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Third-Party Bad Faith

- In Florida, an individual can sue an insurer when he or she believes the insurer acted in "bad faith" in defending or settling a claim. A third-party bad faith claim typically arises when an insurer fails to settle an injured party's claim against the insured within the insurance policy limits, thereby exposing the insured to a judgment for damages in excess of his or her policy limits. Third-party bad faith has long been part of Florida's common law. *See Auto. Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938).

- While an insurer's negligence is relevant to the question of bad faith, ***negligence alone does not amount to bad faith.*** *See Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980).

- In *State Farm Mutual Automobile Insurance Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995), the Florida Supreme Court clarified that the wholly subjective "totality of the circumstances" standard is to be applied in determining whether an insurer acted in bad faith.

    - In *Laforet* the insurer contended that the "fairly debatable" standard should apply to determine if an insurer engaged in bad faith. Under this standard, a claim for bad faith can succeed only if the plaintiff can show the absence of a reasonable basis for denying the claim. *Id.* at 62.

    - The Court rejected this as the applicable standard. In doing so, the Court looked to section 624.155, Florida Statutes, which was initially enacted to create a first-party bad faith cause of action. Under section 624.155, an insurer has acted in bad faith if it has not attempted in good faith to settle the claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for the insured's interest.

    - The Court said that section 624.155 applies to both first- and third-party bad faith claims and held that a totality of the circumstances standard similar to the statutory standard should apply to common-law third-party bad faith claims. Under this nebulous, vague standard, a court must consider five factors in evaluating whether an insurer acted in bad faith: (1) whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to

coverage; and (5) efforts made by the insurer to settle the liability claim in the face of the coverage dispute. *Id.* at 63.

- Despite the Florida Supreme Court's past assurances that an insurer's negligence does not amount to bad faith, ordinary negligence can be bad faith under the totality of the circumstances standard, as illustrated by the following cases following *Laforet*:

    - In *Berges v. Infinity Insurance Co.*, 896 So. 2d 665 (Fla. 2005), the third-party claimant demanded that the insurer settle the claim for the $20,000 policy limits within 25 days of the demand letter. Although the insurer verbally accepted the offer within the deadline, the insurer's written acceptance did not make it in time due to a mistyped zip code on the envelope. The claimant revoked his offer and a jury delivered a bad faith verdict of almost $1.9 million. The Court held that a jury could decide the insurer acted in bad faith, emphasizing that under the totality of the circumstances standard, the focus is on the insurer's entire conduct in the handling of the claim. In dissent, Justice Wells wrote to express his concerns about the lack of a logical, objective standard for bad faith, which had resulted in strategies employed by plaintiffs to manufacture bad faith claims and had ultimately led to "limitless, court-created insurance." *Id.* at 686 (Wells, J., dissenting).

    - In *United Automobile Insurance Co. v. Levine*, 87 So. 3d 782 (Fla. 3d DCA 2011), the insurer tendered the policy limits to an injured third party's estate prior to receiving any demand or claim, along with a general release in favor of the insured. Acceptance of the policy limits, however, was not conditioned on signing the release. Two months later, without explanation, the estate returned the check. Later the estate complained that the release would preclude the estate from bringing other claims. On appeal, the Third DCA upheld the $5.2 million bad faith damages award against the insurer, stating that until there is a substantial change in Florida's bad faith law, juries would be required to decide bad faith in these circumstances.

    - In *Goheagan v. American Vehicle Insurance Co.*, 107 So. 3d 433 (Fla. 4th DCA 2011), the injured party was in a coma. The tortfeasor's insurer immediately tried to contact the injured party's next of kin, her mother, and was told the mother had retained an attorney. Despite numerous attempts to reach the mother or her attorney, the mother rebuffed the insurer's communications and refused to give the insurer the name of the attorney. The Fourth DCA held, however, that this claim survived summary judgment under the totality of the circumstances standard because a jury could find the insurer failed to proactively settle the case in good faith.

    - More recently, in *Harvey v. GEICO General Insurance Co.*, 259 So. 3d 1 (Fla. 2018), the insurer immediately investigated the claim, quickly advised the insured of the possibility of an excess judgment and the right to retain an attorney, and unconditionally tendered the policy limits within nine days of the accident. But the insurer did not immediately tell the insured that the claimant had requested a statement of financial assets nor did the insurer immediately provide the statement to the injured party's estate. In upholding the $8.47 million bad faith verdict, the Florida Supreme Court emphasized that the jury was entitled to find that the insurer still acted in bad faith and that nothing "can be read to suggest that an insurer's

obligations end by tendering the policy limits." *Id.* at 10. In dissent, Chief Justice Canady said that Florida law does not demand perfection by insurers and reminded the majority that even "negligent claims handling does not equate to bad faith." *Id.* at 13 (Canady, C.J., dissenting). Echoing Justice Wells' dissent in *Berges*, Chief Justice Canady advised that the Court should not merely say bad faith is always a jury question and instead set forth clear, logical, and objective rules for bad faith—otherwise courts will continue to sanction awards of limitless insurance.

- As a consequence of *Laforet* and the numerous decisions interpreting that nebulous totality of the circumstances standard, Florida's standard jury instructions on bad faith invite the jury to review all the circumstances and subjectively decide whether the insurer's conduct amounts to bad faith—even if that conduct is only negligent:

  Civil Jury Instruction 404.4 Insurer's Bad Faith: Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interests.

- The current totality of the circumstances standard has led to widespread abuse of the bad faith law by plaintiffs' counsel and punishes insurers for negligent—not bad faith—conduct. **The Florida Legislature should take action to raise this standard and require that, to establish bad faith, it must be that the insurer acted with reckless disregard for the rights of an insured or a beneficiary of the insurance policy (including an injured third party).**