STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

CLEMENT C. SUTTMANN and HOLLY C. SUTTMANN, husband and wife,

Plaintiffs,

v

File No. 97-4093-NZ
HON. PHILIP E. RODGERS, JR.

WOLVERINE MUTUAL INSURANCE COMPANY, a Michigan corporation, and MIKE LAKE, individually and as agent for WOLVERINE MUTUAL INSURANCE COMPANY and ADJUSTING SERVICES UNLIMITED, Inc., as agent for WOLVERINE MUTUAL INSURANCE COMPANY,

Defendants.
_____/

William M. Davison (P12570)
Attorney for Plaintiffs

Patricia A. Suttmann
Co-Counsel for Plaintiffs

Douglas J. Read (P19269)
Attorney for Defendants

DECISION AND ORDER

The Plaintiffs Suttmann own a residential structure in Leelanau County and seek damages from their homeowner's insurance carrier for the repair of substantial structural defects. The Defendant Wolverine Mutual Insurance Company ("Wolverine") is the homeowner's insurance carrier, and it hired Adjusting Services Unlimited, Inc., ("Adjusting Services") to process the Suttmanns' claims. The Defendant Mike Lake ("Lake") was the person associated with Adjusting Services who actually handled the Suttmanns' claims.

INTRODUCTION

This action is one of a series of lawsuits in which Plaintiffs have attempted to recover their damages from the prior homeowner, the builders, the builders' insurer, the Leelanau County Building Inspector and others.[1] Plaintiffs claim damages in excess of the $100,000 policy limits and, to date, have received only modest payments from the Defendant Wolverine and the former homeowners, Mr. and Mrs. Rollings.

The case now comes before the Court on the Defendants' Motion for Summary Disposition. MCR 2.116(C)(10). The Court has reviewed the parties' written submissions and entertained the oral arguments of counsel on February 23, 1998. At the conclusion of the hearing, the Court took the matter under advisement. It will now provide its legal conclusions on the undisputed facts. MCR 2.517.

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

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[1]*Suttmann, et al v Nedow, et al,* Leelanau County Circuit Court File No. 94-3465-NZ, on June 13, 1997 this Court issued its Decision and Order Granting Garnishee Defendant Hastings Mutual Insurance Company's Motion to Dismiss Garnishment. Claim of Appeal filed July 3, 1997, appeal pending.

Suttmann, et al v Derks, et al, Leelanau County Circuit Court File No. 95-3647-CZ , on August 23, 1995, This Court entered its Order Granting Defendants' Motion for Summary Disposition, affirmed by the Court of Appeals in February 1998, leave denied by Supreme Court.

Suttmann, et al v Rollings, et al, Leelanau County Circuit Court File No. 95-3693-NZ, this Court entered its Order of Removal (to 86th District Court) on June 13, 1996. On March 5, 1997, Court of Appeals denied leave to appeal; appeal lies with the Circuit Court.

American States Insurance Company v Nedow, et al, Leelanau County Circuit Court File No. 96-3800-CZ, case administratively closed due to bankruptcy stay on August 16, 1996.

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher* v *Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart* v *J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic* v *Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

UNDISPUTED FACTS

The undisputed facts established that Plaintiffs purchased their home in June of 1993 and immediately obtained a policy of homeowner's insurance with the Defendant Wolverine. Plaintiffs paid their insurance premiums to the Defendant Wolverine and have kept their homeowner's policy in force throughout their occupancy. The first claim on that policy was made early in January of 1994. Wolverine contracted with Defendant Adjusting Services to process the claim and Lake was assigned as the adjustor to complete this task. At all times, Defendants Adjusting Services and Lake acted as agents of the disclosed principal Wolverine.

There is no dispute as to the material facts. Plaintiffs Suttmann purchased their Leelanau County home from Mr. and Mrs. Rollings. The Rollings were first issued a building permit for the home in 1987 and it was constructed off and on over the next four years. The Rollings occupied the home as a summer residence and lived elsewhere during the winter months. Although a certificate of occupancy had been issued for the home, no rough frame inspection ever occurred and no winter occupancy had taken place prior to the winter of 1993-94.

