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Insurance Bad Faith

Bad Faith And Beyond: A Business Law Primer For Insurers

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Commentary

Bad Faith And Beyond: A Business Law Primer For Insurers

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> **"Go on doing with your pen what in other times was done with the sword."**
>
> *Thomas Jefferson*
> 1792 Letter to Thomas Paine[1]

Conflicts in the course of human relations have long been settled by fighting. Dueling was once known as "judicial combat."[2] In fact, the most famous duel in American history was between two prominent lawyers.[3] Attorneys are merely martial artisans of theory and persuasion — warriors of words. Our dagger is the pen; our poison is the ink upon the page. The courtroom is our stage, and a wordsmith's arsenal is bountiful.

I. A Brief History Of Modern Law

Our journey begins in mother England. Judicial decisions evolved in the royal courts of England and ultimately became known collectively as the "common law." The United States of America has adopted English common law in almost every state of the nation, except where Superseded by constitutional, legislative or judicial decree.[4] The Courts in England were divided between courts of equity and courts of law. For many years, our judicial system contained separate courts of law and courts of equity, each of which developed different rules of substance, procedure, and remedy.[5] Courts of law and courts of equity offered distinct types of relief to parties. In the 19th century, however, the American legal system underwent sweeping reform that abolished the separate equity courts and created a single form of action — the civil action.[6] This development is known as the merger of law and equity.[7] Today, the legal theories espoused by our courts of civil law provide a broad array of actionable rights under our current legal system.

With hundreds of years of legal battles behind us, innumerable theories to support a civil action have been proposed and a wide array were found to be actionable. Below, this author presents a brief description of the more frequently litigated legal theories beyond enforcement of the insuring agreement brought against (and sometimes by) insurance companies.

II. Basic Kinds Of Civil Actions

In our modern legal system, we have essentially four types of legal causes of action: contractual, tortious, equitable and statutory. Contract law is intended to enforce the terms of an agreement of the parties, or alternatively to award monetary damages for breach of the agreement.[8] The primary purpose of tort law is that victims should be compensated for their injuries and that those responsible should bear the cost of their wrongful conduct.[9] Forcing wrongdoers to pay for the harm they caused is also intended to provide

incentive for everyone to engage in reasonable conduct.[10] Equitable theories of relief are adopted by the courts in an effort to ensure a just result based on what they believe to be the public conscience. If the judiciary declines to recognize a contract, tort or equitable theory of relief, the legislature may enact laws to create a new civil action. Legislators are elected to office to codify public policy based on contemporary values. The courts are duty bound to interpret and enforce these laws based on complex rules of statutory construction. Ultimately, the courts are the arbiters of all of our legal disputes.

III. Examples Of Civil Actions

Jurisdictions around the country will have different laws — constitutional, legislative and judicial. Legal theories from one state to the next are often similar, but the essential elements to prove a viable civil action will differ. It would be impossible to delineate each and every cause of action and the differences from one state to the next. Therefore, for purposes of illustration, this article gives an overview of some legal theories that an insurer may encounter in the course of extra-contractual litigation in Florida.

A. Bad Faith (And Other Mistreatment Of Consumers)

Common Law Bad Faith. When an insurer handles a claim against its insured, it 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. This duty includes an obligation to settle where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Breach of this duty may give rise to a cause of action for bad faith against the insurer.[11] A third-party bad faith action (that is, a claim against one's own insurer for failing in good faith to settle a third-party's claim, thus exposing the insured to liability in excess of the available insurance coverage), was recognized in Florida as part of the common law as early as 1938.[12] The carrier is required to act in good faith to negotiate a settlement for the benefit of its insured, and not to protect its own interest alone.[13] Florida does not recognize a common law action for first-party bad faith.

Statutory Bad Faith. In Florida, unlike many other states, the judiciary did not recognize a first-party bad faith action by an insured against his or her insurer.[14] Thus, unless the insured could allege an independent tort such as fraud, the only relief available on a first-party claim was a cause of action for breach of contract.[15] The Legislature addressed this issue in 1982 by the adoption of section 624.155, Florida Statutes, entitled merely Civil Remedy, which provides that any person may bring a civil action against an insurer when such a person is damaged by the insurer not attempting in good faith to settle claims when, under all of the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his or her interests.[16]

