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Insurance Bad Faith

Bad Faith And Ordinary Negligence: Distinguishing The Excusable From The Culpable

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Commentary

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I. Introduction

Bad faith and ordinary negligence typically involve two very different standards of care. In most jurisdictions, courts agree that proof of bad faith requires a showing of insurer culpability greater than ordinary negligence. In many of those same jurisdictions, however, courts blur the distinction between bad faith and negligence by incorporating into the definition of bad faith, at least in part, consideration of an insurer's diligence and care in the handling and settling of claims. Thus, in those jurisdictions, courts must often address the issue of whether the insurer's alleged lack of diligence in handling a claim supports a finding of bad faith or constitutes mere excusable negligence.

Distinguishing between bad faith and ordinary negligence has important and practical implications in cases involving liability insurers. When a liability insurer's claim handling is found to reflect ordinary negligence (and not bad faith), the insurer's responsibility will not extend beyond the policy limits. On the other hand, when a liability insurer is found to have acted in bad faith and, as a result, the injured third-party's claim against the insured is not settled for an amount within the policy limits, the insurer may be required to pay the entire judgment ultimately entered against the insured in favor of the third-party claimant in the underlying tort suit, including any amount in excess of the insured's policy limits.[1] In cases involving catastrophic injuries and low policy limits, the determination can mean the difference between an insurer paying its $10,000 policy limits or a $20 million excess judgment.

Distinguishing between bad faith and ordinary negligence is often difficult. One could describe nearly any mistake by an insurer as "mere negligence." For this reason, courts typically look beyond the conclusory label attached to the insurer's claim-handling conduct. Although courts have not articulated a bright-line rule for determining when a liability insurer's conduct reflects excusable negligence, two recent Florida cases out of the Eleventh Circuit provide additional guidance regarding the type of conduct a court will likely view as mere negligence as opposed to bad faith. These two cases are particularly important because they both involve an increasingly common scenario in which third-party bad-faith claims were created or manufactured by claimants who intentionally made it difficult for the insurer to settle the claimant's underlying bodily injury liability claim against the insured. This article discusses those cases and outlines the key circumstances courts consider when determining whether a liability insurer's handling of a claim reflects bad faith or ordinary excusable negligence.

II. The Duty Of Good Faith

Courts generally agree that a liability insurer owes its insured a common-law duty of good faith in its investigation and attempts to settle bodily injury claims brought against the insured by third-party claimants.[2]

Each jurisdiction, however, has a different standard of care governing the insurer's obligations and the determination of whether the insurer has breached its duty of good faith. Some jurisdictions require a showing that the insurer intended to act unreasonably.[3] At least one jurisdiction has adopted a "justifiable reason" standard in which no bad faith liability may be imposed where the insurer has a justifiable reason for the way it handled the claim.[4]

While a few jurisdictions continue to embrace a negligence standard,[5] other jurisdictions have expressly rejected the negligence standard but agree that negligence is a relevant consideration in determining whether an insurer has acted in bad faith.[6] In these jurisdictions, a plaintiff in a third-party bad-faith case must demonstrate that the insurer's degree of culpability is greater than ordinary negligence.[7] Thus, in these jurisdictions, the bad-faith claim may often turn on the issue of whether the insurer's actions reflect mere excusable negligence as opposed to bad faith.

Florida is one of the jurisdictions where it is well settled that ordinary insurer negligence is insufficient to support a finding of bad faith. In Florida, juries are typically instructed that bad faith on the part of an insurance company means "failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for his or her interests."[8]

Under Florida law, the duty of good faith obligates an insurer to investigate the facts of the third-party's claim against the insured tortfeasor and to settle within the policy limits, if possible, when a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.[9] Because the duty of good faith involves consideration of the insurer's diligence and care in the investigation and evaluation of the third-party's claim, courts typically agree that the insurer's negligence in handling a claim is relevant to the determination of whether the insurer has acted in bad faith.[10] But in Florida it is not enough to prove that the insurance company made a mistake or could have done a better job to settle a third-party claim for an amount within the policy limits. In Florida, it is well settled that the essence of a third-party bad-faith claim requires proof that the insurer wrongfully delayed or avoided settlement, placed its interests ahead of the insured's interests, or somehow obstructed settlement of the claim.[11]

