These letters were not answered in a timely fashion. To take another example, Attorney Bright wrote to Mr. Herb on September 20, 1993, requesting a certified copy of the insurance policy. Mr. Herb, along with Mr. Skidmore, was intimately involved in the processing of Leab's request for a certified copy of the policy. While Leab claims that Mr. Skidmore was the person who undertook to obtain the certified copy, Mr. Skidmore relied on Mr. Herb to help him meet Leab's request. See, e.g., Trial Tr. 10/22/96 at 117-20 (Mr. Skidmore asks Mr. Herb to consult with legal counsel to determine if certified copy of insurance policy could be sent to Leab). The certified copy was not sent to Leab's representative until March 1994.

These delays by CIC in sending the employer's signed election form and the certified copy of the insurance policy

undoubtedly influenced the jury's finding of bad faith and its punitive damages award. At trial, CIC did not have the benefit of Mr. Herb's explanation as to why there was a delay in these instances of alleged bad faith conduct. See id. at 118 (Mr. Herb was responsible for responding to Attorney Bright and informing him of reason for delay in sending certified copy of policy) and 87-88 (Mr. Skidmore asked about letters from Attorney Bright to Mr. Herb seeking signed election forms). Furthermore, Leab's bad faith allegations also encompassed the fact that CIC produced three different election of lower limits forms in this case. Mr. Herb would have been one of the people to explain how this could have occurred. Consequently, CIC did not have the opportunity to provide a full defense to Leab's allegations. As such, the court's denial of a continuance was inconsistent with substantial justice.[17]

Although Attorney Roda asserts that all of Mr. Herb's relevant actions were documented in exhibits that were introduced

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[17] Federal Rule of Civil Procedure 61 provides, in pertinent part (emphasis added):

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice.

Allowing the verdict to stand without giving CIC the benefit of Mr. Herb's testimony would be inconsistent with substantial justice. See also Morgan v. Bucks Associates, 428 F. Supp. 546, 548 (E.D. Pa. 1977) ("The jury's verdict may be vitiated only if manifest injustice will result if it were allowed to stand.").

at trial, Mr. Herb was the person in the best position to tell the jury why he took particular actions (or inactions) at different times. Furthermore, Mr. Herb's absence at trial prevented CIC from presenting Herb's recollection of any verbal communications that took place between him and agents for Leab and of any actions Mr. Herb took that might not have been documented in the case file.[18] See Trial Tr. 10/22/96 at 100 (letter reflects oral discussions between Mr. Herb and Attorney Bright concerning production of signed election form). In short, the jury heard all of the evidence concerning the mistakes and delays on CIC's part in processing Leab's claim without having the benefit of a full explanation by Mr. Herb of the reasons for these problems.[19]

"A trial judge has discretion to order a new trial when he is convinced that the judicial process has resulted in the working of an injustice upon any of the parties." Tann v. Service Distributors, Inc., 56 F.R.D. 593, 599 (E.D. Pa. 1972). See also Spence v. Bd. of Educ. of Christina Sch. Dist., 806 F.2d 1198, 1205 n.4 (3d Cir. 1986) (Higginbotham, J., concurring), quoting

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[18] Mr. Skidmore testified that in his experience, "there are many times conversations and different things that go on that aren't always documented in the file." Trial Tr. 10/22/96 at 121.

[19] In other words, a new trial is necessary because the trial that was held "may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts . . . . Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial." Lind v. Schenley Industries Inc., 278 F.2d 79, 90 (3d Cir. 1960).

Schreffler v. Bd. of Educ. of Delmar Sch. Dist., 506 F. Supp. 1300, 1306 (D. Del. 1981) ("[A] motion for a new trial may be granted even though there may be substantial evidence to support the verdict if the Court determines that this action is necessary to prevent a miscarriage of justice."). In the instant action, Mr. Herb's testimony would have comprised an essential element of CIC's defense. As the trial progressed, it became increasingly apparent that Mr. Herb's presence at trial was necessary to provide a full explanation of CIC's response to Leab's claim since CIC, as a corporation, could not speak for itself. Counsel for CIC timely requested a continuance after learning of Mr. Herb's medical condition, and there has been no allegation that the request for a continuance was made in bad faith. In addition, Leab did not make any assertion that a continuance would have been unduly prejudicial to her. Given these circumstances, the court grants a new trial based upon the unavailability of Mr. Herb. See Gaspar v. Kassm, 493 F.2d 964, 969 (3d Cir. 1974) (abuse of discretion for trial court to deny motion for continuance despite defendant's absence due to illness where defendant's testimony was necessary for defense of case, granting of continuance would not have unduly prejudiced other parties, and request for continuance was not motivated by procrastination, bad planning or bad faith by defense counsel).