Equitable Subrogation. Typically, this legal theory is asserted by an insurer against third parties who caused a loss for which the insurer indemnified its insured. However, an excess carrier may bring an equitable subrogation action against a primary carrier under certain circumstances where the primary carrier has not acted in good faith, such as the primary carrier's bad-faith failure to settle a claim against their common insured.[17] Subrogation substitutes the insurer in for the insured whose debt the insurer paid, entitling the paying party to rights, remedies, or securities that would otherwise belong to the insured. The object is to prevent injustice. The essential elements of equitable subrogation are as follows: (1) the subrogee made a payment to protect his or her own interests, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt; and (5) subrogation would not work an injustice to the rights of a third party.[18]

Deceptive And Unfair Trade Practices. Florida's Deceptive and Unfair Trade Practices Act (FDUTPA),[19] is intended to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.[20] FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.[21] A deceptive practice is one that is likely to mislead consumers.[22] An unfair practice is one that "offends established public policy" and one that is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.[23] The measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered

according to the contract of the parties. Florida's Deceptive and Unfair Trade Practices Act, however, does not apply to any person or activity regulated under laws administered Florida's Department of Financial Services (formerly Department of Insurance).[24]

Unfair Claim Settlement Practices. A statutory civil remedy is available to remedy unfair claim settlement practices based on an insurer's failure to adopt and implement standards for a proper investigation, failure to promptly respond to communications in the course of a claim, denial of claims without a reasonable basis, failure to provide a coverage position upon written request, failure to explain a coverage denial, failure to promptly notify an insured when additional information is needed to process a claim, and failure to pay undisputed amounts in a first-party property claim absent exigent circumstances.[25]

Refusal To Insure. The refusal to insure or continue to insure someone solely because of race, color, creed, marital status, sex or national origin is impermissible and actionable. Without a reasonable basis for refusing to insure based on residence, age, occupation, or the location of the risk, these profiling markers are also actionable. Refusal to insure an applicant unless he or she places other business with the insurer or a related entity is also generally prohibited and actionable.[26]

B. Misrepresentations

Fraud And Deceit. Fraud and deceit requires proof of the following essential elements: (1) a false statement of a material fact, (2) the representor's knowledge that the statement is false when made, (3) an intention that the representation will induce another to act on it, and (4) injury resulting from reliance on the false representation.[27] In a fraud action, each element must be plead with specificity.[28] Even a material concealment could be actionable fraud, but only if the defendant had an actual duty to disclose the information.[29] Interestingly, while insurance adjusters generally cannot be held personally liable for negligence or bad faith,[30] they may be sued individually for fraud that they personally committed in the course of their employment.[31] On the other hand, statements of opinion are not actionable "misrepresentations" giving rise to a cause of action for fraud.[32] The factual contexts in which this cause of action could be asserted against an insurer are too numerous to list.

Fraud In The Inducement. An action for "fraud in the inducement" is intended to prove that one party was duped to enter into an agreement with another party who never intended to honor the agreement. The essential elements are: (1) a promise to perform an act in the future, (2) intent (when the promise is made) not to carry it out, and (3) a fraudulent misrepresentation that one will perform in order to induce another to act on it. In the insurance context, this action may be asserted when an insurer or its agent promises to procure more coverage than underwritten, or perhaps when a claim handler promises to pay for property repairs or medical care but does not do so.

Negligent Misrepresentations. To state a cause of action for negligent misrepresentation, a plaintiff must allege that: (1) the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false, (2) the defendant was negligent in making the statement because he should have known the representation was false, (3) the defendant intended to induce the plaintiff to rely on the misrepresentation, and (4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation.[33] The only difference between fraud and negligent misrepresentation is that in a fraud action the plaintiff must show that the defendant knew the false statement to be false, whereas with negligent misrepresentation a plaintiff need only show that the defendant failed to ascertain the truth or falsity of the misrepresentation.

Misrepresentations In Claim Handling. Florida provides a specific statutory civil remedy for unfair claim settlement practices based on misrepresentations to an insured or other person with the intent to settle a claim on less favorable terms than provided for under the applicable insurance policy.[34]

C. Conspiracy Theories

Racketeering / RICO. Florida's RICO statutes[35] were modeled after the Federal RICO statutes.[36] If successful, the plaintiff would be entitled to threefold damages, as well as reimbursement of attorneys fees. The essential elements of this action are: (1) criminal intent to further an endeavor which, if completed, satisfies all elements of a crime, (2) conduct or participation in an enterprise that is an ongoing organization with a common purpose, and functions as a continuing unit, (3) receipt of proceeds derived (directly or indirectly)

from a pattern of criminal activity, (4) a pattern of criminal activity, which includes committing, attempting to commit, conspiring to commit or solicit, coerce or intimidate others to commit the crime, and (5) a crime listed in §772.102(1) (including theft, fraud, perjury, mail fraud, wire fraud, extortion, etc.). Notably, a crime does not actually have to be committed, just attempted or procured through others. A pattern of racketeering activity may be found with as little as two incidents of racketeering conduct, if they have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents.[37] However, the plaintiff has the burden to prove this action by clear and convincing evidence. Moreover, if the defendant prevails and can prove that the lawsuit was brought without "substantial fact and legal support," then the defendant is entitled to recover attorney fees from the plaintiff.

