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Insurance Bad Faith

Uninsured Motorist Bad-Faith Claims: Separate Action, Separate Trial, Separate Damages

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Commentary

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I. Introduction

First-party coverage and first-party bad-faith actions seeking extracontractual damages beyond the policy limit are separate and distinct lawsuits in Florida. An insured cannot try a premature statutory bad-faith claim at the same time as a claim disputing insurance coverage.[1]

First-party bad-faith claims[2] arising from uninsured motorist (UM) coverage are separate and independent actions, too. If the uninsured motorist coverage action is truly separate and distinct from bad faith, one naturally expects a separate trial on bad-faith liability and extracontractual damages. However, there is a unique problem confronting first-party bad-faith claims arising from uninsured motorist coverage under Florida Statute Section 627.727(10).[3] One decision characterizes the problem as a "conundrum" created by Florida law.[4]

Uninsured motorist coverage and bad-faith damages clash in Florida Statute Section 627.727(10). Section 10 allows a claimant to recover the "total amount" of damages in a bad-faith action against the UM insurer. The plain language of Section 10 purportedly allows the insured to recover the full amount of the personal-injury based excess verdict from the first coverage action if the UM insurer is found liable for bad faith.[5] Some trial courts incorrectly allow juries to render excess damage verdicts in the underlying uninsured motorist coverage action. That is wrong. First-party insureds must prove bad-faith damages in a subsequent bad-faith action and in a separate trial. No bootstrapping excess damage verdicts in the coverage action to prove up bad-faith damages later.

Trial courts that permit juries to render excess damage verdicts in the underlying coverage action create multiple problems. First, an excess jury verdict award in a UM coverage trial, if used later to prove bad-faith damages, is inconsistent with Florida law, which recognizes bad-faith actions as separate and independent from coverage actions. A first-party bad-faith claim is premature until coverage is determined. Second, the excess jury verdict results in no judgment of any sort[6] because the trial court may only enter a final judgment for the contractual policy limits. Third, the excess verdict is not within the appellate court's scope of review.[7] Arguably, the appellate court can only review a final judgment for an amount within the contractual policy limits. Fourth, the excess jury verdict, if used later, dangerously threatens an insurer's due process rights (i.e., the right to defend itself against the insured's bad-faith cause of action separately from the coverage action). Lastly, excess damage awards may violate the single-digit ratio for punitive damages. Bad-faith damages in UM cases, like punitive damages, have the effect of punishing an insurer for its bad-faith conduct. Excess damage awards must comply with the single-digit damage ratio outlined by the United States Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[8]

This article will discuss the unique problems confronting Florida courts and practitioners handling bad-faith claims involving uninsured motorist coverage. It will advocate a simple solution to the problems created by Fla. Stat. Section 627.727(10): a separate trial on contractual damages limited to the policy's applicable limits,[9] followed by a separate trial on bad-faith liability and damages. In other words, keep contractual (i.e., coverage) damages and bad-faith damages separate. A first-party insured should not be allowed to establish its bad-faith damages simultaneously with the underlying coverage action. The two actions are not the same at all. There are different strategy objectives, proof elements, and discovery requirements.[10]

If the insured wants to recover "total" damages under Fla. Stat. Section 627.727(10), he or she must prevail on coverage first (i.e., establish liability and contractual damages). The insured can establish coverage through several avenues: a full trial, arbitration,[11] a judgment in the insured's favor, an insurer confessing judgment,[12] settlement,[13] or even a stipulation between the parties.[14] If the insured loses on coverage, or there is no coverage, a viable bad-faith cause of action never existed in the first place. Only after establishing coverage may the insured prosecute its first-party bad-faith case and perhaps recover the "total amount" of damages under Fla. Stat. Section 627.727(10)—damages in excess of the policy limit. If the Florida Supreme Court or legislature contemplates a different procedure, they should tell us. But, until then, insurers should not be forced to defend against excess bad-faith damages, and juries should not be awarding excess damages during a coverage dispute or breach of contract action under the insurance contract.

II. Florida First-Party Bad Faith

A. Liability Determination And Extent Of Damages

Before an insured brings a first-party bad-faith action against its insured, it must establish two elements: a liability determination against the uninsured tortfeasor and the extent of the insured's damages.[15] Liability and damages are conditions precedent to a bad-faith lawsuit. Without them, a bad-faith cause of action does not accrue and remains premature.