During the first winter Plaintiffs occupied the home, they discovered water damage to interior walls. This claim was reported to their insurance agent, George Anderson, on January 8, 1994. Following Defendant Lake's investigation, the claim was paid.

Later that month, the damages became more pronounced and an additional claim was made. Plaintiffs fully cooperated with Defendant Lake in his assessment of the damages and in his request for a site review by a qualified structural engineer. In fact, as the claim progressed and as this litigation unfolded, both parties have relied upon the same structural engineer, Mr. Roswell W. Ard, as the sole engineering expert. Over the ensuing months, Mr. Ard issued a number of reports as his investigation continued, walls were opened up and structural defects identified and described.

In the conclusion to his May 20, 1995 report, Mr. Ard summarized his findings as follows:

> It is important to realize that the work described herein is not concerned with the aesthetic factors of this house or a subjective evaluation of its workmanship. These repairs are necessary to provide for the safety of the building occupants. In over 20 years of investigating various failures for insurance companies and attorneys, designing structural modifications and repairs, and inspecting residential, commercial and industrial buildings for potential purchasers; this house has one of the largest number of structural deficiencies in one residence that I have ever seen. *Id.*, p 4.

Not only was the construction substandard, significant aspects of the original plans did not meet applicable codes. Mr. Ard's various reports describe a variety of significant code violations associated with the basic structure. The main longitudinal central beam was seriously undersized as were its supporting structures. The second-story floor structure was seriously undersized. There was missing and inadequate building insulation and ventilation that caused the very rapid ice buildup on the roof whenever it snowed. The front wall of the house was pushed out of vertical by the improper connection of rafters in the front of the house. The second-story bathroom floor framing was cut away during the installation of the sunken bathtub which destroyed the structural integrity of the floor framing and did not provide the required support for the bathtub. The bearing wall between the kitchen and the laundry was supported by a single floor joist that was so totally cut away for the second-story bathroom plumbing that it was structurally destroyed. The wood framing that supports the stonework around the woodstove was inadequate and sagged. The roof framing that supported the artificial stone chimney was inadequate, and the interior central stairway was too narrow, had insufficient headroom and excessive riser height differences.

Most importantly for the discussion here, were the inadequacies in the construction of the roof. Mr. Ard's report of February 3, 1995 focuses on roof deficiencies and concludes that the design of the rear gable roof found in the plans was inadequate to carry local BOCA roof loads. The plans also did not meet the insulation and ventilation requirements of the Michigan Energy Code, which deficiency was exacerbated by the actual "as built" construction of the rear gable roof structure.

Mr. Ard described problem in the following terms:

> The use of adequate insulation and ventilation in roofs is very important in this climate. Roof surfaces are supposed to be cold in the winter. This is accomplished by using sufficient attic/roof insulation and providing adequate ventilation above the insulation. Insulation slows down but does not stop the transfer of heat. Adequate ventilation on top of the roof insulation captures and vents the heat and water vapor that passes through the roof insulation. This keeps the roof surface cold so that accumulated roof snow does not melt on the warm portions of the roof, flow down the roof pitch and freeze on the cold portions of the roof at the eve overhangs. Once this water starts to freeze at the eves, it forms ice dams that backs subsequent melt water underneath the roof shingles and into the house. *The large amount of ice that rapidly accumulates on this roof immediately after a snowfall indicates severe roof insulation and/or ventilation problems.* *Id.*, p 5. (Emphasis added.)

Within this report, Mr. Ard concluded that the initial construction of the structural frame was not strong enough to carry second-story floor loads or local roof snow loads in accordance with BOCA requirements. He also found that the insulation was deficient and that there was no eve or ridge ventilation and that "the lack of adequate roof ventilation was the major factor that caused the rapid ice build upon on this roof whenever it snowed." *Id.*, p 7.

Consistent with these reports, Mr. Ard's January 14, 1998 Affidavit concludes in paragraph 5, "That the structural deficiencies present in the plaintiffs' residence on or about January 12, 1994, when subjected to seasonal atmospheric precipitation, were the *sole* cause of the physical damage to the dwelling which is the subject of this lawsuit." (Emphasis supplied.) This Court believes these uncontested factual findings and engineering opinions are dispositive of the policy issues raised by the parties.