Civil Conspiracy. Civil conspiracy is also viable as an independent common-law tort. The elements of a civil conspiracy are: (a) a conspiracy between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts performed pursuant to the conspiracy.[38] Generally, an actionable conspiracy requires an actionable underlying tort or wrong.[39] However, an action based on a civil conspiracy exists on its own where the plaintiff can show some peculiar power of coercion possessed by the conspirators by virtue of their combination, which an individual acting alone does not possess. There must be a malicious motive and coercion through numbers or economic influence.[40] A single conspirator, who knows of the scheme and assists in it in some way, will be held responsible for all of the acts of his co-conspirators.[41] Moreover, the existence of a conspiracy and an individual's participation in it may be inferred from circumstantial evidence.[42]

D. Misappropriation And Excessive Charges

Unjust Enrichment. Unjust enrichment is an action based on equity to reverse the amount the defendant profited unjustly, rather than awarding damages based on the amount of the loss suffered by the plaintiff. The essential elements of unjust enrichment are: (1) a benefit conferred on defendant by plaintiff, (2) defendant's appreciation of the benefit, and (3) defendant's acceptance and retention of the benefit under circumstances that make it inequitable to retain it without paying the value thereof.

Civil Theft. An action for civil theft is available under Florida Statutes § 772.11 if, with criminal intent, a person obtains property by fraud or false pretenses. It includes the intentional act of converting money entrusted to another to that person's own use.[43] This action allows recovery of treble damages and attorneys fees, but requires a written demand for treble damages in advance of litigation and provides a safe harbor cure period to avert a lawsuit. The burden of proof is heightened from a standard civil action, requiring a proof by "clear and convincing evidence."

Illegal Dealings In Premiums. Collecting a premium for insurance not provided, collecting excessive premiums, and imposing illegal surcharges are all proscribed and actionable.[44]

Quantum Meruit. This equitable legal theory is based on the idea that even in the absence of a written or oral agreement, a contract can be implied from the facts surrounding the business dealings between a plaintiff and a defendant. It is typically applied to reimburse one person for the reasonable value of goods or services. The elements of quantum meruit are: (1) plaintiff provided goods or services to defendant, (2) defendant assented to and received the benefit of these goods and services, (3) the circumstances are such that a reasonable person receiving this benefit normally would expect to pay for it.[45]

E. Conduct Involving Third Parties

Intentional Interference With Business Relations. The elements of tortious interference with a business relationship are: (1) the existence of a business relationship under which the plaintiff has legal rights (not necessarily evidenced by an enforceable contract); (2) the defendant's knowledge of the relationship; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the interference.[46] For the interference to be unjustified, the interfering defendant must be a third party — a stranger to the business relationship.[47] A defendant is not a stranger to a business relationship if the defendant has any beneficial or economic interest in, or control over, that relationship.[48] Additionally, the plaintiff must prove that the

defendant manifested a specific intent to interfere with the business relationship.[49]

Defamation. Policyholders may claim that statements made about them amount to libelous (written) or slanderous (oral) defamation. To state a cause of action for defamation, a private person must allege (1) publication of (2) false statements about that private person, (3) with knowledge or reckless disregard of the falsity of those statements, (4) resulting in actual damages, and (5) the statement must be defamatory.[50] False statements of fact about a private person are not protected by the constitution, but expressions of opinion are protected.[51] Whether a statement is one of fact or one of opinion is a question of law.[52] To recover, the plaintiff must prove injury to his reputation in the community.[53]

F. Misuse Of The Legal System

When an insurer institutes legal action to resolve a dispute with its insured, the insured will often complain that the insurer's exercise of its right to legal action to resolve the dispute is illicit harassment. Usually, this is simply not so. The following causes of action state viable theories of recovery.

