

JUDGMENT CREDITOR CANNOT MAINTAIN BAD FAITH ACTION
AGAINST TORTFEASOR'S HOMEOWNER'S INSURER ABSENT ASSIGNMENT

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On May 18, 1991, Donald Marks was operating a tractor owned and maintained by Walter Merriman. The brakes on the tractor failed and it overturned on an embankment causing Mr. Marks' death. Patricia A. Marks, administratrix of the Estate of Donald Marks, filed a wrongful death action against Mr. Merriman. While the action was pending, Mr. Merriman died and Mary Lou Swayne, administratrix of the decedent's estate was substituted as a defendant.

The case went to trial and the jury awarded the plaintiff \$1,029,875. The decedent had a \$300,000 homeowner's liability policy. Once judgment was entered, the insurer paid its policy limits on behalf of the decedent.

Patricia Marks, on behalf of the Estate of Donald L. Marks, instituted a lawsuit against Nationwide Insurance Company, the homeowner's insurer for Mr. Merriman. Ms. Marks also named Ms. Swayne, the administratrix of Mr. Merriman's Estate, as co-plaintiff. In her complaint, Ms. Marks contended that Nationwide Insurance Company should be responsible to pay the entire verdict because it wrongfully rejected a variety of settlement offers and by the time the verdict was rendered, the decedent's estate had become insolvent. Because of the insurer's alleged bad faith refusal to settle, Ms. Marks sought damages under the Pennsylvania Bad Faith Statute.

Nationwide Insurance Company filed preliminary objections requesting that the plaintiff's complaint be dismissed because plaintiff had no direct cause of action against the Nationwide Insurance Company. In the complaint, plaintiff failed to allege that she had received an assignment from the insured (Mary Lou Swayne) to allow her to proceed directly against the decedent's insurer. Nationwide Insurance Company argued that absent an assignment,

Pennsylvania law precluded plaintiff, a third-party, from suing an insured's insurance company. The trial court agreed and granted the preliminary objections dismissing the complaint. Plaintiff appealed to the Superior Court.

In her appeal, plaintiff argued that by naming Ms. Swayne (the administratrix) as co-plaintiff, plaintiff had an "equitable assignment of any and all rights maintained by the Merriman Estate (the insured) against Nationwide" even though Ms. Swayne explicitly refused to assign any potential rights to the plaintiff. Regardless, plaintiff contended that she automatically stepped into the shoes of Ms. Swayne by virtue of the fact that she won her case against the insured in the earlier action.

The Superior Court rejected plaintiff's arguments. It found no Pennsylvania statute or case law to support a third-party action directly against an insurer for the insurer's alleged bad faith to its insured. In fact, Pennsylvania case law traditionally held that absent an assignment from the insured, a third-party has no right against the insured's liability insurer to recover a verdict in excess of the policy. Since there was no evidence establishing any contractual assignment from Ms. Swayne to the decedent's estate, there could be no cause of action directly against Nationwide Insurance Company and plaintiff's complaint was dismissed. Marks v. Nationwide Insurance Company, 762 A.2d 1098 (Pa. Super. Ct. 2000)