Bad-faith is codified in Fla. Stat. Section 624.155. Any person injured by an insurer's bad-faith dealings may bring a civil action against the insurer for the purported violations.[16] An insurer is obligated to attempt in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests.[17]

An insured perfects a bad-faith action by sending the insurer a civil remedy notice of insurer violations[18] and establishing liability and damages under the insurance contract. Bad faith depends on the "totality of the circumstances."[19] Negligence alone does not amount to bad faith.[20] Neither does a "mere inability to agree to a dollar amount" so long as the insurer exercises good faith while adjusting the claim.[21] Bad faith is fact-dependent; usually left to the discretion of the fact finder.[22]

Incidentally, three of the most well-known first-party bad-faith decisions in Florida involve uninsured/underinsured motorist coverage. The purpose of the uninsured/underinsured motorist statute is to compensate an insured for a deficiency in the tortfeasor's[23] personal liability insurance coverage.[24] In the typical UM case, the insured sues its own insurer for UM coverage when the tortfeasor has no insurance at all, or the tortfeasor's bodily injury liability insurance is inadequate. Either way, there is not enough coverage available to cover the insured's bodily injuries caused by the accident. These three UM cases establish the framework for treating coverage actions separate and independent from bad-faith causes of action.

In *Blanchard v. State Farm Mutual Automobile Insurance Co.*,[25] the Florida Supreme Court unequivocally created the premature accrual rule. The insured suffered permanent bodily injury when an uninsured motorist hit him. The policy included $200,000 in UM coverage. The insured sued his insurer and the tortfeasor. The insured's specific claim against his insurer was that it refused to make a good faith offer to settle his claim. A jury returned a verdict for $396,990 at trial. The court entered a judgment for the full amount of the jury award against the tortfeasor and $200,000 against the insurer. After the underlying coverage and negligence action, the insured sued its insurer alleging bad faith. The *Blanchard* decision resolved a conflict between the appellate district courts at the time. It held that an insured's claim against a UM insurer for failure to settle a claim in good faith does not accrue before the

conclusion of the underlying litigation for contractual UM benefits. Moreover, absent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for bad-faith failure to settle.[26]

B. Specific Amount Of Damages Not Required

An insured does not need to establish a "specific amount" of damages to perfect a bad-faith cause of action. Three years after *Blanchard*, the Florida Supreme Court analyzed the "extent of damages" condition precedent for bad-faith actions in *Imhof v. Nationwide Mutual Insurance Co.*[27] In *Imhof*, the insured sued his UM insurer for bad faith. However, the complaint failed to allege a determination of the extent of the insured's damages. The trial court dismissed the complaint with prejudice, reasoning that the insured's complaint could not sufficiently state a cause of action without that requisite second element. The Florida Supreme Court affirmed the trial court's dismissal, concluding that neither *Blanchard* nor Fla. Stat. Section 624.155(2)(b) requires a specific amount of damages. Additionally, insureds do not need to allege an award exceeding the policy limits to bring an action for insurer bad faith.[28] Insureds sometimes argue that juries must render an excess damage verdict in order to establish extracontractual bad-faith damages. The *Imhof* decision rejects that argument.

C. Premature Bad-faith Actions Should Be Dismissed Without Prejudice

A premature first-party bad-faith action is subject to dismissal without prejudice. The Florida Supreme Court revisited *Blanchard* and *Imhof* in the decision of *Vest v. Travelers Insurance Co.*[29] The facts in *Vest* involved a wrongful death automobile accident caused by an uninsured motorist. The *Vest* decision ultimately clarified the breadth of the holding in *Blanchard*. Importantly, it reaffirmed that a bad-faith cause of action is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract.[30] A premature bad-faith action is not subject to summary judgment, but rather, should be dismissed without prejudice.[31] A premature bad-faith action also includes an action brought prior to any settlement.[32] A trial court has absolutely no legal basis to convene a trial and adjudicate damages in excess of a policy's UM limits based on a premature bad-faith action. The two actions are separate.

III. Total Amount Of Damages Recoverable Under Fla. Stat. Section 627.727(10)

Florida's UM statute allows an insured to recover the "total amount" of damages when the insured sues for bad faith. The phrase "total amount" is not defined, but includes damages beyond the policy's limit based on the language that follows it. The mandatory word "shall" also precedes "total amount." Section 10 of the UM statute states:

> (10) 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 is recoverable whether caused by an insurer or by a third-party tortfeasor. (Emphasis added).

Section 10 undoubtedly permits an insured to recover total damages—both contractual and extracontractual. Section 10 is a penalty and includes any amount in excess of the claimant's policy limits *without regard to whether the damages were caused by the insurer.*[33] However, Section 10 fails to answer two critical questions. The first question is *when* can the insured recover the total damages contemplated in the UM statute. The second question is actually two parts: *how* does the insured recover total damages and *how* is the fact-finder supposed to determine those damages.

Section 10 does not explain when or how an insured may recover total damages. The plain language of the provision does not address timeliness or procedure at all. According to *Blanchard* and *Vest*, a bad-faith cause of action does not, and cannot, accrue until the insured establishes two elements: existence of liability and extent of damages. In a first-party breach of contract action, the insured cannot establish these two elements until he or she obtains a favorable judgment on coverage in the underlying action. Yet Section 10 fails to consider these conditions precedent to bad faith. Instead, Section 10 assumes that the insured will perfect a first-party bad-faith cause of action correctly. Moreover, it dangerously assumes trial courts will keep first-party contractual actions and premature bad-faith actions completely segregated and correctly abide by

the separate and independent action rationale developed by Florida common law.