C. PUNITIVE DAMAGES

1. Sufficiency of Evidence

CIC argues that the evidence presented at trial was legally insufficient to support an award of punitive damages. In the alternative, CIC contends it is entitled to a new trial since the award was against the weight of the evidence. "Since the standard for granting a new trial is 'lower' than that for entering judgment as a matter of law, it is clear that if a new trial is not warranted, the entry of judgment as a matter of law would be improper. For this reason, the court will analyze the [defendant's] arguments under the new trial standard." Markovich v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, 1235 (E.D. Pa. 1992), aff'd, 977 F.2d 568 (3d Cir. 1992).

The purpose of punitive damages is to punish a defendant for outrageous conduct and to deter it from such conduct in the future. Tunis Bros. Co. Inc. v. Ford Motor Co., 952 F.2d 715, 740 (3d Cir. 1992). Pennsylvania has adopted section 908(2) of the Second Restatement of Torts, which details when punitive damages may be awarded:

> Punitive damages may only be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Id., citing Restatement (Second) of Torts, § 908(2).

As discussed previously in this opinion, CIC did not act in bad faith by requiring a release from Leab as part of the UIM

settlement and seeking arbitration when the parties were not able to resolve the dispute over the UIM limits. As such, there is no basis for an award of punitive damages on these grounds.

On the other hand, during the processing of the plaintiff's UIM claim regarding the $1,000,000 policy and the issue of the release, which issues were resolved against the plaintiff, there were delays that plaintiff says were made in bad faith and that the defendant acknowledges were negligent but not prejudicial to the plaintiff and did not cause her any damages. CIC's delays in responding to Leab's correspondence and its production of three different election forms, without adequate explanation, constitute the type of conduct that an award of punitive damages is designed to punish and deter. Consequently, the court rejects CIC's contention that the jury's decision awarding punitive damages was against the weight of the evidence.

2. Constitutionality of Punitive Damages Award

Alternatively, CIC contends a new trial is required because the magnitude of the jury's punitive damages verdict, $5.5 million, is grossly excessive and therefore unconstitutional. Leab counters that there was more than enough evidence of CIC's reprehensible conduct to find that the verdict was not grossly excessive.

While punitive damages may be imposed to punish wrongful conduct and deter its repetition, the amount awarded cannot be so grossly excessive so as to violate due process. BMW of North

America, Inc. v. Gore, 116 S. Ct. 1589, 1595 (1996). The Supreme Court held that an award of punitive damages enters into the zone of arbitrariness that violates the due process clause only when that award can be fairly categorized as grossly excessive in relation to the interests charged.

The Supreme Court then set out the following three guideposts by which a reviewing court could determine whether the damage award is constitutionally excessive:

> 1. The degree of reprehensibility of defendant's conduct;
>
> 2. The ratio between the plaintiff's award of compensatory damages (representing the actual or potential harm suffered by plaintiff) and the amount of punitive damages; and,
>
> 3. The difference between the punitive damages and the award of civil or criminal sanctions that could be imposed for comparable misconduct. Id. at 1598-99.

a. Degree of Reprehensibility

In assessing CIC's conduct, the delays caused by defendant's conduct were all part of the procedure which eventually resulted in a solution in favor of the defendant, but which prolonged the litigation for both sides. Added to this is the conduct of the plaintiff in pursuing both the release claims and the amount of coverage in the policy. Both issues were resolved in favor of the defendant. They were not the result of a compromise

settlement. Both parties had a right to pursue the disputed claims in which the plaintiff did not succeed and in which the defendant was successful and not reprehensible.

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." Id. at 1599. In other words, "punitive damages may not be 'grossly out of proportion to the severity of the offense.'" Id., quoting TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 453, 482 (1993). When assessing the reprehensibility of a defendant's conduct, aggravating factors include whether the defendant engaged in violence or the threat of violence, trickery and deceit, malice, affirmative misconduct, or repeatedly engaged in prohibited conduct while knowing or suspecting it was unlawful. BMW, 116 S. Ct. at 1599-1600.