Malicious Prosecution. The elements of malicious prosecution are as follows: (1) a commencement or continuation of an original civil or criminal judicial proceeding, (2) its legal causation by the present defendant against the plaintiff, (3) its bona fide termination in favor of the plaintiff; (4) the absence of probable cause for such prosecution; (5) the presence of malice; and (6) damages resulting to the plaintiff.[54]

Abuse Of Process. The elements of abuse of process are as follows: (1) an illegal, improper or perverted use of process by the defendant, (2 an ulterior motive or purpose in exercising the illegal, improper, or perverted process, and (3) injury to the plaintiff as a result of the defendant's action.[55] When process is used to accomplish the result for which it was created, regardless of whether it was brought for spite or other ulterior motive, there is no abuse of process.[56]

G. Failure To Procure Coverage

Promissory Estoppel. An insurer can be estopped to deny coverage where an agent for the insurer represents to an insured that a policy covers a certain risk and the insured relies on such representation to his detriment.[57] A cause of action for promissory estoppel has three essential elements: (1) a representation as to a material fact that is contrary to a later-asserted position, (2) reasonable reliance on that representation, and (3) a change in position detrimental to a prospective insured caused by the prospective insured's reliance on the promise.[58]

Contract Reformation. The terms of an insurance contract may also be changed if the intent of the parties is not reflected by the written agreement. To reform a contract, the plaintiff must establish that, as a result of a mutual mistake or a unilateral mistake by one party, coupled with the inequitable conduct of the other party, the insurance contract fails to express the agreement of the parties.[59]

Breach Of Contract To Procure. An agent may be held responsible for negligent procurement or breach of a contract to procure coverage expressly requested by an insured or prospective insured.[60]

Negligent Advice. Policyholders may pursue an action against the insurer or the insurance agent for giving bad advice. When an agent renders advice, he or she has a duty of reasonable care in doing so.[61] On the other hand, the failure to *volunteer* information, without evidence that the insurance agent agreed to provide advice or that the insured reasonably expected such advice, does not constitute negligence or breach of contract.[62]

Breach Of Fiduciary Duty. The elements of a cause of action for breach of fiduciary duty are as follows: (1) the existence of a fiduciary duty, (2) the breach of that duty, and (3) damages proximately caused by the breach.[63] When it can be shown that a fiduciary duty existed between the agent and the prospective insured to provide advice, the agent may be liable for breach of that duty. The factual circumstances of their interactions will dictate whether the agent is truly a fiduciary of the insured. Usually, there has to be a long and close relationship between the insured and the agent, during which time there was a history of the agent providing advice and counseling to the customer that the customer reasonably came to rely upon.[64] To establish a fiduciary relationship, a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party.[65]

H. Emotional Distress

Emotional distress is different from "pain and suffering."[66] Emotional distress is mental or emotional harm (such as fright or anxiety) that is caused by another and is not directly brought about by a physical injury, although it may manifest itself in physical symptoms.[67]

Intentional Infliction Of Emotional Distress. To state a claim for intentional infliction of emotional distress, the plaintiff must allege: (1) deliberate or reckless infliction of mental suffering; (2) by outrageous conduct; (3) which conduct must have caused the suffering; and (4) the suffering must have been severe.[68] The court will decide, as a matter of law,[69] whether the conduct alleged is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.[70] In addition, a defendant that does nothing more than insist upon its legal rights in a permissible way cannot be held liable for intentional infliction of emotional distress even if the defendant is aware that its insistence upon its legal rights would be certain to cause emotional distress.[71] The insurance cases in Florida allowing damages for intentional infliction of emotional distress involve denial or intentional delay of coverage for some mental or physical disability, together with suitably extreme circumstances.[72]

Negligent Infliction Of Emotional Distress. Usually, this cause of action will not be alleged against an insurance carrier. Florida courts have generally followed the impact rule, which requires that, before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact.[73] Alternatively, if the plaintiff suffered a physical injury as a result of being within sensory perception of physical injuries negligently imposed upon a close family member, the action meets the bystander test.[74] To establish a cause of action for negligent infliction of emotional distress under the bystander test (1) the plaintiff must suffer a physical injury, (2) the plaintiff's physical injury must be caused by the psychological trauma, (3) the plaintiff must be involved in some way in the event causing the negligent injury to another, and (4) the plaintiff must have a close personal relationship to the directly injured person.[75]

IV. Conclusion

Lawsuits combining insurer bad faith with other common-law and statutory causes of action are common in today's litigation environment.[76] The civil actions identified above are by no means an exhaustive list. Literally every wrong will be met with a theory of relief to remedy it. If there is no existing civil action to address the limitless possible fact scenarios giving rise to extra-contractual liability, then rest assured that a creative lawyer will test the boundaries of existing law. So long as there is a good-faith argument for the extension, modification, or reversal of existing law, a lawsuit is not frivolous.[77] The best you can do is to focus on superior screening, training, and retention of qualified and knowledgeable personnel. The next best thing you can do is to hire an excellent lawyer.