A solution to the questions of when and how an insured may recover total damages is actually simpler than it seems. The best answer—a separate trial on contractual coverage and a separate trial on bad-faith liability and damages. No mix or overlap of the two. At the subsequent, and separate, bad-faith trial, the insured must prove its bad-faith damages. However, an insured should not be able to rely on an excess damage verdict from the first coverage action as conclusive proof of bad-faith damages in the subsequent bad-faith lawsuit. And, if the excess verdict is unconstitutional, it should not be considered at all.

IV. Case Developments: Fla. Stat. Section 627.727(10) Poses Unique Problems

Several Florida state and federal decisions illustrate the unique problems caused by Fla. Stat. Section 627.727(10) when juries render excess damage judgments that exceed the policy limits in the underlying coverage action. The decision in *GEICO General Insurance Co. v. Bottini*[34] sparked a healthy debate, unveiling potential substantive and procedural problems with excess damage recoveries under the UM statute—a debate that continues.

A. *Bottini* Concurrence

An excess verdict above the policy limit in a first-party insurance claim arising from UM coverage "results in no judgment of any sort."[35] At least that is what one member of the appellate panel in *Bottini* thought. Here are the relevant facts. An insured driver swerved off the road when the engine of the car in front of him malfunctioned, exploded, caught fire and produced a large smoke cloud. The insured swerved away from the smoke, lost control and rolled the car. The crash ejected the insured from the car. He died.

The insured's Estate sued the tortfeasor for negligence, advancing two negligence theories. The driver did not pull over when the engine started to show signs of malfunction. Additionally, the driver's mother—the owner of the car—maintained it negligently. The negligence case eventually settled for $1 million. However, the insured's Estate also sued the UM insurer for underinsured motorist benefits. The policy provided $50,000 in UIM coverage. At trial, the jury determined the tortfeasor and her mother were negligent. The jury found no comparative fault and concluded the deceased insured was not negligent at all.

The jury awarded the insured's Estate a verdict totaling almost $30 million—$29.5 million above the applicable UM policy limit. The jury awarded $103,552 to the Estate; $14,522,478 to the insured's surviving wife, and approximately $5 million each to the insured's three children. The trial court properly limited the final judgment to the $50,000 UM policy limit.[36] The insurer appealed the verdict as excessive. On appeal, the insurer conceded that a jury would be free under the facts to award a total of $1,050,000. The appellate court affirmed the trial court's $50,000 final judgment and found no harmful error as to that judgment.

Bad-faith damages were the real motivation behind the insurer's appeal in *Bottini*. Judge Altenbernd anticipates that the insured's Estate, since it established liability and damages, will sue the insurer for bad faith. Concurring opinions rarely attract much attention.[37] Judge Altenbernd's concurring opinion in *Bottini*, however, uncovers unique problems for first-party bad-faith claims involving UM coverage. Initially, he emphasizes that the UM statute fails to explain how the fact finder in the next bad-faith lawsuit determines the "total amount" of damages.[38] The Estate will undoubtedly want to use the jury's excess verdict in the subsequent bad-faith case to prove bad-faith damages.[39] Judge Altenbernd frames this issue, but unfortunately, does not resolve how the fact-finder determines the total amount of damages.

Footnote one of the *Bottini* concurrence frames yet another unique problem confronting first-party bad-faith UM claims. Judge Altenbernd explains, "[i]n a standard 'bad faith' case involving a liability insurance company, the verdict in excess of the insurance limits results in a judgment against the defendant, but not against his or her liability insurance company. Only in a lawsuit against the plaintiff's own insurer, a 'first-party' insurance claim, does the excess verdict result in no judgment of any sort."[40]

The insurer wanted an appellate opinion affirming the $50,000 final judgment, but reversing the jury "verdict" because it contained elements of damage not included within the final judgment.[41] But that did not happen.

Judge Altenbernd's concurrence directly supports that a trial court cannot enter a final judgment which exceeds the UM policy limits. An appellate court cannot review anything outside the limits because it only has the power, constitutionally, to review final judgments for reversible error.[42] The excess verdict beyond the UM policy limit therefore falls outside the appellate court's "permissible scope of review."[43] This argument allows Judge Altenbernd to avoid the real problem in the case: whether the damages awarded by the jury in excess of $1,050,000 "is correct or incorrect."[44] Judge Altenbernd refuses to issue an advisory-type opinion on the excess jury verdict. At the same time, Judge Altenbernd qualifies his reluctance, stating that he will review and determine whether the excess verdict is correct as to damages, if the Florida Supreme Court tells him to review it.

B. Federal Court Agrees That The 'Conundrum' Creates A Due Process Problem

The unique problem emphasized by Judge Altenbernd's concurrence in *Bottini* made its way into the Florida federal courts in *King v. Government Employees Insurance Co.*[45] The facts in *King* concerned a three-car accident. Two drivers were cited for careless driving. The two tortfeasors each had automobile policies with $100,000 in bodily injury liability limits. Each tortfeasor contended that the other one caused the accident. Over the next eighteen months, the claimant insured treated with three doctors for injuries allegedly caused by the accident. One treating physician recommended conservative treatment with surgery likely in the future. Two other treating physicians recommended minor surgeries (nerve compression and a lumbar back surgery).