In the instant action, there was no evidence that agents of CIC acted violently or threatened violence, were deceitful, or engaged in affirmative misconduct. Any harm inflicted on Leab in this case was purely economic in nature. The BMW Court did note that "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." Id. at 1599 (internal citations omitted). Attorney Roda argues that it was obvious Leab was financially vulnerable, given that she was a young widow with two small children, but there was no evidence to support this allegation. While it is likely that

the jury's punitive damages award was influenced in great part by the picture of a young widow fighting a large insurance company, the court's duty is to ensure that the parties receive a fair disposition of their case based on the evidence presented. In this case, there was no evidence presented that Leab was financially vulnerable. The only "evidence" that was presented was plaintiff's counsel's argument regarding Leab. There was no indication or testimony of her financial condition. Plaintiff's counsel, addressing a jury of seven women and one man, presented the argument of the widow versus the careless insurance company.[20] Even with cautionary instruction, it is not difficult to understand the inclination to favor a woman who lost her husband versus a rich insurance company. She was represented by counsel within two weeks of the accident and has been duly represented throughout these proceedings.

Leab also attempts to portray CIC as a recidivist, since it already has endured a significant punitive damages verdict in a claim where the insured alleged breach of contract, negligence, and bad faith failure to pay insurance benefits. See Orangeburg Sausage Co. v. Cincinnati Ins. Co., 450 S.E.2d 66, 68 (Ct. App. S.C. 1994) (upholding $1,630,000 punitive damages verdict against Cincinnati Insurance Company). Upon a close examination of Orangeburg, the court finds that there are significant differences

[20] Furthermore, the $35,000 figure, although disputed, remained consistent and was the amount offered initially. After many delays, the plaintiff finally accepted this amount.

between Orangeburg and the instant action which constrain this court from concluding that CIC engaged in repeated instances of misconduct which it knew to be unlawful. Among other differences, in Orangeburg, there were claims of fraud, malice, dishonesty and substantial bad faith.

By contrast, in the instant action, CIC has consistently taken the position, both internally and in its discussions with Leab, that only $35,000 was owed under the UIM policy. Since CIC took a consistent position throughout this case, CIC cannot be found to have made false representations to its insured, as was the case in Orangeburg.[21]

CIC's delays in responding to Leab's legitimate requests for information have been extensively detailed in this opinion. These actions, while worthy of sanction, are not sufficiently reprehensible to warrant imposition of a $5.5 million punitive damages award.

b. Ratio Between Plaintiff's Compensatory Damages and the Amount of Punitive Damages

"The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." BMW, 116 S. Ct. at

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[21] While Leab asserts that both cases involve the defendant's attempt to leverage the settlement of a disputed claim by withholding an undisputed amount, this court has already discussed why it was not bad faith for CIC to request a release in exchange for payment and the reasonableness of pursuing arbitration once CIC and Leab could not resolve their dispute.

1601 (citations omitted). The Supreme Court has rejected using a simple mathematical approach to determine whether a particular punitive damages award is excessive. See Pacific Mut. Life Ins. v. Haslip, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern[] of reasonableness . . . properly enter[s] into the constitutional calculus.").

In BMW, the ratio between the punitive and actual damages was 500 to 1. BMW, 116 S. Ct. at 1602. The BMW Court called this ratio "breathtaking," especially when considering the fact that there was no suggestion the plaintiff or others were threatened with any additional harm due to defendant's conduct. Id. at 1602-03. BMW also discussed two other Supreme Court cases that addressed the issue of the potential excessiveness of a punitive damages award. In Haslip, supra, the Court "concluded that even though a punitive damages award of 'more than 4 times the amount of compensatory damages,' might be 'close to the line,' it did not 'cross the line into the area of constitutional impropriety.'" BMW, 116 S. Ct. at 1602, quoting Haslip, 499 U.S. at 23-24. In TXO, supra, the Court upheld a ratio of 526 to 1 ($10 million punitive damages to $19,000 in actual damages). In upholding the award, the TXO Court relied on the fact that had the defendant's tortious plan succeeded, the compensatory award would have been

much higher so that the ratio would have been not more than 10 to 1. BMW, 116 S. Ct. at 1602.

