

# Insurance Bad Faith Litigation:

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## Winning a Case With Eight Words



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# What is Bad Faith?

- Violation of insurers duty to act in Good Faith
- Unfair Claims Settlement Practices Act (KRS 304.12-230)
- Duty continues during underlying litigation
  - *Knotts v. Zurich Insurance*
- Consumer Protection Act



# Why Does it Exist?

- Insurance is Different
- Contract of Adhesion
- No free market after claim
- Public Policy- importance of insurance

“From cradle to grave individuals willingly pay premiums to insurance companies to obtain financial protection....”

Curry v. Fireman’s Fund, 784 S.W.2d 176, 178 (Ky. 1989).





# Types of First- and Third-Party Bad Faith Claims

## First- and Third-Party Claims:

- Automotive
- Home
- Disability
- Medical Malpractice
- Personal Injury

## You Cannot File Bad Faith Claims For:

- PIP
- ERISA
- Workers Compensation



# How Does it Deter Bad Faith Activity?

Punitive Damages

Compensatory Damages

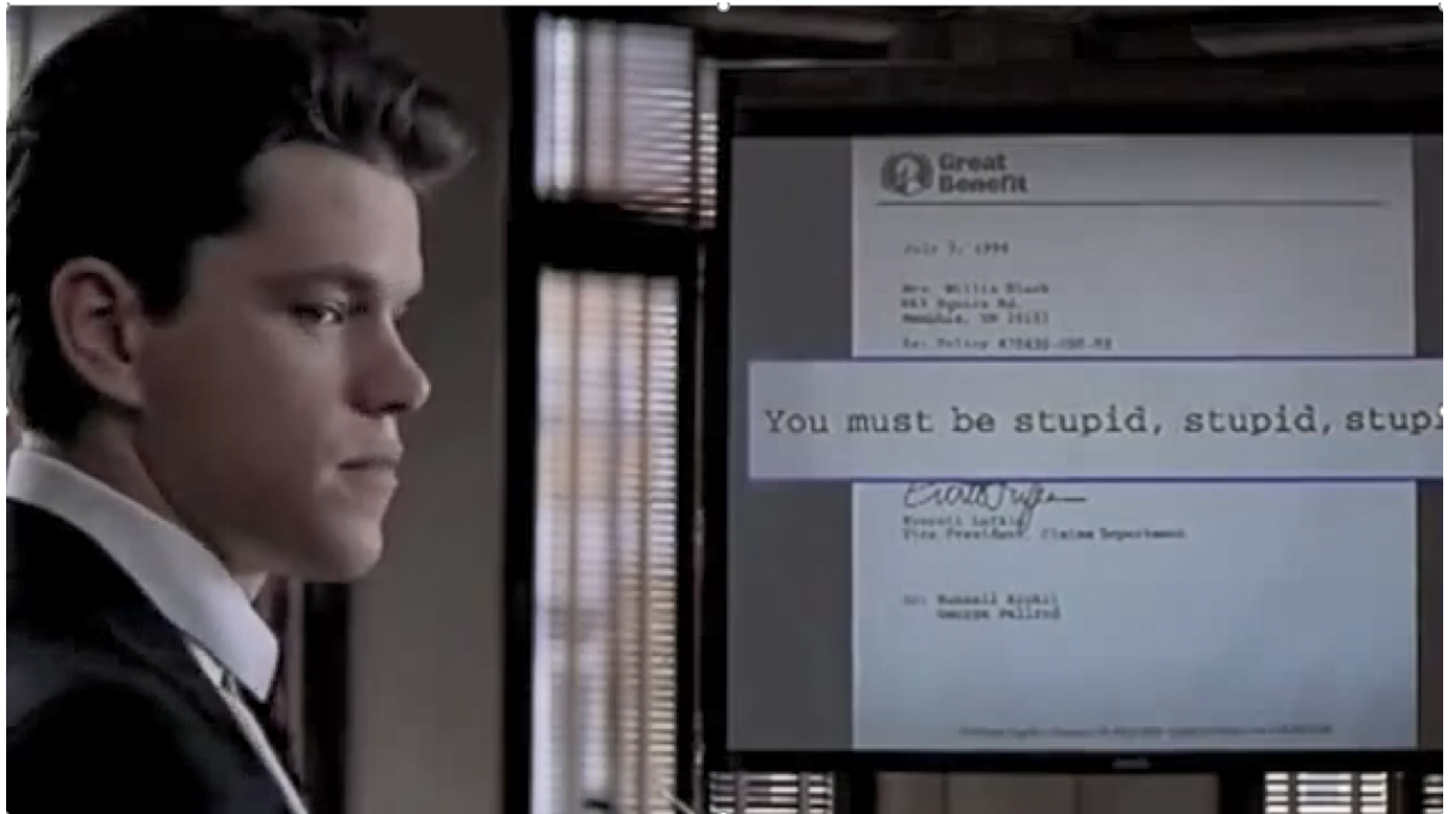
Emotional Distress, Worry, Inconvenience

