Florida's Insurance Settlement Law – An Incentive to Sue

Present Situation

In Florida, individual insureds can sue their insurer if they believe the insurer acted fraudulently or in "bad faith" in defending or settling a claim.[1] This duty stems from sound public policy favoring the expedient handling of claims, and the duty to settle claims in good faith.[2] However, the right to sue is not limited to an insured. In fact, Florida law allows third parties to sue insurers if they believe the company acted in "bad faith" while settling a third party's claim against an insured individual.[3]

Currently, an insurer is presumed to have acted in bad faith if it does not respond within sixty days to a notice of intent to sue.[4] This is an insufficient time period for an insurance company to thoroughly investigate and pay out claims. Plaintiffs' attorneys are also able to place shorter, more arbitrary, time limits on insurance companies.[5] "Typically, a trial lawyer will write to an insurance company demanding payment…[and] [f]ailure to settle can become the basis for an entirely different lawsuit, based on the alleged refusal to act in good faith—and trial lawyers hold seminars on how to exploit the insurance settlement law in order to force an expensive settlement."[6] Further, "[m]ore often than not, such a…notice [of intent to sue for bad faith] is served knowing full well that the insurer will not be in a position to evaluate the loss and claim and make a correct decision upon the claim within the sixty days…Additionally, the subject matter of the...[n]otices are deliberately overbroad and generic, rarely stating with specificity the actual facts of the specific subject claim, and almost never stating with specificity the exact 'cure' or 'remedy' sought."[7] Sometimes, plaintiffs' attorneys will even purposely fail to send notice to the insurance adjuster, and instead, send it to the insurer's corporate home office "in the hope that it gets 'lost' in the bureaucratic mailroom and, therefore, before anyone realizes its significance, the statutorily prescribed 60 day cure period expires, and a rebuttable presumption that the insurer has committed 'bad-faith' is established."[8]

Failure of an insured or third party to give the insurer details of the claim and the remedy demanded is usually an effort to thwart an insurer's good faith attempts at investigating and settling claims, and pave the way for filing a bad faith lawsuit. Presently, there is no duty of an insured to cooperate with an

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1 *Fla. Stat.* § 624.155.
2 *Fla. Stat.* § 624.155.
3 *Fla. Stat.* § 624.155 (1); *Thompson v. Commercial Union Ins. Co. of New York*, 250 So.2d 259, 160 (Fla. 1971).
4 *XL Specialty Ins. Co. v. Skystream, Inc.*, 988 So.2d 96, 99 (Fla. 3d DCA 2008) citing *Imhof v. Nationwide Mut. Ins. Co.*, 643 So.2d 617, 619 (Fla. 1994).
5 *Berges v. Infinity Insurance Company*,896 So.2d 665, 687 (Fla. 2005) (Justice J. Wells, dissenting).
6 The Florida Times-Union, *Legislature: Lacking Faith*, http://www.jacksonville.com/tu-online/stories/062203/opi_12845881.shtml, June 21, 2003.
7 John J. Pappas, *A State in Crisis*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 20 #20, p. 33 (February 20, 2007), http://www.butlerpappas.com/showarticle.aspx?Ref=list&Whow=1347.
8 John J. Pappas, *Florida "Civil Remedy Statute" § 624.155*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 18 #12 (October 19, 2004), http://www.butlerpappas.com/showarticle.aspx?Ref=list&Show=465.

insurance company to arrive at a settlement, allowing insureds and their attorneys to file bad faith lawsuits and obtain settlements far in excess of the insurance for which the insured has paid premiums.

