MEALEY'S™ LITIGATION REPORT
Insurance Bad Faith

Creative Methods Used To Set-Up 'Bad Faith' Claims — Use Of Multiple Coverage Demands

by
David A. Mercer, Esq.

Butler Pappas Weihmuller Katz Craig LLP

A commentary article reprinted from the April 26, 2012 issue of Mealey's Litigation Report: Insurance Bad Faith

LexisNexis®

Commentary

Creative Methods Used To Set-Up 'Bad Faith' Claims — Use Of Multiple Coverage Demands

By
David A. Mercer

[Editor's Note: David A. Mercer, Esq., is a partner with the law firm of Butler Pappas Weihmuller Katz Craig LLP, with offices in Tampa, Chicago, Philadelphia, Charlotte, Mobile, Tallahassee, and Miami. Mr. Mercer is active in the firm's Extra-Contractual, Third-Party Coverage, and Liability Departments. Any commentary or opinions do not reflect the opinions of Butler Pappas or Mealey Publications. *Responses are welcome.]*

I. Introduction

In the past decade, the bad-faith environment has rapidly shifted from a useful tool used by consumers to protect themselves from arguably egregious actions to an elaborate trap set by personal injury plaintiff attorneys to reap outrageous awards from seemingly innocent conduct by claims professionals. Insurance companies now fear multi-million dollar verdicts based on policies written for insureds who did not want more than the absolute minimum coverage allowed. Based on technicalities, clever plaintiff attorneys attempt to convince courts to rewrite insurance policies, allowing for unlimited recoveries.

Plaintiff lawyers have learned that their primary tool to craft a claim for bad faith is the demand letter. These letters can often be one-sided, ambiguous, and unreasonable. Many of these letters seem obvious as attempts to "set up" the insurance company for bad faith. Although these demand letters take a myriad of forms, plaintiff attorneys have recently started issuing demands involving multiple coverages in an effort to trip up the responding insurance company.

Two common scenarios appear. First are the instances where the insurance policy provides property damage liability coverage (but no bodily injury coverage) and where the plaintiff demands questionable or excessive property damage amounts. The second scenario is similar – where the policy provides minimal bodily injury and property damage liability coverage and plaintiff's counsel sends an all-or-nothing demand that seeks all bodily injury limits and an arguably inflated amount for property damage.

II. Background

"Bad faith" law is grounded upon contract principles.[1] The duty of good faith and fair dealing is based on well established contract law. The insurance contract provides that an insured surrenders to the carrier the exclusive right and obligation to defend or settle any claim made during the policy period **provided** the claim is covered by the contract of insurance.[2] Once the insurance company obtains from its insured the sole right and obligation to settle or defend any *covered* claim under the contract, they are obligated to do so in good faith and to deal fairly with its insured.[3] The Florida Supreme Court has explained the purpose of bad faith insurance law:

> Bad faith law was designed to protect insureds who have paid their premiums and who have fulfilled their contractual obligations by cooperating fully with the insurer in the resolution of claims. The insurance contract requires that the insured surrender to the insurance company control over whether the claim is settled. In exchange for this relinquishment of control over settlement and the conduct of litigation, the insurer obligates itself to act in good faith in the investigation, handling,

> and settling of claims brought against the insured. Indeed, this is what the insured expects when paying premiums. Bad faith jurisprudence merely holds insurers accountable for failing to fulfill their obligations. . . .[4]

Of course, the converse remains true. When an insured chooses not to purchase certain coverages, he tells the carrier that he is not surrendering the right and obligation to settle and defend those types of claims.[5]

III. Demands Where The Policy Provides No Coverage

In some recent instances, Plaintiff's counsel have issued demands that offer to settle both covered and non covered claims in exchange for payment of covered property damage claims. The Middle District of Florida squarely addressed this issue and recognized its potential as a set-up.[6] In *Rodriguez*, counsel for an injured pedestrian in an auto accident sent the insurance company a time-limit demand letter. The demand letter offered to release the insured from *all* claims, both property and personal injury, in exchange for a payment of $536.38 in property damages.[7] However, the insured in *Rodriguez* had rejected bodily injury liability coverage; he did not contract for the insurance company to handle or settle any bodily injury liability claim.