Attorney's Fees

12% Interest



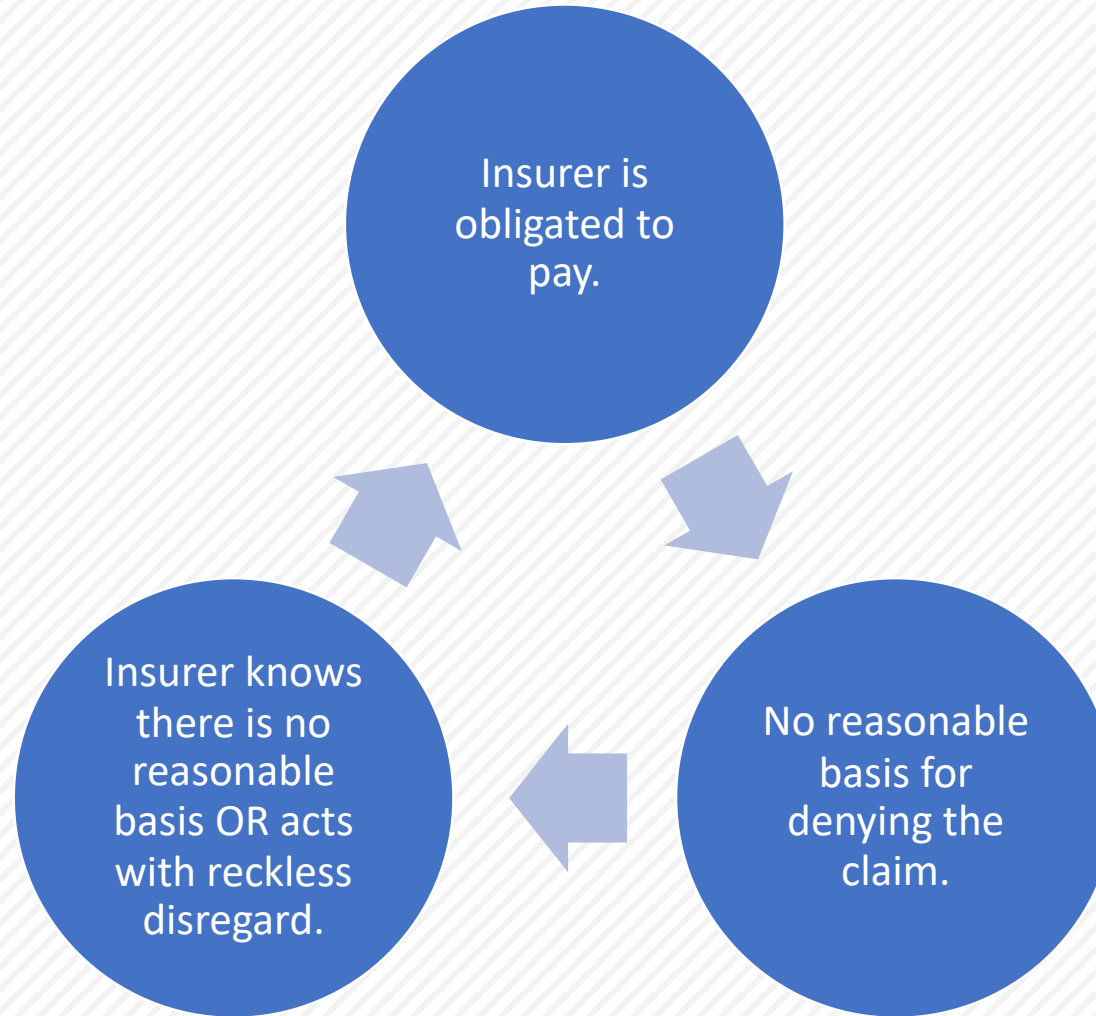
"I'm sorry, but stress caused by trying to figure out your health insurance is not covered by it."



Paramount Pictures (1997).