This ability derives from a third party's "right to sue for monetary awards beyond the coverage of the policy for damage resulting from a breach of duty relating to 'first-party coverage.'"[9] These damages are coined "extra-contractual damages."[10] Justice Wells criticized this "strategy of setting artificial deadlines," stating that the "goal…is to convert a policy purchased by the insured which has low limits of insurance into unlimited insurance coverage."[11] Allowing insureds to recover in excess of the insurance they have procured ignores the natural consequences of such a practice. As Justice Wells continued:

> "Liability insurance is a pool of money. The pool is filled by premiums and drained by claims. When an insured purchases and pays premiums on $20,000 of insurance but the insurer pays $2.5 million in claims, someone has to fill up the pool. Initially, this amount may come out of an insurer's profits, but eventually the someones are the other insureds, whose premiums are increased."

The incentive for plaintiffs' attorneys to frustrate the settlement process and file a bad faith claim for failure to settle must be minimized in order to truly effect a solution to the problem. This conduct is inexcusable because not only does it inhibit the settlement process, but it also allows an attorney to use an insured as a tool for recovering exorbitant amounts of attorneys' fees. One leading insurance defense attorney detailed his experiences with such plaintiffs' lawyers:[12]

> "Illustrative of the unintended consequences of the [insurance settlement] statute is an early litigation mediation that I attended. The first-party property limits were $10,000. My client pre-suit had already paid the insured $9,910. Wanting to avoid what would amount to substantial litigation costs and defense of the so-called 'bad faith' claim, my client offered by pay the insured an *additional $30,000, and their attorney fees*, the amount of which was to be determined by the court. The insureds and their counsel admitted there were no actual 'bad-faith damages,' and, even if there were, the $30,000 figure more than compensated them for any such damages. Nevertheless they rejected the offer. They candidly explained, without so much as a blush, if they continued this litigation for another two years, they would have invested many hours of attorney time in the case, at approximately $400 per hour, more than likely to be enhanced with a multiplier of at least 2.0, which according to them, would render them an attorney fee award in excess of $500,000. Thus, they argued that the carrier should pay them now, $530,000 to settle all claims. Our client, an intelligent and sophisticated man, seemed genuinely confused, if not startled. Believing that the other side was acting in good faith, he sincerely

9 *Progressive Exp. Ins. Co. v. Scoma*, 975 So.2d 461, 466 (Fla. 2d DCA 2007).
10 *Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins.*, 945 So.2d 1216, 1222 (Fla. 2006).
11 *Berges*, 896 So.2d at 685(Justice J. Wells, dissenting).
12 John J. Pappas, *A State in Crisis*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 20 #20, p. 33 (February 20, 2007), http://www.butlerpappas.com/showarticle.aspx?Ref=list&Whow=1347.

> asked, 'But, you have yet to incur these attorney fees and costs?' To which, the other side, again with no hint of shame, stated, 'But we will.' Clearly neither the Florida Legislature nor the Florida courts ever intended such consequences."

Lawyers should be forbidden from obstructing good faith settlement attempts in order to recover excessive attorneys' fees.[13] Unfortunately, this is a familiar trap for insurers, and it only serves to raise insurance premiums for every other insured in the state.

Plaintiffs' attorneys are encouraged to file bad faith lawsuits because of the relatively easy standard of proof they need to meet in order to recover from an insurer. An insured's attorney must only convince a jury that the totality of the circumstances demonstrates that the insurer failed to settle a claim without due regard for the insured's interests.[14] However, it is unclear what that "standard" really means, as the law lacks sound guidelines. While it is undisputed that insurers should always behave in a manner that is fair and reasonable to both parties, failure to meet an arbitrary deadline set by the insured's attorney should not amount to a finding of bad faith, without regard for the fairness of the timeline. Highlighting these problems, Justice Cantero wrote that:[15]

> "Permitting an insured plaintiff's chosen timetable for settlement to govern the bad-faith inquiry would promote the customary manufacturing of bad-faith claims, especially in cases where an insured of meager means is covered by a policy of insurance which could finance only a fraction of the damages in a serious personal injury case. Indeed, insurers would be bombarded with settlement offers imposing arbitrary deadlines and would be encouraged to prematurely settle their insureds' claims at the earliest possible opportunity in contravention of their contractual right and obligation of thorough investigation."