There is no evidence that this structure survived prior winters without incident. To the contrary, it was never occupied in the winter. There is no evidence of massive ice buildups in Leelanau County in the winter of 1993-94 that damaged structurally sound buildings. Indeed, the only structural engineering testimony that has been or can be offered comes from Mr. Ard. His conclusion is that the significant ice buildup and resultant damage to Plaintiffs' home sprang from grossly inadequate roof design and construction.

Following the discovery of this problem, numerous other latent structural defects were revealed. It is extremely fortunate no personal injury occurred as a result of the defective construction. This home, at the time the certificate of occupancy was issued and every day thereafter, was an accident waiting to happen. The question was not whether this home would collapse, but when the event would occur. Having failed to have the home inspected prior to purchase, and apart from Plaintiffs' legal remedies, Plaintiffs were faced with two choices: repair the home or tear it down and start over. Plaintiffs chose to repair the home at a cost that approaches the policy limits on their homeowner's insurance.

Although Defendant Wolverine approved initial claims made on the policy, it has not authorized payment beyond $11,000. The Defendant relies upon exclusions in the insurance contract in support of its denial. The Court will now review the parties' competing claims in Count I as they relate to the insurance language.

INSURANCE CONTRACT

The homeowner's policy at issue here is an occurrence policy. The coverages under discussion are those relating to the dwelling (Coverage A) and personal property (Coverage C). The occurrence alleged is property damage to the residence premises caused by exposure to the weight of ice and snow. Without question, winter occupancy and the application of heat to what had previously been a cold roof lead to a significant ice build up and the damages Plaintiffs and Defendants observed. However, suggesting that the weight of ice was the cause of the lack of structural integrity in this home is akin to suggesting that it is the match and not the dynamite which contains the destructive force. Like a stick of dynamite, this home sat inert on its site for several years until the conditions were present that would cause its gross latent deficiencies to emerge and

the resultant damage to be seen. Here, like the mere striking of a match to a fuse, it was nothing more than reasonable winter occupancy which inevitably lead to excessive ice buildup secondary to defective roof construction and collateral consequences throughout a structure incapable of carrying the second-story load as well as normal roof loads.

The rules of construction which pertain to insurance policies were set forth by the Michigan Supreme Court in *Fresard v Michigan Millers Mut Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982). There the Court wrote as follows:

> When examining the language of this or any other insurance policy, we are mindful of several other principles of construction so rudimentary as to be axiomatic:
>
> > The contract should be viewed as a whole.
> >
> > The intent of the parties should be given effect.
> >
> > An interpretation of the contract which would render it unreasonable should be avoided.
> >
> > Meaning should be given to all terms.
> >
> > Ambiguities should not be forced.
> >
> > Conflicts among clauses should be harmonized.
> >
> > The contract should be viewed from the standpoint of the insured.
> >
> > The insurer should bear the burden of proving an absence of coverage. *Id.*, p 694.

Recognizing these principles of construction, the issue before the Court is whether or not any factual issues existed with regard to a potential ambiguity in the interpretation of the clauses described above. The issue of ambiguity in the interpretation of insurance contracts was discussed by the Michigan Supreme Court in *Raska v Farm Bureau Ins Co*, 412 Mich 355 (1982). There, the *Raska* Court wrote as follows:

> The only pertinent question, therefore, is whether the exclusionary clause in this contract is ambiguous, for if it is not ambiguous we are constrained to enforce it. A contract is said to be ambiguous when its

> words may be reasonably understood in different ways. If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances, and under another fair reading of it leads one to understand there is no coverage under the same circumstances, the contract is ambiguous and should be construed against its drafter and in favor of coverage. Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear. *Id.* p 362. See also, *Allor v Dubay*, 317 Mich 281; 26 NW2d 772 (1947).