The parties have submitted various mathematical formulas for determining the proper ratio which are unusual. Plaintiff contends by releasing the $1,000,000 claim when Leab signed the release, that amount should be included in determining the harm inflicted on Leab resulting in a ratio of 5.5 to 1 ($5.5 million to $1 million). The defendant takes the position that since no compensatory damages were either sought or awarded in this case, the ratio, no matter how calculated, is far in excess of the constitutional limit. Attorney Roda further asserts that interest is due on the delayed payment of $35,000. There was no evidence on this issue. In addition, the delay was caused by the plaintiff.

Attorney Roda also claims attorney's fees and costs should be considered compensatory damages. Compensatory damages of the type described are equitable remedies. Fahy v. Nationwide Mutual Fire Ins. Co., 885 F. Supp. 678, 681 (M.D. Pa. 1995).

There was no evidence that Leab sustained any financial injury due to the delayed payment or that CIC's conduct would cause her any harm in the future.[22] In addition, Leab voluntarily signed

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[22] BMW did note that a low compensatory damages award "may properly support a higher ratio than high compensatory damages awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." BMW, 116 S. Ct. at 1602. Here, as discussed previously, CIC did not act in bad faith by seeking a release or pursuing arbitration. CIC's delay in responding to Leab's legitimate requests for information, while troubling, does not amount to the type of egregious behavior that would allow this court to justify the (continued...)

the release for the UIM claim upon the advice of counsel. Leab was represented by counsel throughout these proceedings, and could have pursued this claim if she felt she had a legitimate entitlement to $1,000,000 under the policy.[23]

Thus, while the ratio between punitive and compensatory damages cannot be calculated with certainty in this case, it is clear that the ratio is far in excess of that seen in BMW, TXO, and Haslip, supra. While a simple mathematical formula cannot be used to determine whether a particular punitive damages award is constitutionally permissible, BMW, 116 S. Ct. at 1602, the ratio is nonetheless a helpful guidepost in determining whether the punitive damages award is grossly excessive. Here, the ratio suggests that the punitive damages award is grossly excessive and therefore is unconstitutional.

c. Sanctions for Comparable Misconduct

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[22](...continued)
affirmation of the punitive damages award given the exorbitant ratio in this case.

[23] Leab asserts that it would have cost her at least $1,000 to arbitrate her UIM dispute, thus making it prohibitively expensive to pursue this claim. The court cannot accept Leab's contention that she did not pursue the UIM claim due to the high cost of arbitration when, just one year earlier, she sought to depose four people--at a cost that was surely in excess of $1,000--in connection with a potential $1,000,000 UIM claim. See Def. Exh. 15. Furthermore, there is no evidence of the financial arrangements she made in pursuing her case. Attorney Roda has submitted a fee of over $136,227 as well as costs of $18,465 which clearly indicates a fee arrangement that would have allowed that case to be pursued if it had any merit.

"Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." Id. at 1603. In this case, there has been no contention that CIC's conduct would subject it to criminal penalties. In regards to potential civil penalties, Leab lists several bad faith cases from other states with large punitive damages awards as evidence that CIC had reasonable notice that the wrongfulness of its actions could lead to a significant punitive damages award. Leab relies on Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634 (10th Cir. 1996), pet. for cert. filed, 65 U.S.L.W. 3675 (Mar. 31, 1997) to support her use of other cases to help determine the sanctions for comparable misconduct. Continental Trend noted, however, that it was appropriate to use punitive damages awards from other cases as a means to show that the defendant had reasonable notice because the defendant's "misconduct involved a violation of common law tort duties that do not lend themselves to a comparison with statutory penalties." Id. at 641.

In the instant action, the bad faith claim was made pursuant to a statute promulgated by the Pennsylvania legislature, which has also passed other statutes providing civil penalties for comparable misconduct. Thus, this court should look first to the nature of these penalties as a guidepost to determine whether the punitive damages award in this case was grossly excessive.[24]

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[24] The punitive damages award in other bad faith cases can, (continued...)

