Florida Bad Faith Law

Case Law Update and Current Trends

Presented by:

Stephen A. Marino, Jr., Esq.

What is Bad Faith?

- Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could an should have done so, had it acted fairly and honestly toward its insured and with due regard for [his] [her] [its] [their] interests. Fla. Std. Jury Instr. 404.4

Types of Bad Faith Claims

First Party v. Third Party Claims

- A first party claim is where the policyholder seeks benefits for themself. Common examples are UM claims and Home Owners claims.
- A third party claim is made against the policyholder, such as a tort liability claim.

First Party Bad Faith

- A condition precedent to filing a first party bad faith claim in Florida is the filing of a Civil Remedy Notice of Insurer Violation with the Florida Department of Financial Services. The Civil Remedy statute was changed in 2019 and is now less policyholder-friendly. In 2020 there were a number of cases which invalidated CRNs, limiting or eliminating a policyholder's ability to prove a bad faith claim.

- First party bad faith claims only exist under §624.155
- First party bad faith claims can be brought if the insurer commits a violation of any of the following provisions:
  - Section 624.155(1)(b);
  - Section 626.9541(1)(i), (o), or (x);
  - Section 626.9551;
  - Section 626.9705;
  - Section 626.9706;
  - Section 626.9707; or
  - Section 627.7283.

Third Party Bad Faith

- Florida law recognizes the fiduciary relationship between policyholder and insurer in third party cases.
- Although an insurer does not owe a duty of good faith to the injured third party, the injured third party is permitted to bring a direct action against the insurer.

Brief History of Bad Faith Law in Florida

Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980)

- Boston Old Colony specifically enumerated the common law duties owed to a policyholder by an insurer in the third party context.
- In broad terms, an insurer must (1) advise the insured of settlement opportunities; (2) advise as to the probable outcome of litigation; (3) warn about the possibility of an excess judgment; (4) advise the insured of steps to be taken to avoid an excess judgment; (5) investigate the facts; (6) give fair consideration to settlement offers; and (7) settle the claim, if possible, "where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.
- An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business…
- The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.

Berges v. Infinity Ins. Co., 896 So. 2d 665 (Fla. 2004)

- *Berges* held that Florida bad faith law requires that a court "focus ... not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured."
- Bad faith law was designed to protect insureds who have paid their premiums and who have fulfilled their contractual obligations by cooperating fully with the insurer in the resolution of claims. The insurance contract requires that the insured surrender to the insurance company control over whether the claim is settled. In exchange for this relinquishment of control over settlement and the conduct of the litigation, the insurer obligates itself to act in good faith in the investigation, handling, and settling of claims brought against the insured. Indeed, this is what the insured expects when paying premiums. Bad faith jurisprudence merely holds insurers accountable for failing to fulfill their obligations, and our decision does not change this basic premise.

Powell v. Prudential Prop. & Cas. Co., 584 So. 2d 12, 14 (Fla. 3d DCA 1991)

- *Powell* arose from serious motor vehicle accident, where the Court upheld a jury verdict finding Prudential acted in bad faith in failing to settle claim against its insured
- There are several important holdings that help frame bad faith litigation today:
  - Lack of a formal offer to settle does not preclude finding that insurer's failure to settle was in bad faith;
  - Bad-faith may be predicated on refusal to disclose policy limits;
  - Bad-faith failure to settle may be inferred from delay in settlement negotiations if delay is willful and without reasonable cause; and
  - If insured's liability is clear and injuries are so serious that judgment in excess of policy limits is likely, insurer has affirmative duty to initiate settlement negotiations.