# The Eight Most Important Words of My Career...

# What You Must Prove



# Insurer Duties

1.  
Implement  
Standards

2.  
Investigation

3. Attempt  
to Settle if  
Liability is  
Clear

4. Explain  
Denial

5. Can't  
Lowball

6. No  
Ulterior  
Motives

# Defense Counsel's Role

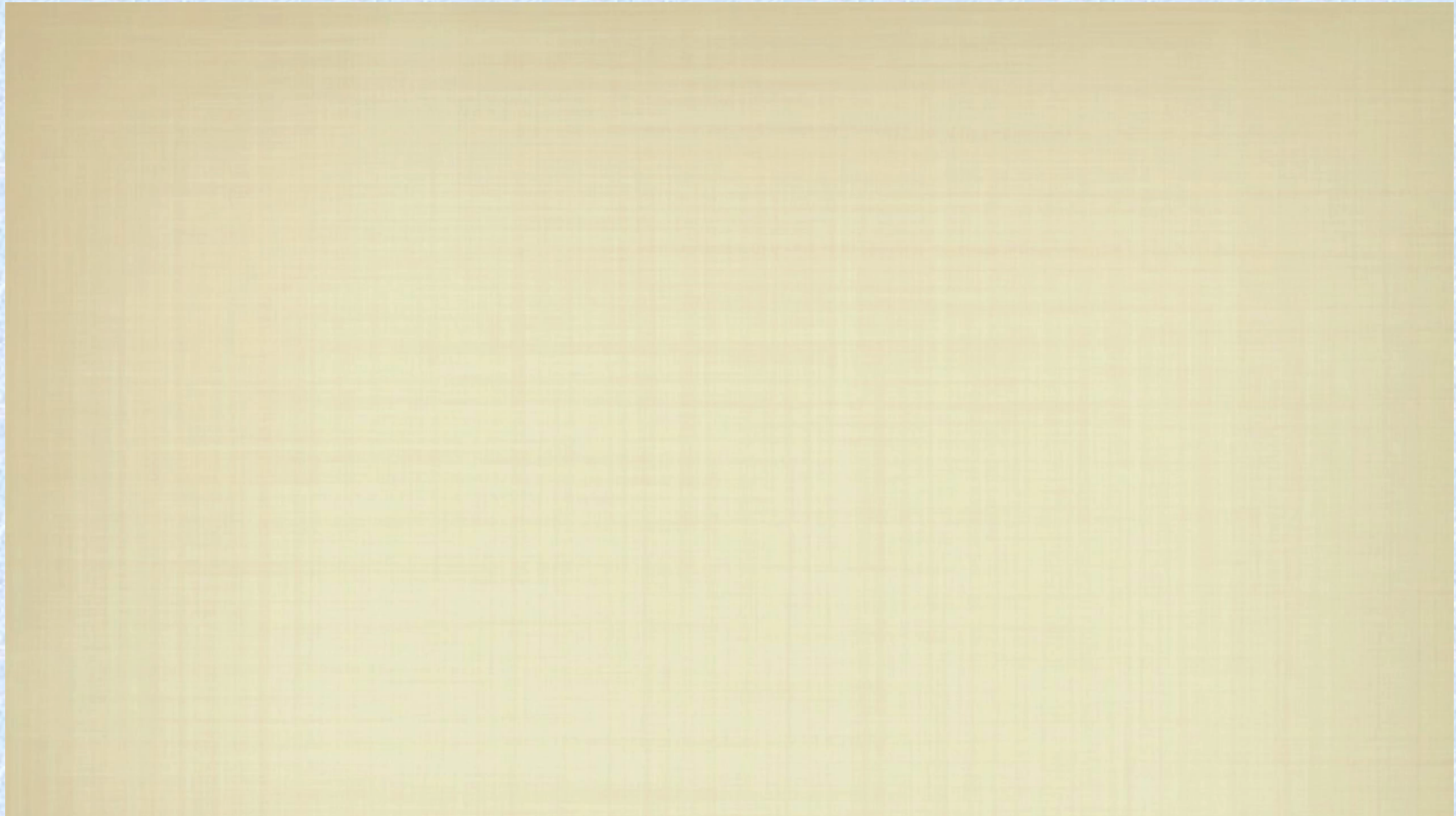
- **Insurer's Duty of Good Faith is Not Delegable to Their Attorney**
  - Advice of counsel is NOT an absolute defense
  - Settlement behavior is admissible, litigation conduct is not
  - Attorney is free to be a zealous advocate





WHY?