Endnotes

1. Letter from Thomas Jefferson to Thomas Paine (June 19, 1792), *quoted in* Jefferson Cyclopedia: A Comprehensive Collection of the Views of Thomas Jefferson 740 (John P. Foley ed., Funk & Wagnalls Co. 1900). In his letter, Thomas Jefferson wrote to Thomas Paine lauding his efforts in the fight for liberty from England. As art imitates life, a more common quote finds its origin in the theater: "The pen is mightier than the sword." Edward Bulwer-Lytton, Richelieu; Or the Conspiracy (1839).

2. "Judicial combat" was so named because the righteous who survived the duel were believed to be the winners as declared by divine decree. *See* PBS.org, History of Dueling in America, http://www.pbs.org/wgbh/amex/duel/sfeature/dueling.html (last visited May 21, 2010).

3. In the most infamous duel in American history, former Vice President Aaron Burr shot and killed respected statesman, Alexander Hamilton. *See generally* Jerome Reiter, Alexander Hamilton: The Duel With Aaron Burr (1998).

4. Holland v. State, 302 So.2d 806, 808 (Fla. 2d DCA 1974). *See*, *e.g.*, Mitchell v. St. Maxent's Lessee, 71 U.S. 237 (1866) (citing Laws of Florida, 1822 to 1825, p. 136). The common law of England is in

effect in Florida except insofar as it is modified or superseded by statute, Wester v. Rigdon, 110 So.2d 470, 472 (Fla. 1st DCA 1959) (citing FLA. STAT. § 2.01), or where the reason for the rule of law ceases to exist, or when change is demanded by public necessity or required to vindicate fundamental rights. *See* Stone v. Wall, 734 So.2d 1038, 1044 (Fla. 1999); Hoffman v. Jones, 280 So.2d 431, 435-36 (Fla. 1973).

5. American Family Mut. Ins. Co. v. DeWitt, 218 P.3d 318, 322 (Colo. 2009) (citation omitted).

6. *Id.* § 2.6(1).

7. *Id.*

8. *See generally* Erwin v. Scholfield, 416 So. 2d 478 (Fla. 5th DCA 1982).

9. Clay Elec. Co-op, Inc. v. Johnson, 873 So. 2d 1182 (Fla. 2003).

10. *Id.*

11. Perera v. United States Fidelity and Guar. Co., __ So. 3d __, No. SC08-1968, 2010 WL 1791151, at *4 (Fla. 2010).

12. Auto Mut. Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938).

13. Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263, 265 (Fla. 5th DCA 1987), *review denied,* 523 So. 2d 578 (Fla. 1988).

14. Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58-59 (Fla. 1995); Baxter v. Royal Indem. Co., 285 So. 2d 652 (Fla. 1st DCA 1973); *cert. discharged,* 317 So. 2d 725 (Fla. 1975).

15. Butchikas v. Travelers Indem. Co., 343 So. 2d 816 (Fla. 1976); Rubio v. State Farm Fire & Cas. Co., 662 So. 2d 956, 957 (Fla. 3d DCA 1995), *review denied*, 669 So. 2d 252 (Fla. 1996); *Opperman,* 515 So. 2d at 265; Allstate Ins. Co. v. Kelley, 481 So. 2d 989 (Fla. 5th DCA 1986).

16. Citizens Property Ins. Corp. v. Garfinkel, 25 So. 3d 62 (Fla. 5th DCA 2009).

17. Accord Perera v. United States Fidelity and Guar. Co., __ So. 3d __, No. SC08-1968, 2010 WL 1791151 (Fla. 2010)(citing U.S. Fire Ins. Co. v. Morrison Assurance Co., 600 So. 2d 1147, 1151 (Fla. 1st DCA 1992)).

18. State Farm Mutual Auto. Ins. Co. v. Johnson, 18 So. 3d 1099 (Fla. 2d DCA 2009).

19. *See* FLA. STAT. §§ 501.201-213.

20. *See* FLA. STAT. § 501.202(2).

21. Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. 2d DCA 2007).