FR

Contreras v. U.S. Security Ins. Co., 927 So. 2d 16 (Fla. 4th DCA 2006)

- In *Contreras*, a personal representative of a deceased pedestrian offered to settle for the policy limits and release the owner of vehicle that killed the pedestrian. The personal representative refused to release the driver of vehicle. The insurer claimed that securing release for only one of its insured would be an act of bad faith. The Court disagreed.
- The Court held that an insurer can be held liable for bad faith arising out of its refusal to accept an offer to settle with the owner of the vehicle but not the driver. If an insurer is given a reasonable period of time in which to settle, and it is clear that the plaintiff is not going to release the driver, the insurer as a matter of law cannot have breached a duty of good faith to the driver.
- The insurer was obligated to take the necessary steps to protect the owner from what was certain to be a judgment far in excess of the policy limits. If an insurer is unable to obtain a release for all defendants, they can still settle with one without being in bad faith.

Harvey v. GEICO Gen. Ins. Co., 259 So. 3d 1 (Fla. 2018)

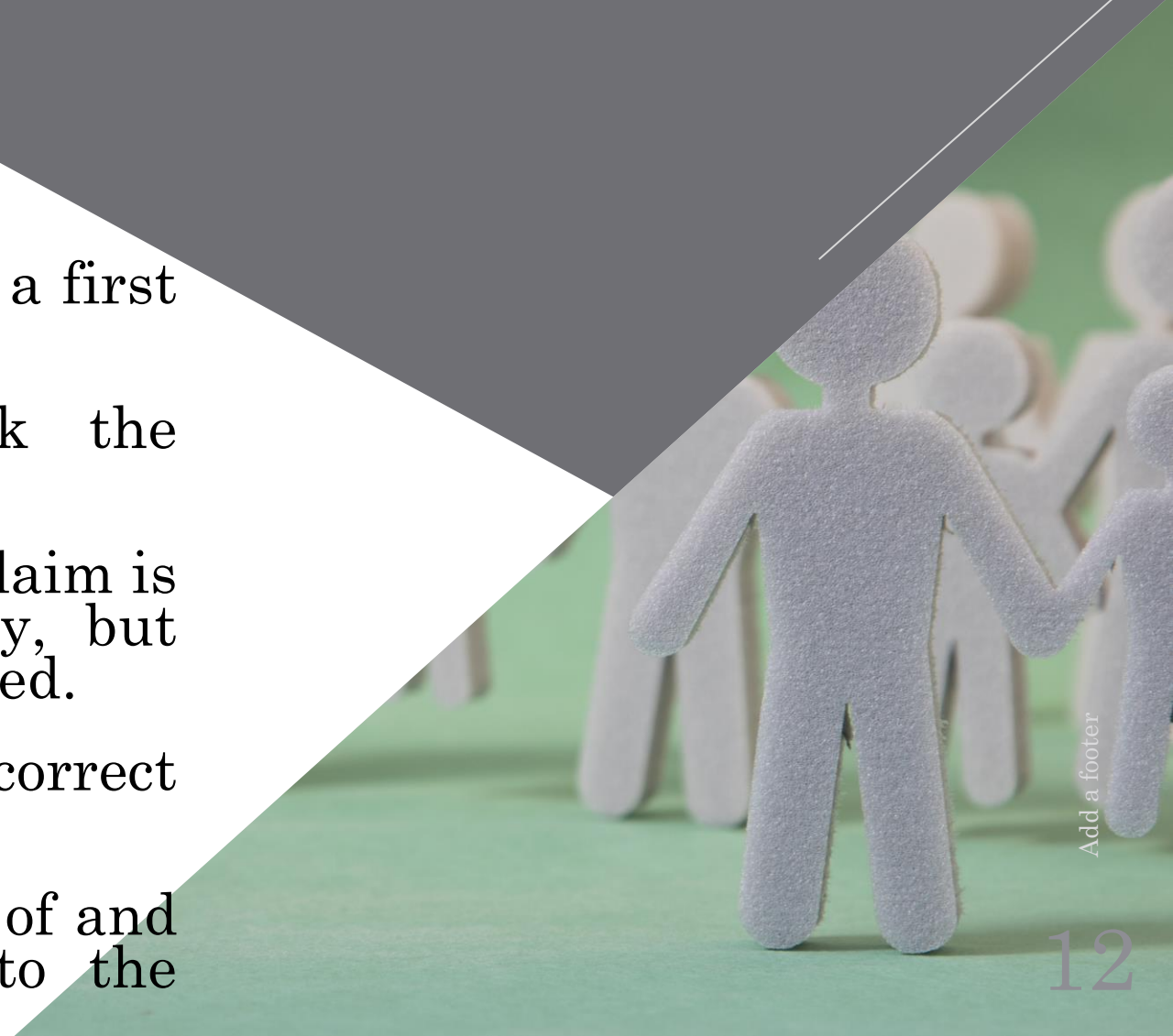
- GEICO's insured, Harvey, was involved in a fatal car crash. The GEICO policy had limits of $100,000. After the claims adjuster for GEICO impeded the estate's attorney's attempts to obtain a recorded statement from Harvey, which would assist the attorney in determining the extent of Harvey's assets, employment and insurance, the plaintiff filed suit and obtain an $8 million judgement.
- Harvey filed a bad faith claim against GEICO based on the judgment. At trial, the estate's lawyer testified that had he been in possession of Harvey's financial information, which would have revealed Harvey had minimal assets, he would not have filed suit and would have advised the insured to accept the policy limits.
- GEICO's expert conceded that the request for information was reasonable and necessary for the estate's attorney to properly advise his client regarding settlement.
- After GEICO's motion for a directed verdict was denied, a jury found that GEICO acted in bad faith and the trial court entered a judgment in favor of Harvey for $9.2 million.
- The Fourth DCA reversed, concluding that "the evidence [against GEICO] was insufficient as a matter of law to show that [GEICO] acted in bad faith." The appellate court stated that while GEICO may have acted negligently, "negligence alone is insufficient to prove bad faith."