The sanctions for comparable misconduct can be found in the Unfair Insurance Practices Act ("UIPA"), 40 Pa. Cons. Stat. §§ 1171.1 et seq., which prohibits unfair methods of competition and unfair or deceptive acts or practices by the insurance industry. Id. § 1171.4. "'Unfair methods of competition' and 'unfair or deceptive acts or practices' in the business of insurance means," inter alia, "[f]ailing to acknowledge and act promptly upon written or oral communications with respect to claims arising under insurance policies," "if committed or performed with such frequency as to indicate a business practice." Id. § 1171.5(a)(10)(ii). Each violation of this statute carries a penalty of not more than $5,000 if the person knew or reasonably should have known there was such a violation, Id. § 1171.11(1), and not more than $1,000 if the person did not know nor reasonably should have known of such a violation. Id. § 1171.11(2).

The punitive damages award in this case dwarfs the penalties available under the UIPA.[25] In fact, the difference between the punitive damages award and the statutory penalty ($5.5 million to $5,000 for a knowing violation) is similar to the differential that was declared unconstitutional in BMW ($2 million to a statutory penalty of $2,000). See BMW, 116 S. Ct. at 1603.

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[24](...continued)
however, be a useful guide in determining the amount of the remittitur. See Section IV.C.3., infra.

[25] It must be stressed that this court is not making a finding that CIC violated the UIPA. Reference to that statute in this opinion is made only as a basis to assess the penalties for comparable misconduct.

Therefore, the fact that the potential civil penalties are far lower than the amount awarded in this case suggests, but does not compel, the conclusion that the punitive damages award is grossly excessive.

When the three guideposts are considered collectively, the court finds that the punitive damages award is so grossly excessive so as to render the award unconstitutional. In making this determination, the court is persuaded by the exorbitant ratio between the punitive damages award and the harm inflicted on Leab, as well as the gross disparity between the amount awarded and the penalties for comparable misconduct. Consequently, the court must now determine the maximum constitutionally permissible punitive damages award justified by the facts of this case. See Continental Trend, 101 F.3d at 643.

3. Remittitur

> [W]here the verdict is so large as to shock the conscience of the court, the appropriate action for the court is to order plaintiff to remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur [is] refused, to submit to a new trial.

Dunn v. Hovic, 1 F.3d 1371, 1383 (3d Cir.) (en banc) (internal quotation marks and citations omitted), cert. denied, 510 U.S. 1031 (1993).[26] Thus, the court must determine the maximum amount that

[26] See also Atlas Food Systems v. Crane National Vendors, Inc., 99 F.3d 587, 595 (4th Cir. 1996) ("The court's review of the (continued...)

is supported by the evidence--an amount sufficient to meet punitive damages' dual goals of punishment and deterrence.

In deciding the amount of the remittitur, a court may consider the nature of defendant's conduct, the extent of harm to the plaintiff, the defendant's wealth, and the awards of punitive damages in similar cases. Dunn, 1 F.3d at 1391. In this case, the nature of CIC's wrongful conduct has already been discussed at length--not responding to repeated requests for the election of lower limits form and the unexplained delay in turning over a certified copy of the insurance policy. It must be noted, however, that Leab did not suffer any documented financial harm as a result of these delays. Attorney Roda argues that the $5.5 million award should be upheld because a large, wealthy insurance company like CIC requires a significant monetary sanction in order to punish and deter it from future reprehensible conduct.[27] At trial, it was established that CIC had a net worth of $1.2 billion in 1995, the latest year for which figures were available. Trial Tr. 10/23/96 at 95.

Contrary to Leab's assertions, the wealth of a defendant is not, by itself, sufficient justification for the imposition of a large punitive damages award. Pulla v. Amoco Oil Co., 72 F.3d

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[26](...continued)
amount of a punitive damage award should involve comparison of the court's independent judgment on the appropriate amount with the jury's award to determine whether the jury's award is so excessive as to work an injustice.").

[27] Leab quotes with approval the old adage, "You don't send a message to an elephant with a flyswatter."

648, 659 n.16 (8th Cir. 1995). To accept Leab's contention that a punitive damages award against a wealthy corporate defendant must be significant in order to have any effect would mean that any punitive damages award against a Fortune 500 company must necessarily be in the millions of dollars to affect the company's behavior. The law makes no such requirement. Rather, the defendant's wealth is just one factor to be considered in determining the reasonableness of the award. Tunis Bros., 952 F.2d at 740.