Specifically, Plaintiffs draw the Court's attention to the collapse hazard which is found at paragraph 8 of the "Additional Coverages." This provision provides as follows:

> 8. **Collapse.** We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
>
> a. Perils Insured Against in Coverage C - Personal Property. These perils apply to covered building and personal property for loss insured by this additional coverage;
> b. hidden decay;
> c. hidden insect or vermin damage;
> d. weight of contents, equipment, animals or people;
> e. weight of rain which collects on a roof; or
> f. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.
>
> Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items **b, c, d, e** and **f** unless the loss is a direct result of the collapse of a building.
>
> Collapse does not include settling, cracking, shrinking, bulging or expansion.
>
> This coverage does not increase the limit of liability applying to the damaged covered property.

Within the collapse hazard, Plaintiffs refer the Court to subparagraphs 8(a) and (f). Paragraph 8(a) incorporates the property damage perils insured against in Coverage C for the benefit of the residence premises. Accordingly, when the weight of ice or snow damages the residence premises

it is a covered loss, "unless the loss is excluded in Section I - Exclusions." The Defendants rely on the exclusion found at subparagraph 2(c). Subparagraph 2 is set forth below in its entirety:

Section I - Exclusions

* * *

2. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

   a. **Weather conditions.** However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1, above to produce the loss;

   b. **Acts or decisions,** including the failure to act or decide, of any person, group, organization or governmental body;

   c. **Faulty, inadequate or defective:**
      (1) planning, zoning, development, surveying, siting;

      (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

      (3) materials used in repair, construction, renovation or remodeling; or

      (4) maintenance;

      of part or all of any property whether on or off the **residence premises.**

With respect to this exclusion, it beyond the pale of reasonable disagreement that the design of the Plaintiffs' home was inadequate and defective; the workmanship and construction were faulty, inadequate and defective and the materials used in the construction were inadequate.

Plaintiffs argue that the application of the defective work and materials exclusion to paragraph 8(a) of the collapse hazard makes the coverage illusory. This Court must disagree. The policy requires a causal nexus between defective design, workmanship, construction or materials and the claimed loss before the exclusion is applicable. Therefore, snow and ice damage to homes that

satisfied applicable codes when they were built or remodeled is compensable and covers losses to both covered structures and personal property.[2]

Plaintiffs also point to paragraph 8(f) of the collapse hazard which provides coverage for the use of defective material or methods in construction. However, coverage is only afforded here if the collapse occurs "during the course of the construction." Additionally, the Defendants argue that there was no collapse.

A careful review of the precedent cited to this Court by the parties convinces it that Michigan does acknowledge the concept of a constructive collapse. That is, the building does not have to fall into ruins for the policy provision to be triggered. The Michigan Court of Appeals has interpreted the term "collapse" to mean damage which impairs "the substantial integrity of the building to such extent as to render it unsuitable for use as a home and that the building was exposed to the inclimacy of the weather . . ." *Vormelker v Oleksinski*, 40 Mich App 618; 190 NW2d 287 (1972). The insurance industry responded to the *Vormelker* decision by amending their contracts to include a specific definition of collapse that would not include settling, cracking, shrinking, bulging or expansion. However, when the Court of Appeals next visited this topic it was in the context of a policy substantially identical to that at issue here. There, in *Dagen* v *Hastings Mut Ins Co*, 166 Mich App 225, 230-231; 420 NW2d 111 (1987), the Court of Appeals overturned a trial court's decision to grant summary disposition for the carrier and held that a collapse could occur if a fact finder concluded that the supporting super structure was so impaired as to destroy the efficiency of plaintiffs' home as habitation. *Id.*, p 114.

A similar conclusion was arrived at by the Federal District Court in *Allstate Ins Co* v *Forest Lynn Homeowners Ass'n*, 892 F Supp 1310 (WD Wash 1995). Although the Federal Court was interpreting the law of the State of Washington, that law and the collapse language at issue here are substantially identical. Finding the language ambiguous and analyzing whether collapse should be

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[2]The Defendants have argued in their supplemental brief that this particular coverage applies only to personal property. This is a clear misreading of paragraph 8(a) and would indeed make the additional coverage superfluous since personal property is already described as an independent subject in Coverage C.

interpreted to cover only the sudden falling down or catastrophic flattening of a structure, the *Allstate* Court wrote as follows:

> . . . The majority of modern courts considering this issue have determined that the term "collapse" is "sufficiently ambiguous to include coverage for any substantial impairment of the structural integrity of a building." . . . Therefore, the Court finds that coverage under the Collapse provision of the policy is triggered by "any substantial impairment of the structural integrity of a building." *Id.*, pp 1313-1314.