Harvey v. GEICO Gen. Ins. Co., 259 So. 3d 1 (Fla. 2018)

- The Florida Supreme Court reversed the Fourth DCA and reaffirmed the bad faith principles set forth in *Boston Old Colony* and *Berges*. The Florida Supreme Court noted that the good faith duties listed in *Boston Old Colony* are "not a mere checklist. An insurer is not absolved of liability simply because it advises its insured of settlement opportunities, the probable outcome of the litigation, and the possibility of an excess judgment.
- The Florida Supreme Court discussed existing bad faith precedent in Florida and then held that, "the critical inquiry in a bad faith [case] is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment." The court then criticized Federal court rulings stating that they did not always "hit the mark," and that an insurer must not only refrain from acting in its own interests in handling claims, but it must also act with "care and diligence."

Civil Remedy Notice ("CRN")

- A CRN is a condition precedent to filing a first party bad faith claim in Florida.
- Insurers have the ability to attack the sufficiency of a CRN in court.
- Insurers will like wait until a bad faith claim is filed to raise the issue of insufficiency, but technical objections may be deemed waived.
- It is critically important that CRNs are correct and specific.
- Equally important is the understanding of and response to the insurer's challenges to the CRN.



Filing a Civil Remedy Notice

- A CRN should include citations to pertinent policy language and explain in detail the history and facts of the claim and the insurer's alleged bad faith violations.
- It is not technically required but good practice to include a demand amount in the CRN. The demand in the CRN should be a "cure amount" that fairly represents the damages.

Pin-Pon Corp. v. Landmark Am. Ins. Co.

- This was a first-party bad faith case arising from Hurricane Frances
- Insured alleged violations of Fla. Stat. §624.155(1)(b)(1): failure to settle
- Insurer argued failure to comply with Florida Stat. §624.155
- Insured filed three CRNs with errors:
  - The first CRN listed an Insured and Complainant other than Plaintiff (Estefan Enterprises Inc., not Pin-Pon Company). It also did not list an email address for the Complainant, or an address of the Insurer.
  - Second CRN listed the same email address for both the Complainant and the Attorney, and did not include the address of the insurer.
  - Third CRN listed the incorrect address for the Complainant and did not include the address of the Insurer.

Pin-Pon Corp. v. Landmark Am. Ins. Co. (cont.)