Even when insurers have endeavored to comply with an insured's arbitrary deadlines, an insured can still refuse to release the insurer from further claims against the subject policy. Usually, an insurer will ask an insured to sign such a release in recognition that the policy limits have been exhausted. Unfortunately, it is common practice for insureds' attorneys to demand payment of the policy limits, and then advise the insured to file a claim for bad faith instead of signing the release.[16] One federal court that was confronted with a bad faith claim reluctantly noted that while the insurer had acted in *good* faith, the court was still required to find *bad* faith because when the check was timely delivered with a release, the plaintiff's attorney instructed the insured to refuse to sign the release.[17] The court wrote:

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13 *Berges*, 896 So.2d at 685 (Justice J. Wells, dissenting) (In the case of a girl who was killed in an automobile accident, her father was able to recover $2.5 million for himself and his attorneys off of a $20,000 insurance policy, because the insurance company did not meet his arbitrary deadline, as a direct consequence of his lack of legal authority to accept payment for his daughter's estate during his stated timeline).

14 *Berges*, 896 So.2d at 687 (Justice R. Cantero, dissenting).

15 *Berges*, 896 So.2d at 694 (Justice R. Cantero, dissenting).

16 *Chen family snubs $1 million settlement*, Tallahassee Democrat, October 3, 2008; *see also Maldonado v. First Liberty Insurance Corporation*, 546 F.Supp.2d 1347, 1358-59 (S.D.Fla. 2008).

17 *Allstate Insurance Company v. Regar*, 942 So.2d 969, 973-74 (Fla. 2d DCA 2006).

> "We are not unsympathetic to [the insurer's] plight in this case. The number of bad faith cases filed in the courts appears to be exponentially increasing, but the increase does not appear to be directly linked to the actions of the insurers. Instead, plaintiffs' attorneys are filing bad faith actions over issues that it seems could be simply resolved, like the wording of the release in this case. These attorneys are perhaps motivated by the promise of fees under section 627.428 upon prevailing in these actions. Certainly this case has mushroomed into over $200,000 in attorney's fees plus an as-yet-undetermined amount of appellate attorney's fees from an initial settlement for meager policy limits of $25,000…While we are not certain that outcomes like today's were contemplated at the time of the statute's enactment, that issue is for resolution by the [L]egislature."[18]

Allowing insureds and attorneys to recover amounts significantly higher than which was insured for is, as Justice Wells wrote, "greatly detrimental to Florida's liability insurance consumers because of the increases in their insurance costs"[19] necessary to cover the rising costs of settling the oft-fabricated bad faith claims.

Proposed Changes

Insureds Right to Recovery

In order to combat rising insurance costs and the abusive tactics used not only by insureds, but by unrelated third parties, section 624.155, F.S. should be amended to provide that the civil remedy for bad faith is available to insureds instead of "any person."

Additionally, an insurer should not have to pay policy limits to multiple third parties; or in other words, an insurer should not be forced to pay $30,000 each to three injured parties when there was only one insurance policy for $30,000. Instead, each injured party should recover pro rata for the extent of their injuries, up to the policy limits.

Duty of Cooperation & Good Faith

To curb hostile pre-litigation tactics and encourage constructive and efficient settlements, both the insured and the insurer should have a duty to cooperate. When an insurer fails in this duty of good faith and cooperation, an insured is able to sue for bad faith. Insurers should have a corresponding defense to bad faith actions when the insured has failed to cooperate in responding to the good faith settlement attempts of the insurer.