III. Manufactured Bad Faith

Distinguishing between ordinary negligence and true bad faith has become increasingly important in light of the continuing proliferation of manufactured bad-faith claims. An increasing number of claimant attorneys have been employing strategies to create or manufacture third-party bad-faith claims under circumstances where an objective analysis of the liability insurer's conduct would not support a finding of bad faith. Claimant attorneys pursue these strategies in order to make it less likely that their client's claim against the insured will settle for an amount within the policy limits and, in the process, make it appear that the insurer's lack of diligence or negligence was the reason the claim did not settle. Thus, the manufactured bad-faith claim has particular significance in jurisdictions where the duty of good faith involves consideration of an insurer's diligence and care in handling a claim.

Strategies to manufacture bad-faith claims are typically used in cases where the claimant's damages are likely to exceed the insured's policy limits and, thus, are particularly common in cases involving catastrophic injuries and low policy limits. Claimant attorneys, for example, often set short and artificial deadlines or other conditions in demand letters that make it difficult for liability insurers to comply within the time specified. When the insurer does not perfectly comply with all conditions within the claimant's deadline, the claimant withdraws the demand and sues the insured to recover the full amount of his damages. In the subsequent bad-faith claim, the plaintiff will argue that the claim against the insured did not settle for an amount within the insured's policy limits because of the insurer's lack of diligence and bad faith failure to comply with the terms of the claimant's demand.

Other claimant attorneys choose a strategy of refraining from making any demand or communicating in any way with the insurer during the months following the accident. This, as one may expect, makes it difficult for the insurer to initiate settlement discussions. After waiting a sufficient period of time (usually at least a few months), the claimant will sue the insured and refuse to accept any subsequent settlement offer for an amount within the policy limits. In the subsequent bad-faith claim, the plaintiff will argue that the claim against the insured did not settle for an amount within the policy limits because of the insurer's lack of diligence in attempting to find the claimant and offer the

policy limits. The plaintiff will argue that if the insurer had done a better job of finding the claimant and had offered to settle for the policy limits sooner, then the claimant would have accepted a settlement for an amount within the policy limits.

The obvious purpose of these strategies is to manufacture a bad-faith cause of action in which the claimant can seek a full recovery of his damages, including the amount of any judgment entered against the insured above the policy limits. The obvious challenge for courts and insurers is to distinguish between real and manufactured bad-faith claims. Faced with this challenge, many courts have begun to look more closely at the insurer's claim-handling activities to determine whether the insurer's conduct reflects a degree of culpability that can support a finding of bad faith. Recently, the focus has been on the issue of whether the insurer's conduct reflects mere excusable negligence as opposed to real bad faith.

IV. *Novoa v. Geico Indemnity Co.*

In a recent case involving a manufactured third-party bad-faith claim under Florida law, the Eleventh Circuit held that insurer bad faith cannot be established based solely on evidence that the insurer could have done a better job in handling the claim.[12] In *Novoa v. Geico Indemnity Co.*, the court affirmed an order granting summary judgment in favor of an automobile liability insurer (Geico).

A detailed review of the facts in *Novoa* is helpful to illustrate how courts distinguish between excusable negligence and bad faith in the context of a manufactured bad-faith claim. Geico insured an individual under an automobile policy of insurance that provided $10,000 in bodily injury liability coverage and $10,000 in property damage liability coverage per incident. The insured, while driving under the influence on November 10, 2007, struck and killed Jose Ordonez, who had stopped his vehicle to help another motorist repair a flat tire. Significantly, Ordonez's vehicle and the vehicle of the stranded motorist (Ethel Walker) were both damaged in the collision.