- **The U.S. Southern District Court initially dismissed Pin-Pon's claim and found that Section 624.155 must be strictly construed.**
- **Pin-Pon moved for reconsideration and the court reversed course.**
- **On reconsideration, Pin-Pon argued that: Fla. Stat. Section 624.155 is remedial in nature and therefore entitled to liberal, rather than strict, construction; PinPon substantially complied with the statute and satisfied its purpose; Landmark waived any technical defects in the CRNs by substantially responding to the notices; and the defective information is optional and thus not required by statute.**
- **The Court agreed with Pinn-Pon and reiterated that Landmark waived any technical defects by substantially responding to the CRNs.**

Bay v. United Services Automobile Association, No.4D19-3332, 2020 WL 6154256 (Fla. 4th DCA Oct. 21, 2020)

- The CRN misidentified the insured as "USAA Casualty Insurance Company," instead of by its correct name "United States Automobile Association," or "USAA."
- USAA disputed the insured's claim on its merits but never argued the CRN was deficient for failure to properly identify the insured.
- The Fourth District Court of Appeal held USAA waived the argument by not raising it in its response to the CRN.

Julien v. United Property & Casualty Insurance Company, No. 4D19-2763 (Fla. 4th DCA Mar. 3, 2021)

- Relied on and cited to recent Order in *Pin-Pon*
- Julien's civil remedy notice listed every statutory provision and every policy provision available to him as the insured. For example, Julien included fourteen statutory provisions followed by twenty-one sections of the Florida Administrative Code.
- The Court determined the insured's failure to "state with specificity" the applicable statutes and policy language that the insurer allegedly violated rendered the CRN defective
- Listing every statutory provision, every policy provision available, and reference to the entire policy was deemed to be insufficient to comply with the requirements of §624.155(3)(b).

Gooden v. People's Tr. Ins. Co., 47 Fla. L. Weekly D749 (Fla. 4th DCA Mar. 30, 2022)

- Insureds brought an action against their homeowners insurer to recover for bad faith.
- Gooden's filed a CRN and alleged that People's Trust acted in bad faith by violating nine provisions of sections 624.155 and 626.9541, Florida Statutes (2018). To cure, Gooden stated that People's Trust must "tender all insurance proceeds owed to [her], as set forth in the Appraisal Award, for damages to [her] home, including interest, for the loss described herein."
- People's Trust did not tender and instead responded to Gooden's demand, raising multiple issues and defenses. Gooden filed suit.
- The circuit court dismissed the suit citing *Julien v. United Property & Casualty Insurance Co*, stating that Gooden failed to meet section 624.155's specificity requirements.

Gooden v. People's Tr. Ins. Co., 47 Fla. L. Weekly D749 (Fla. 4th DCA Mar. 30, 2022) (cont.)

- The Fourth DCA reversed and distinguished *Julien v. United Property & Casualty Insurance Co.,* stating, "[i]n Julien, the civil remedy notice 'listed nearly all policy sections and cited thirty-five statutory provisions.' 311 So. 3d at 879. Gooden's civil remedy notice cited nine statutory provisions and a single policy provision, listing only the statutory and policy provisions relevant to his allegations. While People's Trust raises multiple arguments in opposition to the merits of Gooden's bad-faith claim, those arguments are best left for consideration on a motion for summary judgment."

- The Fourth DCA held that Gooden's notice facially satisfied section 624.155's specificity requirements.

FR

Recent Developments:

Consent Judgments v. Litigated Judgments

Consent Judgments

Once an insurer denies coverage for a claim, the insured has the option of taking control of the case and settling with the claimant. The insured and the claimant may then enter into an agreement whereby the claimant obtains a negotiated consent judgment against the insured; the insured assigns its rights under the policy to the claimant; and the claimant releases the insured from any liability (through a covenant not to execute on the consent judgment or otherwise attempt to collect from the insured) regardless of whether the claimant successfully recovers anything from the insurer. This settlement device is known as a "Coblentz agreement" after the Fifth Circuit Court of Appeals' decision in *Coblentz v. Am. Sur. Co. of New York*, 416 F.2d 1059 (5th Cir. 1969).