If a structure does not have to fall down or catastrophically be flattened into broken pieces to collapse but need only evidence a substantial impairment of its structural integrity, then this building was "collapsed" from the date its certificate of occupancy was issued. As Mr. Ard noted in his May 20, 1995 report, this home was built with deficient plans and construction which significantly impaired its structural integrity.[3] Its repair was necessary to provide for the safety of building occupants and a certificate of occupancy never should have been issued. Ard Report, May 20, 1995, p 4.

Was this structure ever safe? The answer is no. Did this structure become more dangerous in the first winter of its occupancy when the deficient structure inevitably allowed heat to come in contact with the roof and snow causing a buildup of ice? The answer is yes. The challenging issue raised by the parties' competing positions is whether the inevitable discovery of significant latent structural defects by winter occupancy causes the Defendant Wolverine to be liable for the repair of those structural deficiencies under the terms of this policy.

Referring to the language of the collapse hazard, and recognizing the concept of constructive collapse, it is evident to this Court that defective materials and methods were used in the construction of this structure. The constructive collapse that occurred, however, happened long before the Plaintiffs purchased the home and at a time when the Defendant Wolverine's policy of insurance was not in force.

In consideration of the much worsened condition of the building following the winter of 1993-94, a constructive collapse still existed but it was not one that occurred during the course of

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[3]These facts cause this Court to come to a holding different than the Federal Court in *Allstate, supra*. There, the Federal Court did not find that a collapse was inevitable or certain to occur as this Court has here. *Id.*, p 1315.

construction, remodeling or renovation. Ignoring the exclusion for faulty or defective workmanship or materials, the language of the collapse hazard at paragraph 8(f) does not provide coverage for the repair of these significant pre-existing and latent structural defects. Nor does the Court believe that paragraph 8(f) is illusory. If, for example, a load-bearing wall must be removed during the course of remodeling and the method for shoring up the wall or the materials used are defective and a collapse occurs, there is coverage. In a contest between this "Additional Coverage" and the exclusion for faulty workmanship or materials, coverage would certainly be afforded.

The distinction which Plaintiffs miss in their analysis of paragraph 8(a) is the incorporation of Coverage C protections for the structure subject to the same exclusions that were applicable to personal property. Accordingly, whether the ice and snow by their weight and creation of water damage a wall or a picture hanging on it, neither is covered where the cause of the ice buildup is faulty or defective design, workmanship or materials. This does not mean the coverage is illusory. Sadly, the weight of snow and ice can damage homes that are built or remodeled consistent with existing codes.

In this case, where the Defendant insurer has specifically stated that it does not insure against latent defects or provide coverage where the damage flowing from the weight of ice and snow is caused by defective workmanship or materials, coverage cannot be afforded for significant pre-existing structural defects that caused this building to be constructively collapsed the first day its original owners moved into it.

No one disputes that the Suttmanns purchased this home without conducting a structural inspection. Recognizing that fact, however, does not change the responsibility for the construction and sale of this defective home. It lies with the builders and the original owners. The Defendant Wolverine assumed no contractual obligation to compensate subsequent purchasers for these pre-existing latent defects. Wolverine's handling of this claim may have been well intended in its inception and clumsy and disingenuous as it progressed, but the language of the policy never changed. For all the foregoing reasons, the Court will grant the Defendants' motion for summary disposition on Count I of the Plaintiffs' complaint and dismiss it with prejudice.

INTERFERENCE WITH ECONOMIC RELATIONSHIP

In Count II of the Plaintiffs' complaint, they seek relief for a claimed intentional interference with an advantageous economic relationship. Essentially, it is undisputed that having paid $11,000 on Plaintiffs' initial claims, the Defendant Wolverine pursued its subrogation action along with its insured against third parties. Wolverine later abandoned the subrogation claim, ostensibly because the costs of pursuing it made it uneconomical.