Two weeks after the accident, Geico paid its $10,000 bodily injury liability limits to Ordonez's surviving spouse, Viviana Novoa. When it tendered its limits to Novoa, Geico sent Novoa a letter and a proposed release. In its letter, Geico implied that the release would cover only Ordonez's bodily injury claim, and that Ordonez's property damage claim would be handled separately. However, Geico inadvertently enclosed a proposed release of all claims, which included the Ordonez bodily injury claim as well as the Ordonez property damage claim. (This was the first mistake or imperfection in Geico's claim handling.)

Novoa did not cash the settlement check. Instead, on December 12, 2007, she sent Geico a letter demanding $3,100 under the property damage portion of the policy. Notably, this demand did not set a deadline for responding and Geico did not immediately respond to this request (mistake No. 2), nor did it inform its insured that Novoa had made this property damage demand (mistake No. 3). After receiving no response from Geico within about 30 days, Novoa filed her wrongful death lawsuit on January 11, 2008. Novoa's attorney subsequently testified in the bad-faith case that after January 9, 2008 it was unlikely Novoa would have accepted an offer to settle her bodily injury claim for an amount within the $10,000 policy limits.

On January 18, 2008, approximately five weeks after receiving Novoa's property-damage demand, Geico requested Walker's property damage information. On January 28, 2008, Geico received Walker's property damage information and, on this same date, sent a letter to Novoa offering $1,425.29 to settle her property damage claim. In this letter to Novoa, Geico explained that the available property damage limits totaled only $10,000 per incident and that Geico would therefore need to offer Novoa and Walker a prorated amount. Geico explained that Walker's property damage claim was for $18,650, Novoa's claim was for $3,100, and the prorated amount for Novoa's claim was, therefore, $1,425.29. Additionally, on this same date, Geico wrote to the insured and explained that the property damage claims exceeded the policy limit and that Geico would try to settle the property damage claims for an amount within the policy limits.

Novoa rejected Geico's settlement offer, and her wrongful death claim against the insured proceeded to trial. A final judgment for Novoa was entered against the insured in the amount of over $16 million.

Novoa subsequently filed her third-party bad-faith lawsuit against Geico, seeking to recover the full excess judgment of $16,591,426.07. In the bad-faith suit,

Novoa asserted the position that she would have settled the entirety of her claims against the insured if Geico had offered, in addition to the $10,000 bodily injury limits, the sum of $3,100 for the property damage claim (instead of only $1,425). Additionally, Novoa argued that Geico did not respond quickly enough to Novoa's December 12, 2007 demand for $3,100 to setter her property damage claim (i.e., Novoa argued Geico's apparent six-week delay in responding to her demand was evidence of bad faith).

The District Court granted Geico's motion for summary judgment, ruling that Novoa failed to provide sufficient evidence for a reasonable jury to find Geico acted in bad faith. The Eleventh Circuit affirmed, holding that the evidence simply demonstrated that there were many ways that Geico could have handled Novoa's claim better and that the evidence, taken as true, shows that Geico could have improved its claims process, not that Geico acted in bad faith. The court expressly rejected the argument that Geico acted in bad faith by not diligently pursuing a settlement. The court stated: "To fulfill the duty of good faith, an insurer does not have to act perfectly, prudently, or even reasonably. Rather, insurers must 'refrain from acting solely on the basis of their own interests in settlement.' "[13] In reaching its decision, the court relied on the well established principle of Florida law that evidence of carelessness may be relevant in proving bad faith, but that the "standard for determining liability in an excess judgment case is bad faith rather than negligence."[14]

The court further noted that Novoa failed to provide evidence that Geico's alleged bad faith caused the excess judgment. The court stated that Novoa's argument that she would have settled her $16 million case if Geico had offered her only $1,674.71 more in property damage was "patently self-serving" and she provided "no reason why she would settle an undisputed claim over a thousand times less than its actual value or why she never proposed such a favorable settlement until after filing this suit."