22. *Id.*

23. *Id.* (citing Samuels v. King Motor Co. of Fort Lauderdale, 782 So. 2d 489, 499 (Fla. 4th DCA 2001)).

24. Sonic Auto., Inc. v. Galura, 961 So. 2d 961 (Fla. 2d DCA 2007) (citing FLA. STAT. § 501.212(4)).

25. *See* FLA. STAT. §§ 624.155 and 626.9541(1)(o).

26. *See* FLA. STAT. §§ 624.155 and 626.9541(1)(x).

27. Crown Eurocars, Inc. v. Scropp, 636 So. 2d 30, 35 n.8 (Fla. 2d DCA 1993), *aff'd* , Scropp Eurocars, Inc. v. Scropp, 654 So. 2d 1158 (Fla. 1995).

28. Simon v. Celebration Co., 883 So. 2d 826 (Fla. 5th DCA 2004).

29. Transpetrol, Ltd. v. Radulovic, 764 So. 2d 878, 880 (Fla. 4th DCA 2000); State v. Mark Marks, P.A., 698 So. 2d 533, 539 (Fla. 1997); Taylor Woodrow Homes Fla., Inc v. 4/46-A Corp., 850 So. 2d 536, 541 (Fla. 5th DCA 2003) (quoting Watkins v. NCNB Nat'l Bank, N.A., 622 So. 2d 1063, 1065-66 (Fla. 3d DCA 1993)).

30. King v. National Sec. Fire & Casualty Co., 656 So. 2d 1338 (Fla. 4th DCA 1995) (holding that adjuster's duty is owed to his employer, the insurer, and not the insured).

31. *See generally* Boute v. Am. Gen. Life and Accident Ins. Co. v. Freire, 555 So. 2d 387, 388 (Fla. 3d DCA

1989); Shee-Con, Inc. v. Al Seim Appraisal Servs., Inc., 427 So. 2d 311 (Fla. 5th DCA 1983); *see also* Howard v. Crawford & Co., 384 So. 2d 1326 (Fla. 1st DCA 1980).

32. Glass v. Craig, 83 Fla. 408, 91 So. 332, 335 (1922); Thompson v. Bank of New York, 862 So. 2d 768 (Fla. 4th DCA 2003); Baker v. United Servs. Auto. Ass'n, 661 So. 2d 128, 131 (Fla. 1st DCA 1995); Wasser v. Sasoni, 652 So. 2d 411, 412 (Fla. 3d DCA 1995); Carefree Vills., Inc. v. Keating Props., Inc., 489 So. 2d 99, 102 (Fla. 2d DCA 1986).

33. Romo v. Amedex Ins. Co., 930 So. 2d 643, 654 (Fla. 3d DCA 2006); Simon v. Celebration Co., 883 So. 2d 826, 832 (Fla. 5th DCA 2004) (citing Johnson v. Davis, 480 So. 2d 625 (Fla. 1985)); *see* Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334, 337-38 (Fla. 1997); Ragsdale v. Mount Sinai Med. Ctr. of Miami, 770 So. 2d 167, 169 (Fla. 3d DCA 2000).

34. *See* Fla. Stat. §§ 624.155 and 626.9541(1)(i).

35. *See* Fla. Stat. §§ 772.102, et. seq.

36. *See* 18 U.S.C. §§ 1961-68; *see* Gross v. State, 765 So. 2d 39, 42 (Fla. 2000).

37. *Id.* at 47.

38. Walters v. Blankenship, 931 So. 2d 137 (Fla. 5th DCA 2006) (citing Florida Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam County, 616 So. 2d 562 (Fla. 5th DCA 1993)).

39. *Id.*

40. Peoples National Bank of Commerce v. First Union National Bank of Florida, 667 So. 2d 876 (Fla. 3d DCA 1996); Churruca v. Miami Jai-Alai, Inc., 353 So. 2d 547, 550 (Fla. 1977) (citations omitted); *see also,* Blatt v. Green, Rose, Kahn & Piotrkowski, 456 So. 2d 949, 950-51 (Fla. 3d DCA 1984); Buckner v. Lower Fla. Keys Hosp. Dist., 403 So. 2d 1025, 1027 (Fla. 3d DCA 1981), *review denied,* 412 So. 2d 463 (Fla. 1982).

41. Donofrio v. Matassini, 503 So. 2d 1278 (Fla. 2d DCA 1987) (citing Karnegis v. Oakes, 296 So. 2d 657 (Fla. 3d DCA 1974), *cert. denied,* 307 So. 2d 450 (Fla. 1975)).