The insurance company did not meet the time demand and the pedestrian brought suit. When the lawsuit was filed, the pedestrian did not ask for property damage and the carrier did not provide a defense.[8] The insured ultimately settled for $2 million, in exchange that the judgment not be recorded or executed upon for three years so that Plaintiff could conclude a bad-faith action against her insurer.[9]

In the subsequent bad-faith action, the trial court held that without an express statutory or contractual duty to defend, no such duty exists.[10] Nothing in the record suggested the insurance company offered or implied to represent the insured against any personal injury claims asserted by the pedestrian. The court recognized the time demand for what it was, ***a set up.*** Specifically, the court noted:

> Plaintiff, or more accurately the injured pedestrian's lawyer, tried to create insurance coverage where none ever existed. Defendant had no contractual or statutory duty to defend the Plaintiff against bodily injury claims not covered in the policy. Neither the Plaintiff nor the pedestrian's counsel can manufacture such a fiduciary duty here.[11]

The court also noted that a sincere attempt to settle both her property damage claim *and* her extensive personal injury claim would have been "irresponsible."[12] The Court found no bad faith and granted the insurance company's motion for summary judgment.

In *Calhoon v. Leader Specialty Ins. Co.*, plaintiff's counsel issued a demand for "payment of all available bodily injury limits **and** $500.00 for her property damage."[13] (Emphasis added). The demand letter also asked for financial affidavits from the insured that would show the insured did not have assets with which to satisfy an excess personal injury judgment.[14] Unfortunately, like *Rodriguez*, the insured chose not to purchase any bodily injury liability coverage. The insurance company sought to settle the only claim that was covered. The insurance company tendered the property damage amount of $500.00, but did not address the claim for bodily injury coverage or the affidavits that related to that coverage. The injured party then filed suit and obtained a judgment against the insured in the amount of $11,108,996.21.[15]

The plaintiff then commenced her bad-faith suit against the insurance company. The court granted final summary judgment to the insurance company.[16] The court noted that because the insured did not contract with the insurance company to settle the bodily injury claim, the insurance company had no duty to do so. Specifically, the court stated, "Although Leader had the *opportunity* to settle, it is clear that it did not have the *ability* to settle under the terms presented. . ."[17] The court also noted that the insurance company had not undertaken the duty to settle, as it expressly notified the insured that it would not.[18]

The concept that the insurance company could undertake such a duty stems from an older Florida case, *Ging v. American Liberty Ins. Co.*[19] In *Ging*, a Florida appellate court found that an insurance company assumed a duty to handle and defend a non-covered claim for punitive damages.[20] The *Ging* court imposed a duty on an insurance carrier to deal in good faith with its insured concerning a claim that was not covered.[21] The court predicated this duty on the **knowing**

assumption of a duty by the carrier to defend its insured for a non-covered claim and the carrier's assurance to its insured that it would defend up to appeal if necessary.[22] The court held that the insured **relied, to his detriment**, on this assurance.[23] In finding a duty of good faith and fair dealing in the absence of coverage, the court found both that the carrier knowingly assumed a duty it did not owe (to defend a non-covered punitive damage claim) **and** the insured relied on that assumed duty to his detriment.[24]

One Florida court has relied upon *Ging* to suggest an insurer may have a duty to settle non-covered claims where the insurer undertook the duty or the circumstances created such a duty.[25] In *Allstate Indem. Co. v. Oser*, the claimant (Timothy Oser) believed the insured (Sabrina Patterson) had $25,000 in bodily injury liability coverage with Allstate. He offered to settle his claim for the $25,000 bodily injury limits amount plus his property damage. The insurer advised that the policy provided no bodily injury liability coverage. The claimant then submitted a second demand to settle all claims in return for payment of his property damage amount in an amount equal to the insured's property damage limits.[26]

The insurer rejected this demand and suit was filed for both bodily injury and property damage. During the litigation, the insurer settled the property damage claim only[27] The claimant obtained a $1.5 million final judgment against the insured. The claimant and insured then commenced a bad-faith suit against the insurer for failing to settle the claims within the property damage limits.[28]

The insurer filed a motion to dismiss, the trial court denied the motion and the insurer appealed. The insurer argued that it could not be held in bad faith for failing to settle or properly defend until the court determines that the insured had the bodily injury liability ("BIL") coverage at issue, and that the insured is liable to the plaintiff beyond the policy limits.[29] The court disagreed, stating that it had already been determined in the underlying personal-injury action that the insured had no BIL coverage and that she was liable to the claimant. The plaintiff was not seeking coverage limits, but rather the amount of the unsatisfied judgment. The court stated:

> Allstate's liability for bad faith ... depends upon a mixed question of law and fact whether, even without BIL coverage, Allstate owed Patterson a duty to settle Oser's claim against her for both BIL and property damage because it either expressly undertook such duty or because the circumstances created a duty.[30]

The dicta in *Oser* opens the possibility for liability for non-covered claims. Given this possibility, an insurer must make certain it takes no steps to undertake the duty to settle non-covered claims. At the same time, it must also advise its insured that such a demand has been presented and that the insurance company has no duty, and will not, undertake to settle the non-covered claim.