Reasonable Time Frames for Settlement

In order to prevent the manufacture of arbitrary timetables by trial attorneys looking to recover windfall profits, the Legislature should implement a fair timetable for both parties, and require that a person

[18] *Id.*
[19] *Berges*, 896 So.2d at 685 (Justice J. Wells, dissenting).

bringing an action for bad faith notify the insurer and the department in writing at least 90 days prior to commencement of the suit. Currently, such a condition must be carried out at least 60 days prior to commencement of the action. The extension is intended to allow the insurance company a sufficient opportunity to cure any violation that led the insured to pursue the action.

In addition to the current provisions in statute regarding the content of the notice, the Legislature should require that the notice to the insurer and the department specify the amount in dispute and provide the specific facts and circumstances giving rise to the violation.

Further, where an insured seeks aggregate compensation in excess of the policy limits, the insurer should not be liable for extra-contractual damages for failure to pay its policy limits if the insurer makes a timely written offer of its policy limits to all known claimants in exchange for release of all claims against the insured, or if the insurer tenders such limits to the court for apportionment to the claimants.

When an insurer makes a good faith attempt at settlement by tendering policy limits to the insured, the insurer should be entitled to a release from duties imposed by the insurance policy if the claimant accepts the tender offer. For example, if an insurer has timely paid an insured $30,000 for the insured's $30,000 insurance policy, the insured should release the insurer from any additional claims against the already-exhausted policy.

Evidentiary Standard for Proof of Bad Faith

An insurer does not act in bad faith, and thus should not be found to act in bad faith, when it fails to meet an arbitrary deadline.[20] Therefore, the standard of proof should not be so easy that an insured need only show that the insurer failed to meet his/her desired deadline, no matter how unreasonable. Instead, there exists a real need to preempt other causes of action for extra-contractual damages for an insured's failure to settle an insurance contract when an insurer has made a timely offer of the policy limits.

A sane standard of proof must also be implemented. A showing of clear and convincing evidence of an insurer's unreasonable refusal to settle should be substituted for the low bar currently set for plaintiffs.[21]

Moving Forward

Section 624.155, F.S. was implemented to require insurers to deal fairly and responsibly with their insureds. Over the years, it has transformed into a mechanism for harassing good faith insurers and obstructing settlement offers in order to recover windfall profits in excess of the amounts for which an insured has paid premiums. These tactics have handsomely rewarded plaintiffs' attorneys who have adeptly maneuvered the statutory framework to hinder settlement negotiations, detrimentally affecting good faith insureds and insurers across the state. The financial strain of unfounded bad faith lawsuits to

20 *Berges*, 896 So.2d at 692 (Justice R. Cantero, dissenting) *citing DeLaune v. Liberty Mut. Ins. Co.*, 314 So.2d 601, 603 (Fla. 4th DCA 1975).
21 *See Note 13, supra*.

other insured Floridians has been nicknamed by some as the "tort tax,"[22] reiterating the cries of many to reform this broken insurance settlement system.[23] As Justice Wells stated:

> "I conclude what is needed are express guidelines which include set time periods in which all insurers must presumptively make decisions on claims and issue payments…There is also a need for defined penalties for failure to meet these time requirements rather than limitless insurance…[T]here appears to be no alternative but that the guidelines will have to be mandated by statute."[24]

The consequences of inaction are clear: increased premiums for insureds across the state to pick up the tabs for abusive litigation tactics and excessive attorneys' fees. Reform is needed now.

[22] The Florida Times-Union, *Legislature: Reform at Risk*, http://www.jacksonville.com/tu-online/stories/052103/opi_12591679.shtml, May 21, 2003.
[23] *Berges*, 896 So.2d at 685-94 (Justice R. Cantero & Justice J. Wells, dissenting); Insurance Journal, *AIA Reports Florida's Worsening Legal Environment Calls for Legislative Action on Tort Reform*, http://www.insurancejournal.com/news/southeast/2005/03/08/52384.htm?print=1; Florida Coalition for Legal Reform, *What Needs to Be Done*, www.flalegalreform/com/done.html.
[24] *Berges*, 896 So.2d at 686-87 (Justice J. Wells, dissenting).