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Recent Statutory Changes in Florida Insurance Law: Bad Faith - Part Two

Joseph P. Thacker, Of Counsel | jthacker@shumaker.com | 419.270.4949

This is the second in a series of four articles analyzing recent changes in Florida law governing bad-faith claims in insurance coverage litigation. The changes were made in Senate Bill 2A and House Bill 837, which became law in December 2022 and March 2023, respectively (the Amendments).

This article focuses on new subsection (5) in Section 624.155, which applies to all bad-faith claims, both statutory and common law. The new subsection deals with two general topics. Subsection 624.155(5)(a) sets forth a definition, of types, of "bad faith." Subsection 624.155(5)(b) deals with the conduct of insureds, claimants, and their representatives.

A. Pre-Amendment Case Law

To understand new subsection 624.155(5), it is necessary to understand the law on these topics as it existed prior to the Amendment.

1. Standard for bad-faith actions.

Whether an insurer acted in bad faith is, in most cases, a question of fact determined by a jury.[1] The standard "bad-faith" jury instruction reads:

> 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 insured and with due regard for their interests.[2]

This standard has been applied in both statutory and common law claims under both liability and property policies.[3] The jury instruction is based on Fla. Stat. 624.155(1)(b)(1), which makes an insurer liable for extra-contractual damages for:

> Not attempting in good faith to settle 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 her or his interests.

In spite of this relatively straightforward "fairly and honestly" standard, the definition of bad faith has been the subject of some controversy. One dissenting justice has argued for a different standard altogether under which bad-faith liability would be imposed only in "egregious circumstances."[4]

Another dispute centers on whether negligent conduct by an insurer can amount to bad faith. The Supreme Court has stated that "negligence is not the standard"[5] and the "standard for determining liability in an excess judgment case is bad faith rather than negligence."[6] But in applying the standard, the Court has used languagethat sounds very similar to the "reasonable person" standard that is the foundation of negligence. For instance, it has characterized the standard as "failing to use the same degree of care and diligence as a person of ordinary care and prudence should exercise" and failing to settle "where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so."[7] This language has occasionally been added to jury instructions.[8]

One dissenting justice has criticized this as "a negligence standard in all but name."[9]

2. The behavior of insureds, claimants, and their representatives.

The second topic of new subsection 624.155(5) is the behavior of insureds, claimants, and their representatives. The pre-Amendment case law held that the focus in a bad-faith action is on whether the insurer fulfilled its obligations to its insured, not on actions of insured, the injured claimant, or their representatives.[10] In *Harvey*, the Court explained:

> To take the [lower court]'s reasoning to its logical conclusion, an insurer could argue that regardless of what evidence may be presented in support of the insured's bad-faith claim against the insurer, so long as the insurer can put forth any evidence that the insured acted imperfectly during the claims process, the insurer could be absolved of bad faith. As [the insured] argues, this would essentially create a contributory negligence defense for insurers in bad-faith cases where concurring and intervening causes are not at issue. We decline to create such a defense that is so inconsistent with our well-established bad-faith jurisprudence, which places the focus on the actions on the insurer—not the insured.[11]

That said, "the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard,"[12] and evidence of the behavior of insureds, claimants, and their representatives is routinely admitted in bad-faith actions under the "totality of the circumstances" standard. As the Eleventh Circuit recently stated:

> [W]e don't understand that principle [focus is on the insurer, not the insured or claimant] to mean the actions of a claimant — or a claimant's attorney — are irrelevant. In a bad-faith action there's a difference between focusing on a claimant's actions, which would be improper, and factoring a claimant's actions into the totality of the circumstances analysis, which is not improper.[13]

Evidence of and focusing on a claimant's actions has, at times, proven fatal to the claim of bad faith. For instance, in *Boston Old Colony*, the Supreme Court upheld the grant of a directed verdict against a policyholder when "the insurer was ready to settle, expressed its willingness to settle, and only because of the explicit request of its own insured did not settle."[14] And in *Pelaez v. GEICO*, the Eleventh Circuit upheld summary judgment in the insurer's favor, holding that the failure to settle resulted from the actions of the claimant and the claimant's attorney, not the actions of the insurer.[15]

B. The Changes Wrought by New Subsection 624.155(5)

1. Standard for bad-faith actions.

New provision 624.155(5)(a) deals with the standard for determining bad faith in a very odd way. It states, "[m]ere negligence alone is insufficient to constitute bad faith." This new "standard" merely parrots the Supreme Court's "negligence is not the standard" language without clarification.

What is clear, however, is that the Legislature chose not to limit bad faith to "egregious circumstances" and left untouched both the "acted fairly and honestly under all the circumstances" test laid out in 624.155(b)(1). The Legislature also left untouched the judicial application of that standard in cases where the insurer "fail[ed] to use the same degree of care and diligence as a person of ordinary care and prudence should exercise" and failed to settle "where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so."[16]

When construing statutes, courts presume the Legislature knew existing law when the statute was enacted.[17] In re-enacting a statute, the Legislature is presumed to be aware of constructions placed upon it by the Court.[18] Where a provision has received a definite judicial construction, the subsequent re-enactment of that provision by the legislature amounts to legislative approval of the judicial construction.[19]

Here, the Legislature re-enacted, without change, the basic civil remedy for bad faith set forth in Fla. St. 624.155(1). That section sets forth the "fairly and honestly" standard. Prior to the Amendments, the language in 624.155(1) and the jury instruction were subject to "a definite judicial construction" that measured "bad faith" by "a reasonably prudent person" and "person of ordinary care and prudence" standard. New section (5)(a) appears to be Legislative approval of that standard.