V. *Jaimes v. Geico General Insurance Co.*

Two months before its *Novoa* decision, the Eleventh Circuit applied Florida law to decide another manufactured third-party bad-faith case. In *Jaimes v. Geico General Insurance Co.*, the court held that evidence of an insurer's 140-day delay in offering its policy limits was sufficient to support a jury finding of bad faith in a case where the insurer knew since the day of the accident that the insured's liability was clear and a judgment in excess of the policy limits was likely.[15] In *Jaimes*, the court held that the insurer's purported negligence in handling the claim was not a defense, but rather, was material in determining bad faith.[16]

In *Jaimes*, Geico insured Richard Jaimes under an automobile policy of insurance that provided bodily injury liability limits of $10,000 per person and $20,000 per accident. On November 19, 2007, Jaimes was involved in a single-car accident in which two of his passengers (Debbie Lindenberger and her minor daughter "K.L.") were injured. K.L. sustained serious injuries to her hand and one of her fingers was amputated.[17] Jaimes called Geico from the hospital to report the accident. At that time, he informed Geico that K.L. had sustained significant injuries to her hand and that the accident was his fault. At that time, Jaimes asked the Geico adjuster whether he wanted to speak with Debbie Lindenberger, but the adjuster declined this particular opportunity. Additionally, during their initial conversation, Jaimes provided the Geico adjuster with the Lindenbergers' contact information.

However, in the months following the accident, Geico was unsuccessful in its efforts to contact the Lindenbergers. Geico sent numerous letters (to multiple addresses) and left a few voice mail messages (at various numbers) for the Lindenbergers to contact Geico regarding the accident.[18] (None of Geico's failed attempts communicated its desire to settle K.L.'s claim.) Significantly, the Lindenbergers claimed that they tried to contact Geico and left multiple voice mail messages with Geico that went unreturned.

Meanwhile, shortly after the accident, the Lindenbergers retained an attorney who, coincidentally, was also representing Jaimes in an unrelated car-accident case.[19] The Lindenbergers then filed suit against Jaimes on January 11, 2008. Jaimes testified that he learned of the suit in February of 2008, but admitted he did not inform Geico about it at that time and, as a result, a default judgment was entered against Jaimes. Geico first learned of the suit on April 7, 2008, when Jaimes's father sent Geico a facsimile that included a motion for default filed by the Lindenbergers against Jaimes. The Lindenbergers agreed to set the default aside and Geico subsequently entered a defense on behalf of Jaimes. The Lindenbergers ultimately prevailed at

trial and a judgment in the amount of $227,493.85 was entered in their favor against Jaimes.

Jaimes then filed a bad-faith lawsuit against Geico to recover the excess judgment. At trial, the jury found in favor of Jaimes. Geico filed several post-trial motions, including a motion for judgment as a matter of law. In this motion, Geico argued, among other things, that Jaimes offered no evidence that Geico had acted in bad faith. Geico argued that Jaimes, at most, offered only evidence that Geico was negligent, but not that it had acted in bad faith.[20]

Specifically, Geico argued that its lack of success in contacting the Lindenbergers is at most evidence of negligence, not bad faith. In rejecting this argument, the court explained that such matters as reasonable diligence and ordinary care are material to the determination of bad faith.[21] Thus, the court stated that Geico's "purported negligence in handling the underlying claim is not a defense, but rather, is material in determining bad faith."[22]

Overall, the court found that there were a few aspects of Geico's claim handling from which a jury could find bad faith, including the following: (1) Geico knew since the day of the accident that its insured's liability was clear and that the damages would likely exceed the policy limits; (2) based on the foregoing, Geico knew it was necessary to seek to settle the claim promptly and within the policy limits; and (3) Geico did not offer the policy limits until 140 days after the accident occurred.[23]

VI. Key Circumstances

Novoa and *Jaimes* provide an overview of the circumstances courts typically consider when determining whether an insurer's conduct in handling a bodily injury liability claim constitutes ordinary negligence (and not bad faith). Of course, every case is different. In Florida, the determination of whether an insurer has acted in bad faith is based on the totality of the circumstances.[24] Because each case presents different circumstances, it is difficult (if not impossible) to draw general principles concerning whether a certain type of action will likely constitute ordinary negligence in every case. A five-or-six-week delay in responding to certain claimant demands may qualify as ordinary negligence in one case, but may be evidence of bad faith in another case, depending on the circumstances.

