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Commentary

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By
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On July 20, 2012, a three-judge panel of Florida's Second District Court of Appeal released what, on its face, appeared to be a relatively innocuous opinion in *Geico General Insurance Company v. Bottini*.[1] The *Bottini* appeal arose as a result of Geico's appeal of a jury verdict in the amount of $30,872,266 rendered against it in an uninsured/underinsured motorist ("UIM") case. Consistent with precedent, the trial court entered a judgment against Geico in the amount of the policy's limit of liability, $50,000. Because the huge verdict had the effect of fixing the plaintiff's damages in a subsequent bad faith case, Geico naturally sought review of that verdict. The panel opinion concluded simply, "Based on the evidence presented, we are satisfied that even if Geico were correct that errors may have affected the jury's computation of damages, in the context of this case and the amount of the judgment, any such errors were harmless."[2]

So far, so good. However, Judge Altenbernd authored a concurring opinion in which he concluded that the Court had no power to review the verdict and therefore he only reviewed the propriety of the $50,000 judgment, concluding that nothing warranted its reversal. Superficially, his logic is appealing. Because Geico conceded that, even under the fairest circumstances, a verdict in excess of $1,000,000 was supportable, any opinion as to the propriety of the verdict could not affect the $50,000 judgment. Therefore, Judge Altenbernd felt constitutionally constrained to limit the Court's review only to the propriety of the $50,000 judgment and not the propriety of the over $30,000,000 verdict. Being merely a concurring opinion, Judge Altenbernd's argument would ordinarily have been relegated to the status of a historical footnote.

However, two months later, the United States District Court for the Middle District of Florida granted partial summary judgment in favor of Geico in a bad faith case, holding that the underlying verdict of $1,638,171 in a UIM case brought in state court could not serve as any basis for the plaintiff's damages in the pending bad faith case. *See King v. Gov't Employees Ins. Co.*[3] The District Court relied on Judge Altenbernd's concurring opinion in *Bottini* to conclude that, because the appellate court lacked the power to review the verdict, to hold that the verdict supplies the measure of the plaintiff's damages would deny Geico due process.[4] Therefore, the parties would have to retry the issue of the plaintiff's damages, along with the question of whether Geico acted in bad faith, notwithstanding the fact that the judgment in the underlying case was appealed and affirmed without opinion.[5]

Eleven months later, the United States District Court for the Southern District of Florida followed suit, holding that a jury verdict in an underlying UIM case could not serve as the measure of the plaintiff's damages in a subsequent bad faith case. *See Harris v. Geico Gen. Ins. Co.*[6] The Court in *Harris* purported to rely on the logic

of Judge Altenbernd's opinion in *Bottini*, as well as the reasoning of the Middle District in *King*. However, the Court explained its reasoning thus:

> Neither *res judicata* nor principles of collateral estoppel preclude Geico from re-litigating the damages issue because the judgment entered in the underlying case was based on Geico's contractual obligations under the policy; which are separate and distinct from the instant bad faith action. *See Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So.2d 1289, 1291 (Fla.1991) (holding that "the claim arising from bad faith is grounded upon a legal duty to act in good faith, and is thus separate and independent of the claim arising from the contractual obligation to perform"); *GEICO Gen. Ins. Co. v. Harvey*, 109 So.3d 236, 240 (Fla. 4th DCA 2013) (noting that "[t]he Florida Supreme Court has repeatedly recognized that a "claim arising from bad faith is grounded upon the legal duty to act in good faith, and is thus separate and independent of the claim arising from the contractual obligation to perform" and that "a defendant's bad faith claim against his insurer is distinct, separate and independent from the plaintiff's tort claim against the defendant.""). Whereas the underlying case and the instant bad faith case are separate causes of action, *res judicata* does not bind the parties to the underlying verdict amount. Additionally, collateral estoppel does not bind the [*sic*] Geico to the underlying verdict amount because that verdict was not a final judgment accorded conclusive effect. *See King*, 2012 WL 4052271 at *6, 2012 U.S. Dist. Lexis 130662 at *18.[7]

So, with the *Harris* decision, Judge Altenbernd's logic from his concurring opinion has been stretched to the narrow principle that the underlying verdict cannot supply the measure of the plaintiff's damages because imposing an unreviewed verdict against the insurer would deny it of due process, to the astounding proposition that the verdict does not supply the measure of damages because the bad faith action and the UIM action are based on two different causes of action. What a leap!

Apparently the Southern District ignored that portion of the Supreme Court's decision in *Allstate Ins. Co. v. Boynton*,[8] that held that in a UIM case, the insurer "stands in the shoes of the tortfeasor."[9] Thus, while in principle it may be true that a UIM case is a case *ex contractu*, it is governed entirely by principles of tort law. Furthermore, the Southern District opinion does not explain why the difference in cause of action would have any impact on what the plaintiff's damages were. The damages to an insured in a UIM case are the damages caused by the tortfeasor. Therefore, while there may be other attendant damages resulting from the insurer's bad faith, that portion of the insured's damages which are a direct result of the tortfeasor's negligence are fixed in the underlying UIM case.