IV. Demands Under Policies With Multiple Coverages

The second scenario that has been presented lately occurs when the policy provided minimal bodily injury coverage and property damage coverage. Plaintiff's counsel will then issue a demand for the bodily injury limits and property damages, as a joint offer. *Hutton v. Mercury Cas. Co.*, an opinion out of California, was one of the first cases to discuss this type of situation.[31] *Hutton* involved a case of a clear liability accident with significant bodily injury and property damages. The plaintiff's counsel issued a demand, "due to the serious and substantial nature of our client's injuries," for the "full amount of your insured's policy limits."[32] The insurance company's policy provided a bodily injury limit of $15,000 and property damage limit of $10,000. In response to Plaintiff's demand, the insurance company tendered the bodily injury limit of $15,000 and provided a release of "all claims."[33]

Plaintiff's counsel then issued a new demand for the bodily injury limits and $2,600 for property damage. At that time, the insurance company knew the plaintiff's car had been determined a total loss and had itself valued the property damage at approximately $2,400. The court noted that, based on the evidence provided, "there is no reason to conclude Hutton was attempting to leverage his excess bodily injury claim to extract an *unreasonable* settlement for the property damage.[34] However, the insurance company refused to accept the demand.

The insurance company argued that it did not breach its covenant of good faith because its insured was never exposed to a judgment above its property damage

policy limit. The court noted that the insurance company did not cite any case law for its position and found the jury reasonably concluded that the insurance company unreasonably refused to accept the settlement demand.

In a more recent case out of Florida, *Perrien v. Nationwide Mut. Fire Ins. Co.*, the insurer issued a policy that provided $10,000 in bodily injury limits and $25,000 in property damage. Within days after the accident, the insurer tendered the $10,000 per person bodily injury limits.[35] Plaintiff did not negotiate the check, but instead retained an attorney.[36] Plaintiff's attorney issued a demand to the insurer seeking $15,400 for the value of her car, $750 for loss of use of her car for 25 days, and payment of the per person bodily injury limit.[37] Although the insurer agreed to reissue the check for the bodily injury limits, the insurer failed to agree to make any payment on the property damage claim.[38]

Plaintiff then filed suit. Approximately two months later, the insurer tendered checks for the $10,000 bodily injury limits and the requested $18,767 for the property damage claim.[39] The checks were rejected and Plaintiff proceeded with litigation. The parties ultimately settled the property damage claim for $18,767.[40] The parties then stipulated to stay the personal injury action and prosecute a declaratory judgment action to determine whether the insurer acted in bad faith.[41]

In the declaratory judgment action, the parties filed for summary judgment. First, the court discussed the validity of the insurer's affirmative defense that claimed that the Plaintiff's demand improperly combined separate and distinct coverage which must be negotiated severally.[42] The court held that this defense failed as a matter of law. It held that there was no authority prohibiting an offer to settle all claims and damages arising out of an accident.

The insurer argued that it should not be held liable for bad faith where it tendered the bodily injury amount and the property damage claim posed no realistic exposure to the insured.[43] The court disagreed and held that a jury could reasonably conclude that the insurer did not adequately and diligently investigate the property damage claim. Even though the insurer ultimately settled the property damage claim, it did not preclude the bad-faith claim because it did not eliminate the insured's excess liability for the bodily injury claims.[44]

V. Conclusion

Some Florida courts are beginning to notice and understand that bad-faith law has expanded beyond its original framework and that Plaintiff's lawyers are expanding it beyond its original intent. Courts have also begun to recognize the prevalence of tactics to set up insurance companies for bad-faith claims. Unfortunately, under the current case law, the courts have little authority to rewrite bad-faith law. Until such time as the legislature can effectively place restrictions on demands designed to set up the insurance company, or until the courts begin to lessen restrictions on the admission of evidence establishing that these demands are set ups, a conscientious insurance company must scrutinize each demand and ensure it addresses each claim presented. Insurance companies have become very conscientious in their addressing and responding to any bodily injury claim presented. Under these new scenarios discussed here, the insurance company must also timely investigate and appropriately respond to the property damage claim with essentially the same level of concern as the injury claim.