The elements of the claim of interference with advantageous relationships were described by the Michigan Court of Appeals in *Trepel* v *Pontiac Osteopathic Hospital*, 135 Mich App 361, 374; 354 NW2d 341 (1984). They include the following:

1. The existence of a valid business relationship or expectancy;

2. The interferer's knowledge of the relationship;

3. An intentional interference by an illegal, unethical or fraudulent act that breaches or terminates the relationship; and

4. Resultant damage to the party whose relationship has been disrupted.

Defendants' move for summary disposition on this claim and argue that their behavior was always lawful. Without the specific demonstration of an unlawful purpose for the alleged interference, the tort claim must fail. See, *Hutton v Roberts*, 182 Mich App 153; 451 NW2d 536 (1989).

Here, Plaintiffs were pursuing a claim against third parties. The Defendant Wolverine had also made a payment to the Plaintiffs and was pursuing a lawful contractual subrogation right. It is not uncommon for the same attorneys to represent an insurance carrier and an insured when pursuing subrogation rights. No conflict of interest was identified at the time or subsequently. The Defendant Wolverine had no duty to pursue its subrogation action, only a contractual right to do so. It ultimately abandoned the claim as uneconomic.

Nothing in the circumstances surrounding the decision of this insurance carrier to discontinue pursuit of an $11,000 subrogation action suggests that there was any unlawful interference in the relationship which Plaintiffs enjoyed with their attorneys. The Court finds no material factual dispute which would, construed most favorably from Plaintiffs' perspective, allow a finding of an unlawful

purpose so as to preserve this cause of action. Accordingly, Count II of the Plaintiffs' complaint is dismissed with prejudice.

FAILURE TO PROSECUTE A CLAIM

In Count III of the Plaintiffs' compliant, they assert that the Defendant Wolverine and its agents acted in bad faith through their failure to pursue their claim against the former owners and builders to either a judgment or settlement. To the extent Wolverine had a contractual right of subrogation against these persons, it had the right to pursue it or not in its sole discretion. No authority has been provided to this Court which stands for the proposition that an insurer in Michigan has a common law duty to pursue an insured's claim against third parties. Certainly, no such provision exists in the insurance policy.

The applicable law of bad faith is described in *Commercial Union Ins Co* v *Liberty Mut Ins Co*, 426 Mich. 127, 136-139; 393 NW2d 161 (1986), shown hereafter, in pertinent part:

> [W]e define "bad faith" for instructional use in trial court as arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.[5]
>
> Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith. Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment. However, because bad faith is a state of mind, there can be bad faith without actual dishonesty or fraud. If the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured's interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent.
>
> Although the Court has articulated here a precise definition of "bad faith" for instructional purposes, there are supplemental factors which may be considered in determining whether liability exists for bad faith. These factors clarify the "indicators" pronounced in the trial court's bad-faith instruction in the instant case. They also embrace the *Wakefield*[4] language. Because the facts of each individual case will vary in any given situation, the trial court, in its discretion, will have the option of determining which factors, if any, are to be included in instructions to the jury. The recommended factors are not exclusive. No single factor shall be decisive. Among the factors which the fact finder may take into account, together with all other evidence in deciding whether or not the defendant acted in bad faith are:

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[4]Referring to *City of Wakefield* v *Globe Indemnity Co*, 246 Mich 645; 225 NW 643 (1929).

1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured,

* * *

3) failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances,

4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury,

5) rejection of a reasonable offer of settlement within the policy limits,

* * *

8) failure to make a proper investigation of the claim prior to refusing an offer of settlement within the policy limits,

9) disregarding the advice or recommendations of an adjuster or attorney,

10) serious and recurrent negligence by the insurer,

* * *

In applying any factors, it is inappropriate in reviewing the conduct of the insurer to utilize "20-20 hindsight vision." The conduct under scrutiny must be considered in light of the circumstances existing at the time. A microscopic examination, years after the fact, made with the luxury of actually knowing the outcome of the original proceeding is not appropriate. It must be remembered that if bad faith exists in a given situation, it arose upon the occurrence of the acts in question; bad faith does not arise at some later date as a result of an unsuccessful day in court. (Footnotes omitted, except footnote 5.)