Nonetheless, *Novoa* and *Jaimes* show that an insurer's conduct is likely to be considered excusable negligence in bodily injury cases where the conduct involves minor mistakes by an insurer under circumstances in which (1) the claimant is not misled by the mistake; (2) the insurer has timely communicated its willingness to settle the bodily injury claim; or (3) the mistake concerns the handling of the claimant's property damage claim in a situation where the claimant has asserted both property damage and bodily injury claims.

In *Novoa* (where the insurer's mistakes or imperfections in handling the claim were considered ordinary negligence and therefore excusable), it was clear that the claimant was not misled by the insurer's conduct in mistakenly providing the claimant with a proposed release of all bodily injury and property damage claims (while stating in the cover letter enclosing the proposed release that the release would only encompass the bodily-injury claim). Additionally, in *Novoa*, the insurer had timely communicated to the claimant its willingness to settle the bodily injury claim. Within two weeks of the accident, the insurer had tendered its policy limits in an effort to settle the claimant's wrongful-death claim.

Moreover, in *Novoa*, the imperfections in the claim handling arose out of the property-damage aspect of the claim and occurred after the bodily injury policy limits were tendered. Under those circumstances, the court found it was excusable (and ordinary negligence at most) for the insurer to wait approximately 30 days after receiving the wrongful-death claimant's property-damage demand letter before (1) seeking property-damage information from a second claimant competing for a portion of the $10,000 per accident property-damage policy limits, and (2) informing the insured that the wrongful-death claimant had also made a property-damage demand and that two property-damage claimants were competing for the $10,000 per accident policy limits. Thus, the imperfections with respect to the handling of the property-damage claim were excusable.

By contrast, in *Jaimes*, the court found the circumstances supported the finding of bad faith (and not ordinary negligence) because the insurer in that case did not successfully communicate to the claimant that it was willing to offer the policy limits to settle the claim, even though the insurer apparently knew

since the day of the accident that the insured's liability was clear and damages would likely exceed the policy limits.

In *Jaimes*, it appears the insurer made several attempts to initiate settlement discussions by sending numerous letters and leaving multiple voice mail messages asking the claimants to contact the insurer regarding the accident, although (as the court pointed out) none of those communications expressly sought to inform the claimants that the insurer wanted to settle the case. Ordinarily, evidence of an insurer's multiple attempts to contact the claimant would protect an insurer against a finding of bad faith. In *Jaimes*, however, there was evidence the insurer may have ignored multiple voice mail messages that the claimants allegedly left for the insurer. Moreover, in Jaimes, there was evidence of a 140-day delay in offering the policy limits (between the date of the accident and the date the limits were tendered) in a case where the insured's liability for the accident was clear and the claimant's damages were likely to exceed the policy limits. Thus, under those circumstances, the court ruled there were sufficient facts to support a jury finding of bad faith (although the court expressly rejected the notion that the facts supported a finding of bad faith as a matter of law).[25]

VII. Conclusion

Every case is different, so it is difficult to state which specific circumstances will be considered mere excusable negligence in every case. Despite this difficulty, the recent Eleventh Circuit cases, *Novoa* and *Jaimes*, provide useful guidance for determining whether an insurer's conduct warrants a finding bad faith. As indicated in those decisions, a finding of bad faith should be limited to circumstances of lengthy and unexcused delays and actual unfair or wrongful conduct that shows the insurer placed its interests ahead of its insured's interests. Evidence of insurer negligence, standing alone, is not enough to support a finding of bad faith. As the court stated in *Novoa*, an insurer may fulfill its duty of good faith without having to act "perfectly, prudently, or even reasonably."[26]

Endnotes

1. State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995).

2. *See, e.g.*, Berges v. Infinity Ins. Co., 896 So. 2d 665, 668-69 (Fla. 2004).

