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Recent Bad Faith Decisions in Florida Raise Concerns

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The State of Florida has long been known as one of the most challenging jurisdictions for insurance carriers in the context of bad faith - to say the least. Two recent appellate decisions have taken an already difficult environment and seemingly “upped the ante” in what constitutes good faith claims handling in the context of third-party liability claims. Set forth below is an analysis of the *Bannon v. Geico Gen. Ins. Co.* and *Harvey v. Geico Gen. Ins. Co.* decisions.

In terms of background and context, for decades, the bad faith standard in Florida, known as the “totality of the circumstances” standard, was set forth in *Boston Old Colonial Insurance Company v. Gutierrez*, 386 So. 2d 783 (Fla. 1980), where the Florida Supreme Court held:

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. For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate 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. Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith. The question of failure to act in good faith with due regard for the interests of the insured is for the jury.

Id. at 785 (citations omitted). In two recent opinions, the Eleventh Circuit and the Florida Supreme Court weighed in further on what constitutes bad faith in the context of failure to timely tender policy limits.

The first of these opinions is an unpublished opinion issued by the Eleventh Circuit in *Bannon v. Geico Gen. Ins. Co.*, 2018 U.S. App. LEXIS 20204, 2018 WL 3492111 (11th Cir. 2018). The facts of that case are as follows. Geico’s insured was involved in an automobile accident, resulting in serious injuries to the driver of the other vehicle involved. The accident occurred on October 27 and Geico was advised of the accident on November 2. Within three days of being placed on notice of the auto accident, Geico noted that the insured was 100% liable and internally flagged the claim due to of the seriousness of the injuries and available limits ($250,000). Nine days after being placed on notice, Geico was advised that the claimant was in a coma, needed brain surgery, required a feeding tube and had other serious injuries. Over the next several days, Geico sent excess letters to its insureds, and obtained witness statements and information regarding the claimant’s medical bills. Geico internally authorized the tender of policy limits on day sixteen, but did not tender limits to the clamant until November 22—twenty days after being placed on notice of the claim. The claimant rejected Geico’s tender and, after years of litigating the underlying negligence claim, a $2.95 million consent judgment was entered.

During the bad faith litigation, the trial court denied Geico's motion for summary judgment, finding that there were issues of fact as to: (i) whether Geico had an affirmative duty to initiate settlement discussions before November 22; (ii) whether Geico knew that its insured was clearly liable for causing the accident before November 22; and (iii) the question of when Geico knew that the claimant's injuries were serious and that damages would exceed the policy limit. In light of these issues, the court concluded that it could not find that offering the limits twenty days from first notice of the claim was good faith as a matter of law. These factual issues were tried to a jury and the jury rendered a verdict in favor of the plaintiffs. Geico filed a motion for a new trial, as well as a renewed motion for judgment as a matter of law—both of which were denied. In doing so, the trial court reiterated its previous conclusions on summary judgment and noted that the evidence showed that as of November 5, Geico had already assigned 100% liability, and, by November 10, Geico had visited the claimant in the neurosurgical ICU and ordered reserves on the claim to be set at policy limits. Continuing, the court noted that the very next day, Geico advised its insureds that there was a potential for an excess verdict and that it would make every effort to settle the claim within the policy limits.

Geico appealed the district court's denial of its renewed motion for judgment as a matter of law and, on appeal, the Eleventh Circuit affirmed the trial court's determination, finding that a reasonable jury had more than enough evidence to conclude that Geico acted in bad faith, citing to the timeline of events detailed above.

Two months later, the Florida Supreme Court issued a 4-3 decision in *Harvey v. Geico General Insurance Co.*, 2018 Fla. LEXIS 1705, 2018 WL 4496566 (Fla. 2018). The *Harvey* case involved an automobile accident, which resulted in the death of John Potts, who left behind a surviving wife and three children. The accident occurred on August 8. Two days after the accident, Geico determined that liability was unquestionably adverse to its insured. Three days after accident, Geico sent excess letters to its insured. On August 14, counsel for the claimant contacted Geico and requested a recorded statement from Geico's insured to determine if he had other insurance and assets—Geico's claims adjuster denied the request and did not relay the request to the insured. Three days later, on the ninth day after the accident, Geico tendered full policy limits ($100,000).

Over the next several weeks, there were multiple exchanges between Geico and its insured, and Geico and counsel for the claimant regarding the insured's statement. Ultimately, the insured did not provide a statement, which was allegedly due to Geico's failure to respond to and relay messages to counsel for the claimant. Geico's $100,000 insurance check was returned and, two weeks later, suit was filed, resulting in an $8.5 million verdict against the insured.

The insured filed suit against Geico for bad faith and prevailed at trial. On appeal, the Fourth District reversed the trial court's denial of Geico's motion for directed verdict, finding that there was insufficient evidence to find Geico in bad faith. The Florida Supreme Court, however, concluded that the Fourth District "went astray," and held that there was competent, substantial evidence to support the jury's finding that Geico acted in bad faith in failing to settle the claim against its insured. In reaching this conclusion, the Florida Supreme Court made the following statements regarding the Florida's bad faith standard:

Florida's totality of the circumstances test is not a "mere checklist."

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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.

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[T]he critical inquiry in a bad faith [sic] 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.

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In such a case where liability is clear and injuries so serious that an excess judgment is likely … the financial exposure to the insured is a ticking financial time bomb and suit can be filed at any time, any delay in making an offer under the circumstances of this case even where there was no assurance that the claim could be settled could be viewed by a fact finder as evidence of bad faith.

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Bad faith jurisprudence…places the focus of the actions on the insurer – not the insured.

A significant factor in the majority decision appears to be the fact that Geico "dropped the ball" with respect to its insured's sworn statement—*i.e.*, its initial refusal to allow the insured's recorded statement and failure to advise the insured of the counsel for the claimant's request for the recorded statement, as well as its subsequent failure to inform counsel for the claimant that the insured intended to provide a statement. Although Geico had unconditionally tendered policy limits within nine days of the accident, the Court explained that Geico's tender alone did not relieve it of its obligations to its insured– particularly since it knew the claimant had demanded a statement from the insured as to any additional assets or other insurance. According to the Florida Supreme Court, Geico's duty to act in good faith "continued through the duration of the claims process."

The dissenting judges took issue with the majority's decision to reinstate the jury verdict, noting that, "although Geico's claims agent handled the claim less than perfectly," the majority's decision "muddies the waters between negligence and bad faith and bolsters 'contrived bad faith claims.'"   Continuing, Justice Canaday explains:

By adopting a negligence standard in all but name, ignoring the controlling conduct of the insured and the third-party claimant, and relying on unsupported assumptions, the majority incentivizes a rush to the courthouse steps by third-party claimants whenever they see what they think is an opportunity to convert an insured's inadequate policy limits into a limitless policy.

In closing, whether these two opinions are limited to the particular facts of each case, or substantially alter bad faith jurisprudence by effectively adopting a negligence standard, as suggested in the *Harvey* dissent, is yet to be seen. Nonetheless, it is a virtual certainty that these two cases have "raised the bar" as to what constitutes good faith claims handling. As such, it is imperative that carriers and practitioners alike be very mindful of these decisions.