Leab also relies on Orangeburg, supra, as further evidence of the reasonableness of the $5.5 million award against CIC. The $1.6 million punitive damages award in Orangeburg was three tenths of one percent of Cincinnati's net worth at the time of that verdict while the $5.5 million awarded in the instant action is four tenths of one percent of CIC's net worth. As discussed earlier, the differing factual circumstances between Orangeburg and the instant action do not allow the court to treat the two cases identically. Furthermore, the fact that two different juries give similar awards on virtually identical evidence does not prevent the trial judge from assessing the reasonableness of the awards. See Atlas, supra. In Atlas, the issue on appeal was "whether the district court abused its discretion in ordering a new trial unless the plaintiff agreed to a remittitur of a $3-million punitive damage award [to $1 million] and, after the plaintiff's rejection of the remittitur and retrial, another new trial unless the plaintiff agreed to a remittitur of a

$4-million punitive damage award [to $1 million]." Id. at 591. The Fourth Circuit Court of Appeals ruled that the district court did not abuse its discretion by ordering successive new trials unless the plaintiff accepted a remittitur. Id. at 595. In so holding, the Court of Appeals noted the comparative advantage a trial judge has over a jury in determining the amount of punitive damages. See id. at 594 ("[T]he district courts not only see punitive damage awards daily, but themselves are required frequently to impose penalties for punishment and deterrence in a wide array of circumstances, both in civil and criminal contexts."). Thus, even assuming that Orangeburg and the instant action are against the same defendant on a charge of bad faith, the court retains its obligation to order a remittitur if the amount awarded exceeds that supported by the evidence.[28]

The punitive damages awards in other cases can serve as a useful guide in helping the court determine the amount of the remittitur. Unfortunately, the case law governing punitive damages awards under the Pennsylvania bad faith statute is limited because the statute was enacted relatively recently. Neither party cited any cases that discussed the amount of punitive damages awarded pursuant to Pennsylvania's bad faith statute. This court's

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[28] Courts in the Third Circuit have ordered significant remittiturs of punitive damages awards when the amount awarded exceeds that which was supported by the evidence. See Dunn, supra (trial court orders a remittitur of award from $25 million to $2 million, which is further reduced to $1 million on appeal); Friedman v. F.E. Myers Co., 710 F. Supp. 118 (E.D. Pa. 1989) (trial court orders remittitur of jury's $750,000 punitive damages award to $30,000).

independent research found only one case that will help assess the reasonableness of the punitive damages award against CIC. See Polselli v. Nationwide Mutual Fire Ins. Co., Civ. A. No. 91-1365, 1995 WL 430571 (E.D. Pa. July 20, 1995).

In Polselli, the court, following a bench trial, awarded $75,000 in punitive damages on the plaintiff's bad faith claim. The court found that the defendant (Nationwide) acted in bad faith by not advancing money to the insured, Polselli, after determining she was covered under the policy. Nationwide took this course of action even though it had a custom of advancing money owed to destitute insureds for claims and was aware of Polselli's dire financial need. Polselli, 1995 WL 430571, at *8. Other grounds for the punitive damages award included Nationwide's delays in participating in settlement negotiations and in responding to plaintiff's communications. Id. at *8-9.

Nationwide's conduct in Polselli was more reprehensible than CIC's because Nationwide was informed on numerous occasions that the plaintiff did not have a place to live and was forced to rely on the charity of others until Nationwide paid what it owed her. Id. at *8. By contrast, there was no evidence introduced at trial suggesting that Leab was financially destitute and needed CIC's payment of the UIM claim in order to survive nor was any requested for that reason. On the other hand, both Polselli and the instant action involve situations where there was an

unjustifiable delay in handling the insured's claim that rose to the level of bad faith.[29]

Finding no support in the case law for a multi-million dollar punitive damages award under the Pennsylvania bad faith statute, Leab cites numerous bad faith cases from around the country in which juries awarded significant punitive damages awards.[30] A close examination of these cases reveals, however, that the only unifying principle to be drawn is that a court plays a significant role in determining the reasonableness of the jury's award.