42. Northwestern Nat'l Ins. Co. v. General Elec, Credit Corp., 362 So. 2d 120 (Fla. 3d DCA 1978), *cert. denied,* 370 So. 2d 459 (Fla. 1979).

43. Burke v. Napieracz, 674 So. 2d 756 (Fla. 1st DCA 1996).

44. *See* Fla. Stat. §§ 624.155 and 626.9541(1)(o).

45. W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc., 728 So. 2d 297, 305 (Fla. 1st DCA 1999).

46. Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 385 (Fla. 4th DCA 1999).

47. *Id*. at 386; Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285, 1294 (11th Cir. 2001).

48. Nimbus Tech., Inc. v. SunnData Prods., Inc., 484 F.3d 1305, 1309 (11th Cir. 2007) (quoting Tom's Foods, Inc. v. Carn, 896 So. 2d 443, 454 (Ala. 2004)).

49. Chicago Title Ins. Co. v. Alsay-Donalson Title Co. of Fla., Inc., 832 So. 2d 810 (Fla. 2d DCA 2002).

50. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1105 (Fla. 2008).

51. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

52. From v. Tallahassee Democrat, Inc., 400 So. 2d 52 (Fla. 1st DCA 1981), *petition for review denied,* 412 So. 2d 465 (Fla. 1982).

53. *Rapp*, 997 So. 2d at 1109.

54. Hickman v. Barclay's Realty Inter. Inc., 16 So. 3d 154 (Fla 4th DCA 2009); Scozari v. Barone, 546 So. 2d 750, 751 (Fla. 3d DCA 1989); Auto-Ins. Co. v. Hooks, 463 So. 2d 468, 476 (Fla. 1st DCA 1985); Cazares v. Church of Scientology of California, Inc., 444 So. 2d 442, 444-45 (Fla. 5th DCA 1983); *see also* Levin v. Middlebrooks, 639 So. 2d 606 (Fla. 1994).

55. Hardick v. Homol, 795 So. 2d 1107, 1111 n. 2 (Fla. 5th DCA 2001); Thompson McKinnon Securities, Inc. v. Light, 534 So. 2d 757, 760 (Fla. 3d DCA 1988).

56. *Light*, 534 So. 2d at 760; Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 1984).

57. Crown Life Ins. Co. v. McBride, 517 So. 2d 660 (Fla. 1987) ([T]he form of equitable estoppel known as promissory may be utilized to create insurance coverage where to refuse to do so would sanction fraud or other injustice.); *see also* Prof'l Underwriters Ins. Co. v. Freytes & Sons Corp., 565 So. 2d 900, 902 (Fla. 5th DCA 1990) (holding that doctrine of promissory estoppel can be used to create insurance coverage, but burden is on plaintiff to establish elements of promissory estoppel by clear and convincing evidence).

58. Romo v. Amedex Ins. Co., 930 So. 2d 643, 654 (Fla. 3d DCA 2006) (citing FCCI Ins. Co. v. Cayce's Excavation, Inc., 901 So. 2d 248, 251 (Fla. 2d DCA 2005)).

59. Kolski v. Kolski, 731 So. 2d 169 (Fla. 3d DCA 1999); Circle Mtg. Corp. v. Kline, 645 So. 2d 75, 78 (Fla. 4th DCA 1994); Providence Square Assoc. v. Biancardi, 507 So. 2d 1366, 1369-72 n. 3 (Fla. 1987); Am. Fire & Indem. Corp. v. State Farm Auto. Ins. Co., 483 So. 2d 122, 123 (Fla. 1st DCA 1986); Canal Ins. Co. v. Hartford Ins. Co., 415 So. 2d 1295, 1297 (Fla. 1st DCA 1982); Samet v. Prudential Ins. Co. of Am., 294 So. 2d 35, 36 (Fla. 3d DCA 1974).

60. Wachovia Insurance Services, Inc. v. Toomey, 994 So. 2d 980, 990 n.4 (Fla. 2008) (citing Romo v. Amedex Ins. Co., 930 So. 2d 643, 654 (Fla. 3d DCA 2006)); *see also* 5 Florida Torts § 150.24 (2007) ("An agent may be liable to a customer, through breach of contract or negligence, for the failure to perform an agreement to procure insurance coverage."). However, an agent cannot be held liable for failing to procure insurance coverage unless he or she agreed to secure it. Willis Ins. Agency, Inc v. Luckey, 466 So. 2d 1197, 1197-98 (Fla 3d DCA 1985); Neida's Boutique, Inc. v. Gabor & Co., 348 So. 2d 1196, 1197 (Fla. 3d DCA 1977).

