

# HIGHLIGHTS FROM







# Insurance Company Bad Faith Litigation in 2011



In the summer of 2010, an Appellate Court in New Jersey came out with a decision in the case of *Wood v. New Jersey Manufacturers (No.-L-0926-08)* that addressed the present state of bad faith litigation in New Jersey at this time. This article will address what is necessary to show in order to obtain damages in excess of a specific policy amount, and what occurs after a jury verdict is rendered in excess of that policy. These are two separate but equally important concepts, and unfortunately the law has not really changed in New Jersey as a result of this decision. Where is the law headed, and will the State Supreme Court render a different verdict if it hears this matter on appeal? These are important times for those practicing law and trying cases against companies who are willing to gamble with their policyholders' money.

The above case grows out of a prior lawsuit for personal injuries brought by Karen Wood against NJM's insured after a dog attack at a condominium complex. The condo complex was named as a defendant in the underlying case as well, for allowing the dog to

roam free after repeated warnings not to do so. Ms. Woods sustained significant injuries to her cervical spine as well as her lumbar spine, which necessitated surgeries to both areas. These injuries were contested by NJM and they claimed to have evidence that at least some of the injuries pre-existed the incident. These proofs were never forthcoming in the trial.

Ms. Wood was a letter carrier for the U.S. Postal Service who ended up having to pay almost \$80,000 in medical payments and over \$200,000 in disability income payments. Claims were made for loss of income - past and future - as well as for pain and suffering and for Ms. Woods' husband for a per quod claim.

At the time of the incident, NJM's insured maintained a \$500,000 coverage limit. Prior to the trial, NJM's defense attorney, claims adjuster and the "Major Claims Committee" evaluated the case. The Major Claims Committee came up with a value of \$300,000 and that is all that was ultimately ever offered to the plaintiff to resolve her claim. Plaintiff's counsel made an offer

to resolve the case for either the \$500,000 policy or just less than the policy amount prior to the jury being called to render a verdict. When the jury came back with a gross award of \$2.4 million (split approximately 50/50 between the NJM insured and the condo development), Woods accepted an assignment of rights of the insured to proceed against NJM for its potential bad faith in settling the matter within its policy limits.

The bad faith litigation and the underlying case (two separate cases) were heard by the trial court judge. The judge then granted summary judgment against NJM for the bad faith, ordering them to pay the excess amount owed by NJM's insured based upon its failure to appropriately evaluate the case, its failure to protect its insured and its failure to deviate from its one and only evaluation of the case in spite of indications from other sources (a claims adjuster, arbitrator and the attorney trying the case) that its evaluation may not be appropriate. NJM's position was that its evaluation was based on some evidence not brought out during the trial and was appropriate at the

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time it was made, making this not, in a sense, “bad faith.”

NJM asserted that there were a number of issues as to its decision not to offer more than they did. They claimed that there were general issues of material fact as to the reasonableness of its pre-verdict settlement posture, and that the trial judge misapplied the legal standards for bad faith liability under *Rova Farms* and associated case law. As such, they maintained, the trial judge’s decision should be overturned and a hearing regarding its decision making as to the settlement offer should be held - in front of a different judge than the original one. In short, the appellate court agreed with NJM’s position and sent the case back down to the lower court to hold a hearing as to its bad faith, by a different judge than the one who heard the initial case.

The court relied upon the quite famous case of *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474 (1974). The court first examined the case of *Radio Taxi Serv. Inc. v. Lincoln Mut. Ins. Co.*, 31 N.J.299 (1960), which explained the insurance company’s obligation as follows:

In the making of such a determination, the court emphasized that considerations of experience, expertise and judgment are particularly important and significant. Essentially, the *Radio Taxi* case declined to adopt a principle of strict liability that would make an insurer automatically responsible for an excess verdict if it had rejected a pre-verdict opportunity to settle within the policy limits. Fourteen years later in *Rova Farms*, the court reiterated those general principles of bad faith liability laid out in *Radio Taxi* and cast the insurer’s obligation as one of fiduciary duty, sounding in both tort and contract law, recognizing that the insurer had “contractually restricted the independent negotiating power of its insured” to deal directly with the injured claimant.

Essentially, that leaves us in much the same position in which we have been for the last 36 years - in order to prove the bad faith of an insurance company after their failure to settle a case with policy limits (which then results in a significantly higher verdict than their policy limits), it is necessary to

essentially try the “intent” of the insurance company’s failure to settle and to determine more than mistake but actual malice or utter failure to make the least inquiry into the actual settlement value. The insurer’s obligation is not a passive one, but as the court noted in *Rova Farms*, the insurer “has a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within the policy coverage.” Even so, the court specified that an insurer will not be held liable under these bad faith principles unless its exercise of judgment is found to be “actually dishonest, unreasonably optimistic or otherwise in bad faith, or infected with negligence such as to impede the reaching, or having the capacity to reach, a ‘good faith’ decision.”

This seems to me to be a high standard and not reachable except under the rare and most egregious cases. Perhaps this is the intent of the authors of the ruling opinions. Should this be the law? Would a standard leaning towards a strict liability force the insurance companies to more carefully appraise the cases and offer fair settlement value? I think this goes without saying, but might be a better question for a legislator than a court.

**“(The insurer’s) decision not to settle must be an honest one. It must result from a weighing of probabilities in a fair manner. To be a good faith decision, it must be an honest and intelligent one in the light of the company’s expertise in the field. Where reasonable and probable cause appears for rejecting a settlement offer and for defending the damage action, the good faith of the insurer will be vindicated.”**

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