The insured's policy contained $25,000 in UM coverage. The UM insurer, based on the medical bills and recommendations known at the time, concluded that the value of the insured's claim fell within a single tortfeasor's limits of $100,000.[46] Because the tortfeasor's limits would adequately cover the insured's damages, the insurer denied UM coverage.

The UM insurer's decision to deny the claim sparked a fury of litigation and an appeal. A few months after the denial, the insured filed a Civil Remedy Notice of Insurer Violations alleging bad faith. The same day he filed the Civil Remedy Notice, he sued his UM insurer and one of the tortfeasor's individually. Curiously, one year later, the UM insurer received new medical records containing some very surprising information. Unbeknownst to the UM insurer, the insured underwent a much more serious surgery with a new physician. Based on this new information, the UM insurer tendered the $25,000 UM policy limit. The insured strategically refused to accept that tender and settled with the two individual tortfeasors instead. The case proceeded to trial. The jury rendered a verdict for the insured, awarding $1,638,171 for the accident-related damages. The trial court entered final judgment for the $25,000 UM policy limit. The UM insurer appealed the excess verdict. Similar to the *Bottini* decision, the Second District Court of Appeal did not review the excess jury verdict and affirmed the final judgment only. The insured amended its complaint to add bad faith and the UM insurer removed the bad-faith action to federal court. The UM insurer moved for partial summary judgment on the underlying liability and damage verdict as an element of damages.

Judge Moody, relying on Judge Altenbernd's concurrence in *Bottini*, noted the unique problem afoot in first-party bad-faith claims involving uninsured motorist coverage. He calls it a "conundrum" created by Florida law. He agrees that both the UM statute and case law fail to explain *how* the finder of fact determines the "total amount" of the claimant's damages in a subsequent bad-faith action.[47] He also agrees that a trial court can only enter a policy-limits award against the UM insurer for contract liability in the underlying coverage action.[48] He reiterates that the jury's excess verdict beyond the final policy-limit judgment cannot be review on appeal for errors.[49]

Treating an excess verdict as a final damage determination owed to the insured in a subsequent bad-faith action robs insurers of procedural due process because an appellate court cannot review that excess verdict. Additionally, *res judicata*[50] and collateral estoppel[51] do not clarify this dilemma because bad-faith claims are "separate and independent actions" from claims arising from contractual obligations.[52] In the contractual coverage and bodily injury action, the insurer is not defending specifically against bad faith. Yet the jury is allowed to render extracontractual excess damages.

Judge Moody recognizes the "conundrum" created by Florida's UM statute, but, like Judge Altenbernd,

expressly refuses to resolve the problem. However, he preserves due process principles for insurers by requiring insureds to prove their damages in the subsequent bad-faith action without "rely[ing] on the underlying verdict as conclusive proof of those damages."[53] He does not foreclose the excess verdict's use however or say exactly how the insurer may use an excess verdict in the subsequent bad-faith action. He merely confirms that the excess verdict cannot be the only proof of bad-faith damages.

Ultimately, Judge Moody entered partial summary judgment for the UM insurer, concluding that it is not bound by the first trial's excess verdict in a subsequent bad-faith action. Moreover, "the $1,638,171 verdict is not an element of damages that conclusively determines the amount of damages" in the bad-faith action.[54] There will likely be some jousting over what "conclusive" means and how insureds can use the excess verdict at a subsequent bad-faith trial, if at all. The unique problems confronting first-party UM actions did not end with *Bottini* and *King*.

C. Confessing Judgment

A trial court should not force a trial when there is no actual dispute on coverage and the insured admits coverage in full. There is nothing left to try. However, after a four-day trial, a jury returned another excess damage verdict in the lower court of *Safeco Insurance Co. of Illinois v. Fridman*.[55] Inexplicably, the trial court allowed the jury to render that excess verdict without an actual coverage dispute. An actual solution to the excess-verdict problem remains elusive even when coverage is not in dispute.

The underlying facts and rationale behind the trial court's decision-making in *Fridman* illustrates that clarification of Fla. Stat. Section 627.727(10) is long overdue. In 2007, an automobile accident injured the insured. His policy provided $50,000 in UM coverage. The tortfeasor's insurer tendered its limits. But that payment was not enough to cover the insured's injuries caused by the accident. The insured made a claim against his own insurer for the UM limits. One year and ten months after the accident, the insured filed its Civil Remedy Notice of Insurer Violations and eventually sued Safeco. The one-count complaint, which did not include a bad-faith count, sought damages against Safeco for UM benefits only.