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[5] Although the right to recover on a bad-faith claim is generally conditioned upon proving "bad faith" as it is defined in this opinion, we agree with the Court of Appeals that the "bad faith" definition, "conscious doing of a wrong because of dishonest purpose or moral obliquity," as used in *Medley* v *Canady*, 126 Mich App 739, 748; 337 NW2d 909 (1983) is correct when limited to bad-faith cases involving Sec. 6 of the Uniform Trade Practices Act, MCL Sec. 500.2006(4); MSA Sec. 24.12006(4). The differentiation in definitions arises because Sec. 6 of the Uniform Trade Practices Act is a statutory penalty, intended to penalize recalcitrant insurers who, in bad faith, are dilatory in paying claims. *Fletcher* v *Aetna Casualty & Surety Co*, 80 Mich App 439, 445; 264 NW2d 19 (1978), aff'd 409 Mich 1, 294 NW2d 141 (1980); *Sharpe* v *DAIIE*, 126 Mich App 144, 150; 337 NW2d 12 (1983); *Sederholm* v *Michigan Mutual Ins. Co*, 142 Mich App 372, 394; 370 NW2d 357 (1985). Since Sec. 6 is a statutory provision having a punitive purpose, a higher standard of liability is warranted. Virtually all authority sanctioning penalties and other punitive-type damages require the higher standard of malice or fraud. See *Hoskins* v *Aetna Life Ins Co*, 6 Ohio St.3d 272, 452 NE2d 1315 (1983); *Kirk* v *Safeco Ins Co*, 28 Ohio Misc 44, 46, 273 NE2d 919 (1970).

Bad faith cases in Michigan have traditionally involved the relationship between an insurance company, its insured and a third party. It most often arises in those circumstances where the insurer's failure to negotiate a settlement exposes the insured to a judgment in excess of policy limits. Here, the Plaintiffs have made a claim which was paid only in part. Wolverine's dispute as to coverage for to the claim cannot amount to bad faith where the Court agrees that coverage may not be afforded as a matter of law. Accordingly, Count III of the Plaintiffs' complaint is dismissed with prejudice.

UNIFORM TRADE PRACTICES ACT

In Counts IV and V of their complaint, Plaintiffs assert claims under the Uniform Trade Practices Act, MCL 500.2001; MSA 24.12001. Count IV deals with the Defendant Wolverine's interpretation of the contract, and Count V addresses the failure to pay the claim. Given this Court's ruling that the insurance contract does not afford the coverage Plaintiffs' seek, there can be no cognizable cause of action under the Uniform Trade Practices Act. Accordingly, Counts IV and V of the complaint are dismissed with prejudice.

CO-DEFENDANTS LAKE AND ADJUSTING SERVICES

As the Court has previously noted, Adjusting Services and Lake were agents of the disclosed principal Wolverine. Apart from the legal conclusions reached above, this Court finds that neither Lake nor Adjusting Services have any independent liability to the Plaintiffs. There is no claim that either acted outside the scope of their agency relationship. There being no basis for a claim of independent liability on the part of either, the claims against both are dismissed.

CONCLUSION

While this Court has a great deal of sympathy for the Plaintiffs and salutes the heroic effort counsel has made on their behalf, its core determination is that the Defendant Wolverine never assumed a contractual obligation to indemnify Plaintiffs for the latent structural deficiencies in their home. The dismissal of the bad faith and Uniform Trade Practice Act claims naturally flow from this conclusion. Independently, the Court has found no evidence of unlawful behavior on the part of the Defendant Wolverine or its agents in the context of the decision to pursue and then abandon a subrogation claim. Because Lake and Adjusting Services were at all times acting as agents of a

disclosed principal, they can have no independent liability. For all the foregoing reasons, then, the Plaintiffs' complaint is dismissed with prejudice. MCR 2.116(C)(10). The complaint was not frivolous and no sanctions will be ordered. MCR 2.114. A judgment consistent with this Decision and Order shall be submitted consistent with the procedure described in MCR 2.602(B)(3).

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 4/10/98