# Lowball Offers



# Punitive Damages

Saint Joseph Healthcare, Inc. v. Thomas, 2016 Ky.  
LEXIS 179 (Ky. May 5, 2016).

Hospital liability for EMTALA violation  
Indigent, paraplegic man turned away from  
hospital – dies hours later  
\$25,000 compensatory award (only 15%, \$3,750  
assessed to Hospital)  
\$1,450,000 punitive award against Hospital  
Tried to a jury twice

## Bad Faith Totals and Averages

These charts summarize the bad faith totals for the seventeen-year sample from 1998 to 2015, as well as for each set.

<u>Verdicts</u>	<u>Won-Loss%</u>	<u>Aggregate Awards</u>	<u>Plaintiff's Average</u>	<u>Average Verdict</u>
14 (98-02)	8-6 57.1%	\$7,105,838	\$888,229	\$507,559
16 (98-03)	9-7 56.2%	\$7,115,838	\$790,648	\$444,738
21 (98-04)	14-7 66.6%	\$36,224,346	\$2,587,453	\$1,724,968
23 (98-05)	15-8 65.2%	\$36,374,346	\$2,424,956	\$1,581,493
24 (98-06)	16-8 66.6%	\$37,129,376	\$2,320,586	\$1,547,057
26 (98-07)	17-9 65.3%	\$37,159,376	\$2,185,845	\$1,429,206
28 (98-08)	19-9 67.8%	\$39,181,923	\$2,062,206	\$1,399,354
31 (98-10)	22-9 70.9%	\$45,651,200	\$2,075,054	\$1,472,619
Note - No results in 2010				
33 (98-11)	24-9 72.7%	\$47,921,200	\$1,996,716	\$1,452,157
35 (98-12)	25-10 71.4%	\$51,346,200	\$2,053,848	\$1,467,034
36 (98-13)	25-11 69.4%	\$51,346,200	\$2,053,848	\$1,426,283
36 (98-14)	25-11 69.4%	\$51,346,200	\$2,053,848	\$1,426,283
37 (98-15)	25-12 67.5%	\$51,346,200	\$2,053,848	\$1,387,735
38 (98-16)	26-12 68.4%	\$55,929,672	\$2,151,141	\$1,471,833
39 (98-17)	26-13 66.6%	\$55,929,672	\$2,151,141	\$1,434,094
42 (98-18)	28-14 66.6%	\$71,988,672	\$2,571,024	\$1,713,539

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## Bad Faith Punitive Damage Awards

*How often are they awarded and in what amounts?*

<u>Verdicts</u>	<u>Punitives Awarded</u>	<u>Punitives Rejected</u>	<u>Punitives Not Reached</u>	<u>Not Applicable</u>
42	23-54.7%	4-9.5%	13-30.9%	2-4.7%

**Note:** Making more sense of this chart, the jury considered punitive damages in 27 cases. In twenty-three of those twenty-seven cases, a jury made a decision to award punitives. While the above chart lists a 54.7% (23-42) success rate for punitives, 85.1% (23-27) is likely more accurate, representing plaintiffs took punitives in 23 of 27 cases where they prevailed on liability.

<u>Aggregate Punitive Awards</u>	<u>Plaintiff's Average Punitive Award</u>	<u>Average Punitive Award</u>
\$55,535,615	\$2,414,591	\$1,322,276

<i>Adjusted Averages Less the \$28,405,505 verdict which included punitives of \$18,405,505</i>		
\$37,130,110	\$1,168,732	\$905,612

## 2 Recent Supreme Court Decisions

- *Holloway v. Direct General Insurance Company of Mississippi* 497 S.W.3d 733 (Ky. 2016)  
Defense Summary Judgment Upheld
- *Indiana Insurance Company v. Demetre* 527 S.W.3d 12 (Ky. 2017)  
Punitive Jury Verdict Upheld

# Why Different Outcomes?

## Holloway

- Parking lot collision
- Fault disputed (supported by testimony)
- Total \$463.62 of property damage
- No police called to scene
- Causation contested

## Demetre

- Investigation focused on denial of coverage
- 3<sup>rd</sup> Adjuster, Magi, “Go to Guy” — 7290 Denials
- Same adjuster on coverage & claim
- Files and loses. Dec Action on Coverage
- New counsel acts quickly
- Settled \$165,000
- Spent \$397,000 on attorney’s fees