Before trial, Safeco tendered a check to the insured for the $50,000 policy limits. Safeco filed a motion for entry of confession of judgment. Safeco also agreed to the trial court entering a final judgment in favor of the insured for $50,000. However, the insured opposed the entry of a confessed judgment, arguing that a jury verdict needed to determine the upper limits of Safeco's liability for the future bad-faith claim. The trial court, relying on the plain language of Fla. Stat. Section 627.727(10), denied Safeco's confession motion. It justified that denial as consistent with the legislative intent of Fla. Stat. Section 627.727(10).[56]

Safeco had no other choice but to try the case. But what was left to try, contractually, if the parties agreed the limits were owed? Nothing. Coverage was no longer in dispute; and therefore, moot under the insurance contract. The trial court held a trial anyway.

At trial, the jury concluded: 1) the other driver who hit the insured was negligent and 100% responsible for the damages; and 2) the "total" damages were $1 million. The trial court reduced the final judgment to the $50,000 UM limit, plus interest, "notwithstanding the excess jury verdict."[57] The insurer appealed.

The Fifth District Court of Appeal reasoned that any coverage dispute once in existence between the parties became moot when Safeco agreed to a policy limits judgment against it. So, the trial court erred when it forced the parties to proceed to trial.[58] On appeal, the insured argued that the entry of a confessed judgment might somehow render the remedies available for bad-faith damages "impotent and obsolete."[59] The appellate court rejected that argument, explaining that nothing in the decision created a legal impediment to the insured suing Safeco for bad-faith later.

The appellate court also reaffirmed that the insured is not required to obtain a jury verdict in excess of the policy limits to pursue bad faith.[60] A confessed judgment for the policy limits, like a stipulation, arguably perfects the insured's ability to pursue bad-faith damages in a subsequent action.[61] But the key word is "subsequent." A confessed judgment does not ignore the legislative intent of Fla. Stat. Section 627.727(10) because the insured "can still seek the full measure of damages afforded by this subsection in a subsequent bad-faith action."[62] The appellate court directed the trial court on remand to amend its final order, deleting

any reference to the $1 million jury verdict. The appellate court reached the correct result.

D. An Excess Jury Verdict In The Underlying Coverage Action May Not Be The 'Proper' Measure Of Bad-faith Damages

A jury verdict in an underlying coverage action may not be the proper measure of bad-faith damages. The jury's verdict usually reflects medical expenses and medical bills, not damages flowing from the insurer's breach. In *King*, Judge Moody concluded that the excess-damage verdict could not be used by an insured as "conclusive proof."[63] *Harris v. Geico General Insurance Co.*,[64] another federal decision from Florida's Southern District, analyzed Fla. Stat. Section 627.727(10) and added another consideration. An uninsured motorist hurt the insured in an automobile accident. The insured's policy contained $100,000 in UM limits. Initially, the insured complained of chest pain and headaches. The first doctor recommended conservative treatment for subsequent back and neck pain. The insured demanded the UM policy limits. The UM insurer rejected that demand so the insured filed a Civil Remedy Notice of Insurer Violations alleging bad faith. The insured underwent a discectomy a few weeks later. She sued the UM insurer for coverage and underwent another surgery. This time, the surgery was a spinal fusion, which quadrupled her medical costs, and of course, changed the claim's damage analysis. At trial, the jury awarded a $336,351 verdict (i.e., $236,351 more than the UM policy limit).[65]

With a favorable judgment on coverage and contractual liability in hand, the insured sued for bad-faith damages next. Approximately two and a half years later, a jury returned a bad-faith verdict for the insured, finding that the UM insurer acted in bad faith when it failed to settle the claim within the 60-day safe harbor period.[66] The UM insurer moved for a judgment as a matter of law during the trial, and again after the verdict, setting the stage for another review of Fla. Stat. Section 627.727(10).

A jury verdict in the underlying case that reflects expenses incurred as a result of medical treatments after the insurer attempts to settle the case are not the proper measure of bad-faith damages. Paraphrasing Judge Altenbernd in *Bottini*, Judge Ryskamp concludes, "[s]ignificantly, the statute does not say that the damages are what a jury awarded in an underlying liability action."[67] He also relied on Judge Moody's overall analysis in *King*, praising the "strength of its reasoning."[68] Judge Ryskamp entered a judgment as a matter of law for the insurer. However, he did not break any new ground on an actual solution to the excess jury verdict problem.

V. Excess Jury Verdicts And Single-Digit Damage Ratios

Jury verdicts that exceed a single-digit damage ratio between compensatory damages and punitive damages are unconstitutional and violate due process. Contractual damages are compensatory. Insurance contracts indemnify the insured for a loss up to the limits agreed to by the parties. Bad-faith damages, on the other hand, are extracontractual. First-party bad-faith in Florida is statutory, but its origins are in tort. Bad-faith damages are punitive. They are meant to punish and deter bad-faith conduct in UM cases. The aim is retribution, not indemnification.

Absent extreme cases that may warrant an exception, extracontractual bad-faith damages under Fla. Stat. Section 627.727(10) should be limited to single-digit damage ratios (1:9). Otherwise, Fla. Stat. Section 627.727(10) is not constitutionally compliant with *State Farm Mutual Automobile Insurance Co. v. Campbell*.[69] In *Campbell*, the United States Supreme Court held that a $145 million punitive damage award on a $1 million compensatory judgment violated due process.