Endnotes

1. Allstate Ins. Co. v. RJT Enter., Inc., 692 So. 2d 142, 144 (Fla. 1997); Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980).

2. RJT, 692 So. 2d at 144; State Auto Ins. Co. v. Rowland, 427 S.W.2d 30, 33 (Tenn. 1968).

3. Gutierrez, 386 So. 2d at 785.

4. Berges v. Infinity Ins. Co., 896 So. 2d 665, 682-83 (Fla. 2005).

5. Rodriguez v. American Ambassador Cas. Co., 4 F. Supp. 2d 1153 (M.D. Fla 1998), *aff'd*, 170 F.3d 188 (11th Cir. 1999); *Spencer v. Assurance Co. of Am.*, 39 F.3d 1146 (11th Cir. 1994) (the liability of an insurer depends upon whether the insured's claim is within the coverage of the policy).

6. Rodriguez v. American Ambassador Cas. Co., 4 F. Supp. 2d 1153 (M.D. Fla. 1998).

7. *Id.* at 1155. At the time of the demand, the plaintiff claimed liens of approximately $42,768.15 for medical expenses.

8. *Id.*

9. *Id.*

10. *Id.* at 1156.

11. *Id.* at 1157.

12. *Id.* at n.5.

13. 2007 WL 4098840 (M.D. Fla. 2007).

14. *Id.*

15. *Id.* at *2.

16. *Id.* at *5.

17. *Id.* at *5.

18. *Id.* at *4-5.

19. 423 So. 2d 115 (Fla. 5th DCA 1970).

20. *See also* Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491 (10th Cir. 1994). The Magnum court noted:

> We hold that here, where both compensatory and uninsurable punitive damages are sought, and CNA assumed the defense of the entire suit under the obligations of the policies, the presence of the punitive claim did not absolve CNA from its obligation of good faith in handling the entire case.
>
> 36 F.3d at 1506.

21. *Id.*

22. *Id.* at 117. Generally, the concept of any assumption of duty applies to actions sounding in tort resulting in bodily injury or property damage *See* Goldberg v. Florida Power & Light Co., 899 So. 2d 1105, 1113 (Fla. 2005). Further, the general rule is that estoppel may not be invoked to enlarge or extend coverage specified in an insurance contract. Solar Time Ltd. v. XL Specialty Ins. Co.,142 Fed. App'x 430, 433 (11th Cir. 2005) *citing* Carneiro Da Cunha v. Standard Fire. Ins. Co., 129 F.3d 581, 587 (11th Cir. 1987); Doe v. Allstate Ins. Co, 653 So. 2d 375, 375 (Fla. 1995); Family Care Center, P.A. v. Truck Ins. Co. Exchange, 875 So. 2d 750, 752-754 (Fla. 4th DCA 2004).

23. *Id.*

24. *Id.*

25. Allstate Indem. Co. v. Oser, 893 So. 2d 675, 677 (Fla. 1st DCA 2005).

26. *Id.* at 676.

27. *Id.*

28. *Id.*

29. *Id.* at 676.

30. *Id.* at 677.

31. 2004 WL 1467442. The Hutton citation is red-flagged in Westlaw only because it is unpublished.

32. 2004 WL 1467442 at *1.

33. *Id.* at 2.

34. *Id.* at 6 (emphasis in original).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at *2.

39. *Id.*

40. *Id.*

41. *Id.* This type of agreement is often described in Florida as a *Cunningham* agreement. *See* Cunningham v. Standard Guaranty Ins. Co., 630 So. 2d 179 (Fla. 1994).

42. *Id.* at 83. Specifically, the insurer's Fourth Affirmative Defense stated:

> . . .Plaintiff's complaint fails to state a cause of action upon which relief can be granted because Salo's demand for settlement improperly combined two demands for payment under two separate and distinct coverages. Such demand cannot form the basis of a claim for breach of fiduciary duty based upon Nationwide's efforts to negotiate Salo's separate and distinct claims severally as required by Florida law.

43. *Id.* at *5.

44. *Id.* at *6. ■

MEALEY'S LITIGATION REPORT: INSURANCE BAD FAITH
edited by Mark Rogers
The Report is produced twice monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1526-0267