# Try to Settle the Claim!



Not “Set Up” for Bad Faith

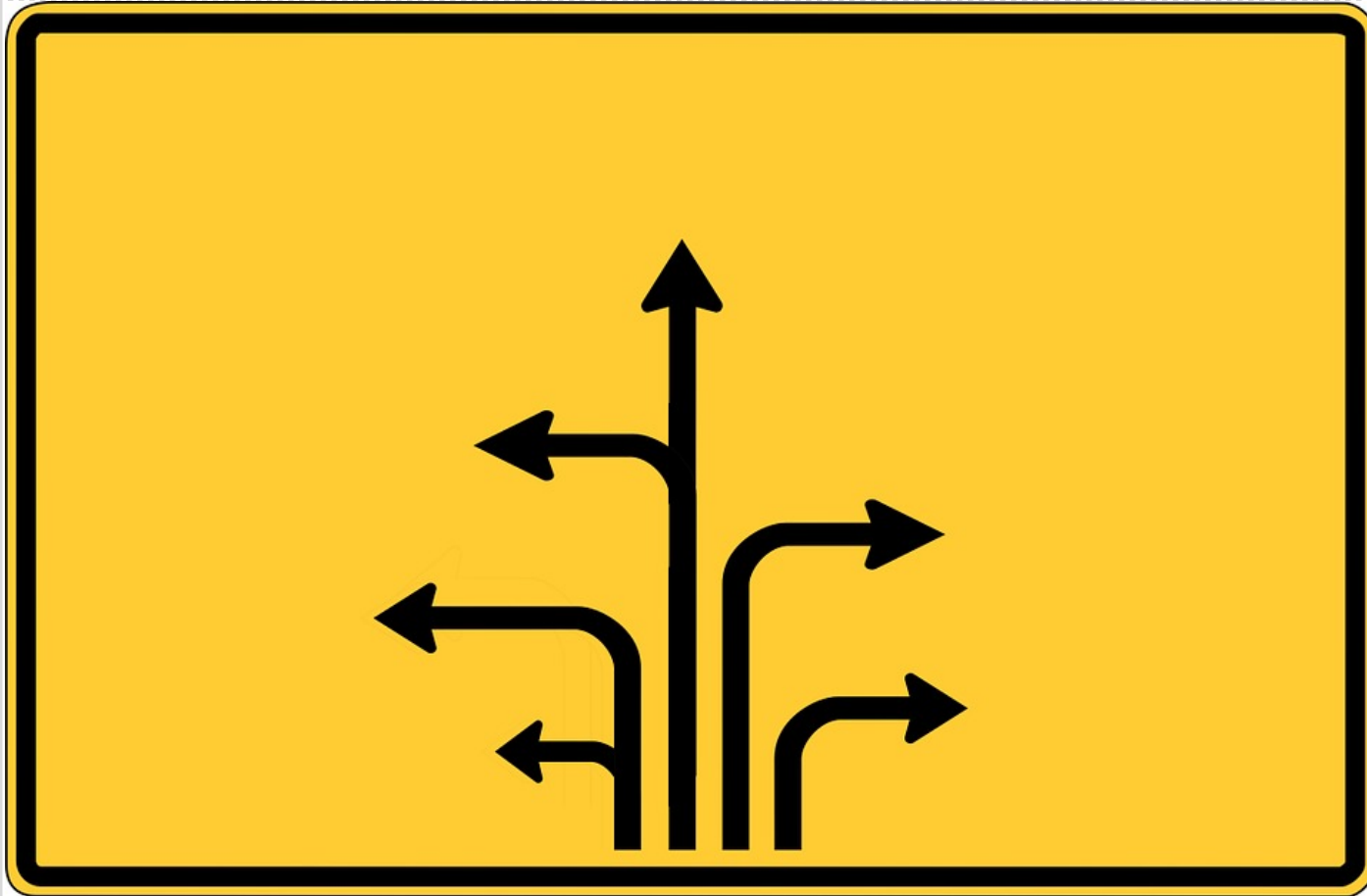




# Waiving Attorney-Client Privilege

- Underlying Attorney as Witness
- Implications
- Discussing with the Client
- Documents “Intended to be Confidential”

# Bifurcation and Stay



Demand an  
Offer!





# Don't Be the Source of Delay

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- Depositions
- Medical Records Requests
- Disperse Money

An hourglass with a wooden frame and a light-colored, textured sand-like material inside. The hourglass is positioned vertically, with the top and bottom bulbs visible. The background is a solid light color.

# When to File the Bad Faith Claim

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- File with original action?
- What happens if I wait?
  - May lose claims for bad faith that occurred prior to the suit





Settle and Release?