3. Craig v. Colonial Penn Ins. Co., 335 F. Supp. 2d 296 (D. Conn. 2004) (holding that under Connecticut law evidence of motive to act unreasonably is necessary but not sufficient condition to prove bad faith); Allstate Ins. Co. v. Fields, 885 N.E.2d 728 (Ind. Ct. App. 2008) (explaining that poor judgment or negligence do not amount to bad faith and that a finding of bad faith requires evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will); Martin v. Travelers Indem. Co., 450 F.2d 542 (5th Cir. 1971) (insurer is not liable for judgment in excess of the policy limits unless its refusal to settle was so arbitrary and unreasonable as to constitute fraud).

4. *See* Badillo v. Mid Century Ins. Co., 121 P.3d 1080 (Okla. 2005) (holding that a central issue in the analysis of whether an insurer has breached its duty of good faith is determining whether the insurer had a "good faith belief in some justifiable reason for the actions it took or omitted to take" and that the "minimum level of culpability necessary for liability against an insurer to attach is more than simple negligence, but less than reckless conduct necessary to sanction a punitive damage award"). This standard appears similar to the "fairly debatable" standard applied in first-party cases in many jurisdictions.

5. Roberts v. Printup, 595 F.3d 1181 (10th Cir. 2010) (Kansas law); Tyler v. Grange Ins. Ass'n, 473 P.2d 193 (Wash. App. 1970) (holding an insurer may be liable for "failure to settle within [its insured's] policy limits, if that failure is attributed to either bad faith or negligence").

6. Smith v. Safeco Ins. Co., 78 P.3d 1274 (Wash. 2003).

7. Steedly v. London & Lancashire Ins. Co., Ltd., 416 F.2d 259 (6th Cir. 1969); Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co., 753 F.2d 824 (10th Cir. 1985); Novoa v. Geico Indem. Co., 542 Fed. App'x 794 (11th Cir. 2013).

8. Florida Standard Jury Instruction 404.4 Insurer's Bad Faith (Failure to Settle); *see also* Fla. Stat. § 624.155(1)(b)(1).

9. Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980). In Boston Old Colony, the Supreme Court of Florida described specific duties owed by an insurer, stating, "The 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 the 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." *Id.*

10. *Id.*

11. Novoa v. Geico Indem. Co. 542 Fed. App'x 794 (11th Cir. 2013); Campbell v. Gov't Emps. Ins. Co., 306 So. 2d 525, 530-31 (Fla. 1974) (noting that Florida has aligned itself with those states whose standards for determining liability in an excess judgment case is bad faith rather than negligence); Maldonado v. First Liberty Ins. Corp., 546 F. Supp. 2d 1347, 1353 (S.D. Fla. 2008) ("The essence of an insurance bad faith claim is the insurer acted in its own best interests, failed to properly and promptly defend the claim, and thereby exposed the insured to an excess judgment.").

12. Novoa, 542 Fed. App'x 794.

13. *Id.*, quoting State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995).

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

15. Jaimes v. Geico Gen. Ins. Co., 534 Fed. App'x 860 (11th Cir. 2013).

16. *Id.* at 866.

17. *Id.* at 861.

18. *Id.* at 862.

19. The Lindenbergers and Jaimes signed forms waiving this obvious conflict of interest. The Eleventh Circuit noted it was "troubled" that the attorney determined that he could ethically represent the Lindenbergers in a suit against his current client, Jaimes. *Id.* at 862 n.2.

20. *Id.* at 865.

21. *Id.* at 866, citing Campbell v. Gov't Emps. Ins. Co., 306 So. 2d 525, 530-31 (Fla. 1974).

22. *Id.*

23. *Id.* at 866.

24. State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 63 (Fla. 1995).

25. Jaimes, 534 Fed. App'x at 860.

26. Novoa, 542 Fed. App'x 794. ■

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