The *Campbell* decision followed *BMW of North America, Inc. v. Gore*.[70] In *Gore*, the Supreme Court refused to sustain a $2 million punitive damage award on a compensatory verdict of $4,000 and established three analytical guideposts for determining the constitutionality of punitive damage awards. The awards cannot be grossly excessive. Courts reviewing punitive damages must consider: 1) the degree of reprehensibility of the defendant's misconduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and 3) the difference between punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The most important factor when evaluating the reasonableness of a punitive damages award is "the degree of reprehensibility of the defendant's conduct."[71]

In *Gore*, the punitive to compensatory damage ratio was an excessive 500:1. *Campbell* produced a 145:1 punitive to compensatory ratio. Both were unconstitutional and violated due process.

The causal connection between the harm and the punitive damage award is just as important as the ratio that the jury award produces. The punitive damage award rendered by the jury in *Campbell* "bore no relation to the [insured's] harm" caused by the insurer's alleged bad faith.[72] Similarly, the conduct by an insurer in a first-party UM coverage case bears very little causal relationship to the medical expenses actually incurred by the insured and caused by the negligence of a third-party tortfeasor. The conduct that harms the insured "is the only conduct relevant to the reprehensibility analysis."[73] Courts must simply ensure "reasonable" and "proportionate" punishment when compared to the plaintiff's harm and general damages recovered.[74] The Court was careful not to impose a bright-line ratio which a punitive damages award cannot exceed. But, the Court emphasized that "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process."[75]

Three out of four recent Florida decisions involving first-party uninsured motorist coverage under Fla. Stat. Section 627.727(10) discussed in Section IV above violate the single-digit damage ratio test. Assume the insured wants to use the excess damage verdicts rendered by the juries in *Bottini*, *King*, and *Fridman*. The insured wants to present evidence of each excess verdict in a subsequent bad-faith case in order to establish extracontractual damages and recover the total amount of damages permitted by the UM statute. The problem of course is that each excess verdict is unconstitutional under the single-digit ratio rule pronounced in *Campbell*. In *Bottini*, the ratio is 600:1 ($30 million verdict: $50,000 UM limit). The ratio produced by *King* is 40:1 ($1 million verdict: $25,000 UM limit). The ratio in *Fridman* is 20:1 ($1 million verdict: $50,000 UM limit). The ratio in *Harris* is the only one that could pass single-digit *Campbell* scrutiny at 3:1 ($336,351 verdict: $100,000 UM limit). However, as a matter of law, that verdict was not a proper measure of the bad-faith damages. A jury in a subsequent bad-faith action should not be permitted to hear evidence about an excess damage verdict rendered under Fla. Stat. Section 627.727(10) that is unconstitutional.

VI. Conclusion

Insurers should be cognizant of the unique problems caused by excess verdicts in first-party bad-faith cases arising from UM coverage. In Florida, trial and appellate courts are still grappling with the "conundrum" created by Fla. Stat. Section 627.727(10). The problems are substantive, procedural, and even constitutional. Clarification is necessary and long overdue, whether that clarity comes by way of court challenge or legislative amendment.

The recent state and federal decisions analyzing Florida's UM statute appropriately frame questions and issues that neither the plain language of the statute or case law resolves. That is a good start. Sometimes questions lead to clarification. Other times, they lead to more questions, no clarification, and more confusion. However, the proverbial elephant in the room, which is not going away, is: Why is a jury in a first-party UM coverage action allowed to render an excess jury verdict if the trial court cannot enter a final judgment against the insurer in excess of that policy limit anyway? The acknowledgement by courts that an insured may proceed to prove its full and total damages in a *subsequent* bad-faith action does not solve the excess verdict problem in the underlying first-party coverage action. Telling insureds that they can prosecute a subsequent bad-faith action and telling them exactly when and how to recover total damages, are two separate concepts. Unfortunately, Fla. Stat. Section 627.727(10) does not answer either question.

First-party coverage actions and bad-faith actions are separate and independent actions in Florida. It should remain that way for first-party bad-faith UM coverage disputes too. The question of *when* the insured gets to prove total damages in excess of the policy limits has a plausible answer: at a separate bad-faith trial, assuming the insured proves liability on the part of the tortfeasor and damages under the insurance contract. If the insured cannot prove those elements first, bad faith cannot possibly exist. If the insurer in the first action admits coverage, does not dispute liability, and pays the policy limits, a trial under the contract is unnecessary. But bad-faith rights are still preserved.