In what appeared to be the start of a slippery slope, a magistrate judge in the Middle District of Florida granted an insurer's motion to compel discovery on a damage issue in a bad faith case, adopting the reasoning of Judge Altenbernd and the Courts in *King* and *Harris*. *See Batchelor v. Geico Cas. Co.*[10] On review of the magistrate's decision, however, the District Court sustained the plaintiff's objection and held that the underlying verdict actually supplied the measure of the plaintiff's damages.[11] The Court explained:

> The ***Bottini*** majority entered a per curiam affirmance with a brief opinion holding that "**even if Geico were correct that errors may have affected the jury's computation of damages**, **in the context of this case and the amount of the judgment**, **any such errors were harmless**." ***Id.* at 476** (majority op.). Logic dictates that in order to hold an error harmless, one must consider it-and that is precisely what the majority did. Judge Altenbernd's concurrence thus improperly conflates a lack of jurisdiction with harmless error review.[12]

The Court then looked to Florida decisions which allow review of verdicts, where they differ in amount from the judgment, specifically in the context of remittiturs and judgments notwithstanding the verdict.[13] It then noted that in the underlying case, Geico appealed the judgment and attacked the propriety of the verdict, but the Fifth District Court of Appeal affirmed

without a written opinion. Rejecting the argument that the *per curiam* affirmance meant that the verdict was not reviewed, the Court explained further:

> Thus, the Fifth District Court of Appeal in the instant case, presented with briefing and oral argument on potential errors affecting the jury's damages award, had jurisdiction to review those errors, even though the judgment was reduced to the policy limits. The appellate court rejected those arguments and affirmed. . . . This Court cannot discern any due process violation from this procedural posture. Defendant fully litigated the issue of the extent of Plaintiff's damages, argued that issue on appeal, and obtained a ruling from the appellate court. . . . It has received all of the process to which it is due.[14]

Thus, at least one District Court has returned to some level of sanity with regard to this relatively simple issue. However, the decisions in *King* and *Harris* remain on the books. It appears that the issue may well be settled by the Florida Supreme Court in the near future. Geico appealed the District Court's decision in *Harris* to the Eleventh Circuit Court of Appeals and requested that the Eleventh Circuit certify the question to the Florida Supreme Court.[15]

Of course, in the event the Eleventh Circuit does certify the question and the Florida Supreme Court accepts jurisdiction, the likely result is a return to the state of the law which existed for seventeen years prior to Judge Altenbernd's concurrence. *See State Farm Mut. Auto. Ins. Co. v. LaForet*.[16] In *LaForet*, the Supreme Court applied Florida's newly-enacted UIM statute, which reads:

> The damages recoverable from an uninsured motorist carrier in an action brought under s. 624.155 *shall include the total amount of the claimant's damages, including the amount in excess of the policy limits*, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state. *The total amount of the claimant's damages are recoverable whether caused by an insurer or by a third-party tortfeasor.*[17]

Given the emphasized language, it is difficult to conceive how the legislature did not intend for the underlying verdict to be the measure of the plaintiff's damages in a UIM bad faith case. Therefore, given the confusion engendered by Judge Altenbernd's concurrence, it is highly likely that the Eleventh Circuit will certify the question and equally likely that the Supreme Court will accept jurisdiction. Whether it chooses to reverse its own clear interpretation of the UIM statute based on such a slim reed, however, remains to be seen.

Conclusion

Judge Altenbernd's concurring opinion in *Bottini* has contributed a great deal of unnecessary confusion in Florida's UIM bad faith jurisprudence. With any luck, the esteemed members of the panel considering the *Harris* appeal will certify the question of whether the underlying verdict supplies the amount of the plaintiff's damages in a subsequent bad faith claim to the Florida Supreme Court. One can only hope at that point that the Justices of the Florida Supreme Court will once again restore clarity to this area of the law.

Endnotes

1. 93 So. 3d 476 (Fla. 2d DCA 2012).
2. *Bottini*, 93 So. 3d at 477.
3. 2012 WL 4052271 (M.D. Fla. Sept. 13, 2012).
4. *Id.* at *5-6.
5. *See* Gov't Employees Ins. Co. v. King, 64 So. 3d 1270 (table decision), withdrawn on rehearing, 68 So. 3d 267 (*en banc*). Ironically, the court's *en banc* decision was authored by none other than Judge Altenbernd.
6. 961 F. Supp. 2d 1223 (S.D. Fla. 2013).
7. Harris v. Geico Gen. Ins. Co., 961 F. Supp. 2d at 1233.
8. 486 So. 2d 552 (Fla. 1986).

9. *Id.* at 558.

10. 2014 WL 3697690 (M.D. Fla. Mar. 4, 2014), overruled, Batchelor v. Geico Cas. Co., 2014 WL 3906312 (M.D. Fla. June 9, 2014).

11. *See Batchelor v. Geico Cas. Co.*, 2014 WL 3906312, *2-3 (M.D. Fla. June 9, 2014).

12. *Id.* at *2 (emphasis in original).

13. *See, e.g.*, Normius v. Eckerd Corp., 813 So. 2d 985, 988 (Fla. 2d DCA 2002) (remittitur); Duclos v. Richardson, 113 So. 3d 1001, 1003-04 (Fla. 1st DCA 2013) (judgment notwithstanding the verdict).

14. Batchelor v. Geico Cas. Co., 2014 WL 3906312, *3 (M.D. Fla. June 9, 2014).

15. *See* Harris v. Geico Gen. Ins. Co., 2014 WL 1286948 (Reply brief of Appellant, Geico General Insurance Company).

16. 658 So. 2d 55 (Fla. 1995).

17. (Emphasis added). ■

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