2. The behavior of insureds, claimants and their representatives

New provision 624.155(5)(b) deals with the behavior of insureds, claimants, and their representatives. Paragraph 624.155(5)(b) states:

1. The insured, claimant, and representative of the insured or claimant have a duty to act in good faith in furnishing information regarding the claim, in making demands of the insurer, in setting deadlines, and in attempting to settle the claim. This duty does not create a separate cause of action, but may only be considered pursuant to subparagraph two.

2. In any action for bad faith against an insurer, the trier of fact may consider whether the insured, claimant, or representative of the insured or claimant did not act in good faith pursuant to this paragraph, in which case the trier of fact may reasonably reduce the amount of damages awarded against the insurer.

The duty of good faith imposed on the insured, claimant, and their representatives set forth in Subsection 624.155(5)(b)(1) is new under Florida law. Subsection 624.155(5)(b)(2) overrides, or at least limits, prior case law holding that "the focus in a bad-faith case is not on the actions of the claimant, but rather on those of the insurer in fulfilling its obligations to the insured."[20] The change allows insurers who opt not to take advantage of the "tender" safe harbor in new 624.155(4) to focus their defense on the conduct of the insured, the claimant, or their representatives.

The new provision is confusing as to when the finder of fact is to consider the conduct of the insureds, claimants, and their representatives. On one hand, it states, "[i]n any action for bad faith against an insurer, the trier of fact may consider whether the insured, claimant, or representative of the insured or claimant did not act in good faith." On the other hand, it limits the use to which the finding of breach is relevant to situations in which the jury has decided to award damages against the insurer ("in which case the trier of fact may reasonably reduce the amount of damages awarded against the insurer"). An award of damages presupposes, of course, that the jury has already found the insurer has violated its duty or good faith.

This limited use is further emphasized by the last sentence of 624.155(5)(b)(1) stating that the duty of good faith "does not create a separate cause of action, but may only be considered pursuant to subparagraph 2."

A reasonable reading of the provision is that breach of the duty by the insured, claimant, and their representatives is to be considered by the jury only after the finder of fact has determined that an award of damages against insurer is appropriate. Any other reading would invite the jury to consider the conduct and breach of the duty for reasons other than "reasonably reducing the amount of damages awarded against the insurer." This would allow the jury to consider the conduct the sort of "contributory negligence defense for insurers in bad-faith cases where concurring and intervening causes are not at issue" precluded by the Supreme Court of Florida in *Harvey*.[21] If the Legislature wanted to create such a defense, it surely would have done so in a much clearer way than the language in 624.155(5)(b)(2).

Other questions raised by Fla. Stat. 624.155(5) include:

a. Will the jury instructions on bad faith change significantly as a result of Fla. Stat. 624.155(5)(b)?

b. Under the new statutory language, may an insurer be found to have acted in bad faith if the only proof establishes the insurer failed to exercise "the same degree of care and diligence as a person of ordinary care and prudence should exercise" in evaluating settlement demands?

c. Under the new statutory language, may an insurer be found to have acted in bad faith if the proof establishes the insurer failed to "settle where a reasonably prudent person would"?

d. May evidence that the insureds, claimants, and their representatives breached their duty of good faith be considered by the trier of fact when determining who caused the case not to settle?

a. If so, does this necessitate a comparative fault or contributory negligence-type defense like that the *Harvey* court refused to create?

b. If so, and the percentage of fault attributable to the insured, claimant, or their representatives exceeds 50 percent, is the insurer exonerated of bad faith? See, e.g., Fla. St. 768.81(6) (applicable only in negligence actions).

e. What is the effect of the Legislature's express statement of the action the finder of fact may take if it finds a breach of the duty of good faith by the insureds, claimants, and their representatives ("reasonably reduce the amount of damages awarded against the insurer")? Will the principle of construction *"expressio unius est exclusio alterius"* ("the expression of one thing implies the exclusion of another") apply so that the finder of fact may not use the finding for other purposes?

f. Will the role of experts change in light of the Amendments? Will additional experts be required to deal with the conduct of the insureds, claimants, and their representatives on the reduction of damages issue?

g. Will insureds/claimants seek to bifurcate the liability issue from the damages issue, limiting consideration of the conduct of the insureds, claimants, and their representatives to the damages phase?

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1 *Id.*

2 *In re Standard Jury Instructions in Civ. Cases*, 35 So. 3d 666, 720–21 (Fla. 2010).

3 See *Berges v. Infinity Insurance Co.*, 896 So.2d 665, 679 (Fla. 2004) and *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 62 (1995).

4 *Berges v. Infinity Insurance Co.*, 896 So.2d 665, 686-87 (Fla. 2004) (Wells, dissenting).

5 *Harvey v. GEICO General Insurance Company*, 259 So.3d 1, 9 (2018).

6 *Campbell v. Gov't Emps. Ins. Co.*,306 So.2d 525, 530 (Fla. 1974)).

7 *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783, 785 (1980).

8 *Brink v. Direct General Insurance Company*, 38 F.4th 917 (11th 2022).

9 259 So.3d at 20 (Canaday, C.J., dissenting).

10 *Berges*, 896 So.2d at 677.

11 *Harvey*, 259 So.3d at 12.

12 *Berges v. Infinity Insurance Co.*, 896 So. 2d at 680 (citing *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 63 (Fla. 1995)).

13 *Pelaez v. Gov't Emps. Ins. Co.*, 13 F.4th 1243, 1254 (11th Cir. 2021).

14 386 So.2d at 786.

15 *Pelaez*, 13 F. 4th 1253–54.

16 *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783, 785 (1980).

17 *Collins Investment Company v. Metropolitan Dade County* 164 So.2d 806, 809 (Fla. 1964).

18 *Delaney v. State*, 190 So.2d 578 (Fla. 1966).

19 *Collins Investment Company,* at 809.

20 *Burgess*, at 677.

21 *Id.*, at 12.