61. *Id.*

62. 1 Bertram Harnett, Responsibilities of Insurance Agents and Brokers § 3.05 [1][a] (2007).

63. Gracey v. Eaker, 837 So. 2d 348, 353 (Fla. 2002).

64. *See generally* Lee R. Russ & Thomas F. Segalla, Couch on Insurance §46:61 (3d ed. 2005); Smith v. Millers Mut. Ins. Co., 419 So. 2d 59 (La. Ct. App. 1982); Sadler v. Loomis Co., 776 A.2d 25 (Md. Ct. Spec. App. 2001); Peter v. Schumacher Enters., Inc., 22 P.3d 481 (Alaska 2001); Seascape of Hickory Point Condo. v. Associated Ins. Servs., Inc., 433 So. 2d 488 (Fla. 2d DCA 1984); Woodum v. Moore, 428 So. 2d 280 (Fla. 4th DCA 1983).

65. Watkins v. NCNB National Bank of Fla., N.A, 622 So. 2d 1063 (Fla. 3d DCA 1993).

66. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 544 (1994).

67. *Id.*

68. Hart v. United States, 894 F.2d 1539, 1548 (11th Cir. 1990) (citing Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277, 278 (Fla. 1985) (adopting definition laid out in Restatement (Second) of Torts § 46)). In Florida, conduct is intentional [w]here the actor knows that [severe] distress is certain, or substantially certain to result from his conduct. *Hart,* 894 F.2d at 1548 (quoting Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956, 958 (Fla. 1st DCA 1979)).

69. Liberty Mut. Ins. Co. v. Steadman, 968 So. 2d 592, 595 (Fla 2d DCA 2007); Dependable Life Ins. Co. v. Harris, 510 So. 2d 985, 986 (Fla. 5th DCA 1987); Lay v. Roux Laboratories, Inc., 379 So. 2d 451 (Fla. 1st DCA 1980).

70. Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277 (Fla. 1985).

71. *McCarson*, 467 So. 2d at 278-79 (citing Restatement (Second) of Torts § 46 (1965)).

72. *See, e.g.*, *Steadman*, 968 So. 2d at 595; *Harris*, 510 So. 2d at 986; Dominguez v. Equitable Life As-

surance Society, 438 So. 2d 58, 61 (Fla. 3d DCA 1983).

73. R.J. v. Humana of Fla., Inc., 652 So. 2d 360, 362 (Fla. 1995) (quoting Reynolds v. State Farm Mut. Ins. Co., 611 So. 2d 1294, 1296 (Fla. 4th DCA 1992)).

74. Champion v. Gray, 478 So. 2d 17, 20 (Fla. 1985); *see generally* Consolidated Rail v. Gottshall, 512 U.S. 532, 548 (1994); Hagan v. Coca-Cola Bottling Co., 804 So. 2d 1234, 1237 (Fla. 2001).

75. Zell v. Meek, 665 So. 2d 1048, 1054 (Fla. 1995), *rehearing denied* (1996).

76. *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (alleging bad-faith failure to settle, fraud and intentional infliction of emotional distress); Wade v. Emcasco Ins. Co., 483 F.3d 657 (10th Cir. 2007) (alleging fraud and bad-faith failure to promptly investigate and settle); Weiss v. First Unum Life Ins. Co., 482 F.3d 254 (3d Cir. 2007) (alleging fraud, intentional infliction of emotional distress, RICO violations, and wrongful termination of insurance benefits); King v. Nation Union Fire Ins. Co. of Pittsburgh, PA, 201 F. App'x 749 (11th Cir. 2006) (alleging fraud, tortious interference, bad faith, negligence, wantonness and failure to indemnify or defend); Torres v. American Employers Ins. Co., 151 F. App'x. 402 (6th Cir. 2005) (alleging violations of Kentucky Unfair Claims Settlement Practice Act, bad faith, fraud, outrageous conduct, and intentional or negligent infliction of emotional distress); Hangarter v. Provident Life and Accident Ins. Co., 373 F.3d 998 (9th Cir. 2004).

77. Williams v. Paterson Public Schools, No. 09-2999, 2010 WL 1799660 (D.N.J. May 4, 2010) (citing Napier v. Thirty or More Unidentified Federal Agents, 855 F.2d 1080, 1090-91 (3d Cir. 1988)). ■

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