Cawthorn v. Auto-Owners Ins. Co., No. 6:16-cv-2240-Orl-28GJK (M.D. Fla. April 27, 2018)

- Cawthorn suffered a severe spinal cord injury in an auto accident with Auto-Owners' insured. Auto-Owners failed to make any effort to contact Mr. Cawthorn or his family, despite knowledge of Mr. Cawthorn's injuries.

- Two months after the accident, when Mr. Cawthorn's father contacted Auto-Owners to discuss his son's claim, Auto-Owners made no settlement offer and told Mr. Cawthorn not to hire an attorney. Auto-Owners waited another two months before offering Mr. Cawthorn the policy limits.

- Mr. Cawthorn sued the insured driver, who was represented by Auto-Owners throughout all aspects of the underlying litigation. The parties entered into a consent judgment for $30 million.

Cawthorn v. Auto-Owners Ins. Co., (cont.)

- The Court attacked the entire idea of a consent judgment versus a litigated judgment.
- The Eleventh Circuit Court of Appeal affirmed the trial court's summary judgment order in Auto-Owners' favor, holding that the insureds were not exposed to an excess judgment. In doing so the Court found that the consent judgment was not an "excess judgment or a functional equivalent."
- The Court essentially held that "excess judgment," for the purposes of proving the causation element of a bad-faith claim, can only arise from a trial and resulting verdict.

McNamara v. Gov't Employees Ins. Co., No. 20-13251 (11th Cir. 2021)

- The Court rejected *Cawthorn* and held, that a final judgment that exceeds all available liability policy limits, whether from a jury verdict or a consent agreement, constitutes an "excess judgment" that can be used to satisfy the causation requirement of an insurer bad faith claim in Florida.

- The case involved a collision that caused claimant's catastrophic injuries. The insureds' auto policy provided limits of $100,000. The claimant sued the insureds for negligence, and the insurer agreed to defend the case. The claimant served settlement proposals for $5,000,000. The proposals were conditioned upon entry of a stipulated judgment against the insureds, and the insurer's agreement not to assert that the settlement breached the policy. The insurer ultimately agreed not to deny coverage for breach of the policy, and a consent judgment for $5,000,000 was entered against the insured.

McNamara v. Gov't Employees Ins. Co., No. 20-13251 (11th Cir. 2021) (cont.)

- The claimant then sued the insurer for bad faith seeking to collect the excess judgment, alleging that the insurer's failure to settle the claim within the $100,000 limits was in bad faith. The district court granted summary judgment for the insurer. The district court followed *Cawthorne* and reasoned that the insurer's alleged failure to settle could not have caused a stipulated excess judgment to be entered against the insured, and therefore was not the "functional equivalent" of an excess judgment under Florida law.

- On appeal, the Eleventh Circuit noted that the Florida Supreme Court had previously held in *Perera v. United States Fidelity & Guaranty Co.*, 35 So. 3d 893 (Fla. 2010) that an excess judgment can be presented in the form of not only a verdict rendered after a trial, but also in the form of a Cunningham agreement, a Coblentz agreement or a claim by an excess carrier against a primary carrier based on failure to settle.

McNamara v. Gov't Employees Ins. Co., No. 20-13251 (11th Cir. 2021) (cont.)

- The Court then turned to its prior decision in *Cawthorn*, which was expressly relied upon by the District Court, and stressed that, as an unpublished decision, *Cawthorn* is not binding precedent. The Court expressly held that *Cawthorn* incorrectly analyzed Florida bad faith law. The Eleventh Circuit reversed the district court, holding that a consent judgment is the "functional equivalent" of an excess judgment that permits the insured to proceed against the insurer for bad faith.

FR

The Future of Bad Faith

Where are we headed?

Thank You.

Stephen A. Marino, Jr., Esq.

305 577 3996

smarino@vpm-legal.com

www.vpm-legal.com