A separate trial on contractual damages, limiting the verdict against the UM insurer to the policy limits with a simple jury instruction,[76] followed by a *subsequent*

and a separate trial on bad-faith liability and bad-faith damages, if necessary, eliminates problems and unnecessary confusion caused by excess damage verdicts. Juries should not render excess damage verdicts in a first-party coverage action in the first place. But, if the trial court permits them, the judgments should be appropriately reduced to the limits. However, an insured should not be allowed to rely conclusively, or at all, on a verdict that the appellate court cannot even review to prove its bad-faith damages in a subsequent bad-faith action. This is especially true if that excess verdict exceeds a single-digit compensatory to punitive damage ratio.

Endnotes

1. Premature bad-faith claims are dismissed without prejudice or abated. *See* State Farm Auto. Ins. Co. v. O'Hearn, 975 So. 2d 633, 635 (Fla. 2d DCA 2008). Dismissal without prejudice is the better option for premature first-party bad-faith claims. *See, e.g.*, Stallworth v. Hartford Ins. Co., 2006 WL 2711597 (N.D. Fla. Sept. 19, 2006) (dismissing plaintiff's first-party bad-faith claim without prejudice until liability determined). Some courts acknowledge that a bad-faith cause of action is more appropriately prosecuted as a separate cause of action. *See* Allstate Ins. Co. v. Jenkins, 32 So. 3d 163 (Fla. 5th DCA 2010); Gov't Emps. Ins. Co. v. King, 68 So. 3d 267, 270 n.3 (Fla. 2d DCA 2011).

2. This article's discussion is limited to first-party actions. "A first-party action is one in which the insured is also the injured party who is to receive the benefits under the policy. In contrast, a third-party action is one in which a third party injured, not the insured, is entitled to benefits under the policy as the result of the insured's tortious conduct." McLeod v. Continental Ins. Co., 591 So. 2d 621, 623, n.3 (Fla. 1992). In a first-party bad-faith claim, the insured makes a direct claim against its insurance company for failing to settle a claim, delaying the claim or payment, or only making a partial payment on the claim. There is no common law action for breach of the implied warranty of good faith and fair dealing in the first-party coverage context. *See* QBE Ins. Corp. v. Chalfonte Condominium Apartment Ass'n, Inc., 94 So. 3d 541, 549 (Fla. 2012).

3. *See* Geico General Ins. Co. v. Bottini, 93 So. 3d 476, 478, n.1 (Fla. 2d DCA 2012) (Altenbernd, J., concurring).

4. *See* King v. Government Employees Ins. Co., 2012 WL 4052271 (M.D. Fla. Sept. 13, 2012).

5. *See* J. Pablo Caceres and Christopher M. Ramey, *Ripe for Campbell Review: A Florida Uninsured Motorist Claimant's Statutory Right to Recover Excess Verdict Damages in a Bad Faith Action*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 21, #18, January 22, 2008.

6. *Bottini* at 478, n.1.

7. *Id.* at 478.

8. 538 U.S. 408 (2003).

9. First-party contractual liability damages are limited to the policy limits, plus legal interest. *See* Hudson Jones, *Why Sue For Bad Faith When Consequential Damages Are Available?* Mealey's Litigation Report: Insurance Bad Faith, June 27, 2013.

10. For example, in a first-party breach of contract coverage action where the insured wants to establish liability and damages under the insurance contract, the insurer's claim file is privileged work product. *See, e.g.*, Nationwide Ins. Co. of Fla. v. Demmo, 57 So. 3d 982 (Fla. 2d DCA 2011); State Farm Florida Ins. Co. v. Desai, 106 So. 3d 5 (Fla. 3d DCA 2013); American Reliance Ins. Co. v. Rosemont Condominium Homeowners Ass'n, Inc., 671 So. 2d 250 (Fla. 3d DCA 1996); Gavin's Ace Hardware, Inc. v. Federated Mut. Ins. Co., 2011 WL 5104476 (M.D. Fla., Oct. 27, 2011); State Farm Fire & Cas. Co. v. Valido, 662 So. 2d 1012 (Fla. 3d DCA 1995); State Farm Florida Ins. Co. v. Gallmon, 835 So. 2d 389 (Fla. 2d DCA 2003). Disclosure constitutes premature bad-faith discovery.

11. *See* Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 475 (Fla. 2006).

12. *See* Safeco Ins. Co. of Ill. v. Fridman, 117 So. 3d 16 (Fla. 5th DCA 2013); Scott v. Progressive Express Ins. Co., 932 So. 2d 475 (Fla. 4th DCA 2006).

13. *See* Brookins v. Goodson, 640 So. 2d 110 (Fla. 4th DCA 1994) (settlement of UM claim where insurer paid policy limits did not preclude insured's first-party bad-faith claim), *disapproved on other grounds*, *Laforet*, 658 So. 2d at 62.

14. *See* Clough v. Government Employees Ins. Co., 636 So. 2d 127 (Fla. 5th DCA 1994) (stipulation that insured's damages exceeded maximum available coverage is sufficient basis for subsequent bad-faith action, and exact amount of damages can be determined in that action).

15. *See* Vest v. Travelers Ins. Co., 753 So. 2d 1270 (Fla. 2000).