As an initial matter, it must be noted that several of the cases cited by Leab are unpublished, not included in her court submissions, and could not be located by the court. These cases

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[29] See also Schimizzi v. Illinois Farmers Ins. Co., 928 F. Supp. 760 (N.D. Ind. 1996) (court orders remittitur of punitive damages award from $600,000 to $135,000 for tortious breach of insurer's duty to deal in good faith). In Schimizzi, the court stated:

> The jury reasonably could find that . . . [defendant] handled [plaintiff's] medical bills initially in a cavalier fashion, eventually burying its questions about the bills and the check for a fraction of the bills pending another inquiry from [plaintiff], years after the bills' submission, and many years after the accident and the provision of the medical services. [Defendant] never articulated a principled, rational basis for not paying [plaintiff's] medical bills before this suit was filed.

Id. at 775.

[30] Although Leab made no attempt to show how the bad faith cases from other states were based on a similar standard to that used by courts interpreting Pennsylvania's bad faith statute, this similarity will be assumed for the purposes of this discussion.

include Key v. Prudential, CV 93-479 (Marshall Cty., Ala. Aug. 28, 1995); Fellows v. Allstate Ins. Co., No. C 259993 (L.A. Cty., Cal. Nov. 9, 1993); Santesson v. Beech Aircraft Corp., No. 312743 (San Mateo Cty., Cal. 1991); Clark v. State Farm Fire & Casualty Ins. Co., No. WEC 094395 (L.A. Cty. Cal. 1989); Warren v. Colonial Penn Franklin Ins. Co., No. SOC 78890 (L.A. Cty. Cal. 1987); Satalich v. State Farm Mutual Auto Ins., No. 31-76-01 (Cal. Super. Apr. 9, 1984); Bertolani v. Equitable Life Ins. Co., No. 304817 (Sacremento Cty., Cal. Mar. 29, 1984); Sprague v. Maccabees Mutual Life Ins. Co., No. C-218000 (L.A. Cty. Jan. 10, 1983); Whitmore v. 20th Century Ins. Co., No. C-306-467 (L.A. Cty. Aug. 18, 1981); Norman v. Colonial Penn Franklin Ins. Co., No. EAC 22385 (L.A. Cty. Cal. Mar. 11, 1981). See Pl.'s Opp'n to Def.'s Post-Trial Mots. at 35-36 & Exh. 4. The court will not rely on the above-cited cases because there is no way for the court to determine their subsequent disposition. The award may very well have been reduced significantly on appeal (as was true with numerous other cases cited by Leab-see infra), settled out of court for a far lesser sum, or became moot due to a variety of circumstances. See Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1071 (1997), quoting, United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) ("When a civil case becomes moot pending appellate adjudication, '[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.'").

As for the published decisions cited by Leab, the subsequent histories of these cases demonstrate the key role the court plays in ordering a remittitur of excessive punitive damages verdicts. In other words, Leab errs by relying on the jury's punitive damages award without taking into account how the award fared on appeal. See, e.g., Dempsey v. Auto Owners Ins. Co., 717 F.2d 556 (11th Cir. 1983) (reduction of jury's $3.1 million award to $1.5 million); Tan Jay Intl., Ltd. v. Canadian Indemnity Co., 243 Cal. Rptr. 907 (Ct. App. Cal. 1988) (appellate court affirms trial court's decision to order remittitur of award from $35 million to $500,000); Central Armature Works, Inc. v. American Motorists Ins. Co., 520 F. Supp. 283 (D. D.C. 1981) (trial court reduces jury's award from $2 million to $1 million); Republic Ins. Co. v. Hires, 810 P.2d 790 (Nev. 1991) (jury's $22.5 million punitive damages award reduced to $5 million on plaintiff's claims of breach of contract, misrepresentation, bad faith, negligence, and invasion of privacy).[31]

The $5 million award remaining after the remittitur in Hires, supra, was meant to punish a defendant's conduct that was far more reprehensible than that seen in the present action. In Hires, the evidence demonstrated that the defendant insurance company had a policy of summarily reducing claims paid to low and

[31] In another case cited by Leab, Blough v. State Farm Fire & Casualty Co., 250 Cal. Rptr. 735 (Ct. App. Cal. 1988), the appellate court reversed a judgment of nearly $10 million, including a punitive damages award of $5.6 million. This case, however, may not be cited pursuant to Cal. Rules of Court 976, 977, and 979.

middle income policyholders, who were less likely to dispute the insurance company's position. Hires, 810 P.2d at 792. Furthermore, the insurance company conducted a wide ranging investigation of the claim even after the police concluded that the insured had not participated in the burglary of his own house. Id. at 791-92. The investigation was so invasive that the plaintiff testified his neighbors' attitude toward him and his family changed as a result. Id. at 792. In the case at bar, there was no evidence that CIC had a policy of unilaterally reducing claims. In fact, plaintiff's claim of $35,000 was offered early in the case and was refused by plaintiff until court action convinced her to accept the release.

The other cases cited by Leab upholding multi-million dollar punitive damages awards all involved situations where the defendant acted far more reprehensibly than CIC. See Ainsworth v. Combined Ins. Co., 763 P.2d 673 (Nev. 1988) ($200,000 compensatory and $5.939 million in punitive damages in case where insurance company denied initial claim without any investigation, did not consider documentation supporting plaintiff's claim, and knew plaintiff urgently needed claim to be paid); Moore v. American United Life Ins. Co., 197 Cal. Rptr. 878 (Ct. App. Cal. 1984) ($30,000 compensatory and $2.5 million in punitive damages upheld since jury could reasonably conclude that insurance company's deceptive claims practices were particularly invidious because lay persons would be unlikely to uncover the deception, and company did not change claims review procedures even though it had actual

knowledge its procedures misstated California law); Betts v. Allstate Ins. Co., 201 Cal. Rptr. 528 (Ct. App. Cal. 1984) ($500,000 compensatory and $3 million in punitive damages upheld where evidence demonstrated insurance company deliberately concealed adverse reports not only from the other party, but also from its own insured, did not put adverse facts in writing, had a practice of invading an insured's privacy through a process known as "backdooring", and manipulated its own insured both during and after trial).

For its part, CIC's supplemental brief in support of its post-trial motions relies primarily on Continental Trend, supra, and Utah Foam Products Co. v. Upjohn Co., 930 F. Supp. 513 (D. Utah 1996). The court in Continental Trend ordered a remittitur of a $30 million punitive damages award to $6 million, which was six times the actual and potential damages plaintiff suffered. Continental Trend, 101 F.3d at 643. In Utah Foam, the trial court ordered a remittitur of the jury's $5.5 million verdict to $607,000, which reduced the punitive to compensatory damages ratio from 17 1/2 to 1 to a ratio of 2 to 1. Utah Foam, 930 F. Supp. at 532. While both Continental Trend and Utah Foam involve far different factual circumstances than the instant action, the cases still support the proposition that a punitive damages award can be subject to a remittitur if there is an excessive ratio between punitive and compensatory damages. As discussed in Section IV.C.2.b. supra, the ratio between the punitive damages awarded and

the actual or potential harm suffered by Leab is far in excess of that seen either in Continental Trend or Utah Foam.

After considering all of the factors discussed above, including the reprehensibility of CIC's conduct, the extent of harm to Leab, CIC's wealth, and awards made in similar cases, the court concludes that the jury's $5.5 million punitive damages award shocks the court's conscience and requires a new trial. In any event, the court feels that an award of $35,000 would be adequate. This amount is sufficient to punish CIC for its wrongful conduct and deter it from engaging in such activity in the future.

V. CONCLUSION

This case was tried by very able counsel from both sides who vigorously represented the interests of their clients. While the court is understandably hesitant to disturb a jury's verdict, the interests of justice require the grant of a new trial due to the absence of Stephen Herb and the grossly excessive award of punitive damages. An appropriate order follows.

BY THE COURT:

_____
TULLIO GENE LEOMPORRA
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TAMMY S. LEAB, Administratrix of the Estate of EDWARD L. LEAB, Plaintiff	:	CIVIL ACTION
	:	NO. 95-5690
v.	:	
THE CINCINNATI INSURANCE COMPANY, Defendant	:	

O R D E R

And now, this _____ day of June, 1997, upon consideration of Defendant's Motion for Judgment as a Matter of Law and Motion for a New Trial, and Plaintiff's Opposition thereto, it is HEREBY ORDERED as follows:

1. Defendant's Motion for Judgment as a Matter of Law is DENIED.
2. Defendant's Motion for a New Trial is GRANTED.
3. The Court orders the $5.5 million punitive damages award reduced to $35,000. If the Plaintiff does not accept the remittitur within twenty (20) days from the date of this order, a new trial is also granted on the excessive punitive damages award.

BY THE COURT:

_____
TULLIO GENE LEOMPORRA
United States Magistrate Judge