16. Fla. Stat. Section 624.155(1) (2005).

17. Fla. Stat. Section 624.155(1)(b) (2005).

18. Fla. Stat. Section 624.155(3)(a)-(b). After proper notice, the insurer has 60 days to respond, or cure the claimed bad faith by paying the benefits owed on the insurance contract. *See* Talat v. Aetna Casualty & Surety Co., 728 So. 2d 205 (Fla. 2000).

19. *See* State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55 (Fla. 1995) (rejecting the "fairly debatable" standard). Other states, like Wisconsin, adopt the "fairly debatable" standard. So long as the coverage question is "fairly debatable," the insurer may debate it and there is no liability for bad faith. *See* Dianne K. Dailey et al., *First-Party Bad Faith*, 29-WTR Brief 44, 45 (2000). But where a claim is not fairly debatable, an insurer's refusal to pay constitutes bad faith.

20. *See* King v. Government Employees Ins. Co., 2012 WL 4052271 at *3 (M.D. Fla. Sept. 13, 2012), citing Travelers Indem. Co. of Ill. v. Royal Oak Enter., Inc., 429 F. Supp. 2d 1265, 1271, n.21 (M.D. Fla. 2004).

21. *See* 316, Inc. v. Maryland Cas. Co., 625 F. Supp. 2d 1187, 1191 (N.D. Fla. 2008).

22. *See* King v. Government Employees Ins. Co., 2012 WL 4052271 at *4 (M.D. Fla. Sept. 13, 2012).

23. The party at fault for the accident.

24. *See* Neff v. Prop. & Cas. Ins. Co. of Hartford, 133 So. 3d 530 (Fla. 2d DCA 2013).

25. 575 So. 2d 1289 (Fla. 1991).

26. *Id.* at 1291.

27. 643 So. 2d 617 (Fla. 1994).

28. *Id.* at 618.

29. 753 So. 2d 1270.

30. *Id.* at 1276.

31. *Id.*

32. *Id.* at 1275.

33. *See* State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 60 (Fla. 1995).

34. 93 So. 3d 476 (Fla. 2d DCA 2012).

35. *Id.* at 478 n.1.

36. *Id.* at 477.

37. One exception is Supreme Court Justice Robert Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (establishing tripartite model for executive authority and decision-making).

38. *Bottini* at 478.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. 2012 WL 4052271 (M.D. Fla. Sept. 13, 2013).

46. *Id.*

47. *Id.* at *5.

48. *Id.* at *5, citing Nationwide Mut. Fire. Ins. Co. v. Voigt, 971 So. 2d 239, 241-242 (Fla. 2d DCA 2008) (holding that final judgment against an insurer in a first-party action for contract liability for UM benefits should be limited to the policy limits).

49. *Id.* at * 5, *citing Bottini* 93 So. 3d 476 (Altenbernd, J., concurring); Gov't Emps. Ins. Co. v. King, 68 So. 3d 267, 269 (Fla. 2d DCA 2011).

50. "Res judicata" is a judicial doctrine often called claim preclusion used to bar parties from relitigating claims previously decided by a final adjudication on the merits. *See generally*, W & W Lumber of Palm Beach, Inc. v. Town & Country Builders, Inc., 35 So. 3d 79 (Fla. 4th DCA 2010).

51. The doctrine of "collateral estoppel," also known as issue preclusion and estoppel by judgment, bars relitigation of identical issues between identical parties in two proceedings. It is intended to prevent repetitious litigation of what is essentially the same dispute. *See generally*, Provident Life and Accident Ins. Co. v. Genovese, 2014 WL 714695 (Fla. 4th DCA Feb. 24, 2014).

52. *Id.* at *6.

53. *Id.*

54. *Id.*

55. 117 So. 3d 16 (Fla. 5th DCA 2013).

56. *Id.* at 18.

57. *Id.* at 19.

58. *Id.* at 19-20.

59. *Id.* at 20.

60. *Id.*, citing Clough v. Gov't Emps. Ins. Co., 636 So. 2d 127 (Fla. 5th DCA 1994).

61. *Id.*

62. *Id.* at 21 (emphasis added).

63. *King* at *6.

64. 961 F. Supp. 2d 1223 (S.D. Fla. 2013).

65. *Id.* at 1225-1227. The decision does not mention whether the trial court reduced the final judgment to the UM policy limit.

66. *Id.* at 1226-1227.

67. *Id.* at 1232.

68. *Id.* at 1233.

69. 538 U.S. 408 (2003).

70. 517 U.S. 559 (1996).

71. 538 U.S. at 419, citing *Gore* at 575.

72. *Id.* at 422.

73. *Id.* at 424.

74. *Id.* at 426.

75. *Id.* at 425.

76. A jury instruction at trial on the underlying UM coverage action for contractual liability might say: 1) Do you find the tortfeasor liable for the accident's damages? 2) If your answer to number 1 is yes, please state the amount of the damages owed under the contract that you believe the insurer must pay? 3) If your answer to number 2 is more than [insert policy limit], your verdict against the insurer is [insert policy limit]. ■

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