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BAD FAITH LIABILITY

A partner at Wiley Rein LLP examines a recent ruling from the Florida Supreme Court regarding bad faith liability for insurers. The author notes that the best reading of the case is that it confirms what history has taught—that Florida's law on bad faith lacks bright lines, and a third-party bad faith case can rarely be decided in state court at the summary judgment stage.

INSIGHT: Harvey v. Geico—Armageddon in Florida, or Same Old Sunshine State?

BY CHARLES C. LEMLEY

The Florida Supreme Court issued an opinion Sept. 20 in *Harvey v. Geico General Ins. Co.* addressing the law regarding bad faith claims against insurers for failing to settle claims against their insureds. Sharply divided along ideological lines, the court held that the underlying appellate court had misapplied longstanding Florida precedent on insurer bad faith and relied on inapplicable federal law when it granted judgment notwithstanding the verdict to an insurer that had lost at trial. A heated dissenting opinion stated that the majority, not the lower court, had misconstrued existing law. The dissent stated that the majority opinion ''works a vast and unwarranted expansion of liability for bad faith claims,'' and opined that ''[i]n Florida, mere negligence has now become bad faith.''

Whether the *Harvey* opinion merely rectifies a misapplication of existing law, as the majority claims, or works a vast expansion of bad faith law, as the dissent warns, is an important question. Florida case law on bad faith in the third-party settlement context, coupled with stringent procedural standards making summary judgment very difficult to obtain in state court, have made Florida a notorious venue for ''bad-faith setups.'' The American Tort Reform Foundation cited the risk of bad-faith setups in singling out Florida in its annual ''Judicial Hellholes'' report in December 2016, and Florida topped the list in December 2017. Plaintiffs' lawyers no doubt will be eager to test the post-*Harvey* boundaries of bad faith law. Florida's future standing as a ''judicial hellhole'' may turn on how courts rule on those arguments—or on resolution of the constitutional dispute addressed later in this article.

What Is a Florida Bad-Faith Setup?

Bad-faith setups in Florida are based on ''strategies . . . to create bad faith claims against insurers when ... bad faith did not occur.'' *Berges v. Infinity Ins. Co.*, 896 So.2d 665, 686 (Fla. 2005) (Wells, J., dissenting). The strategies typically involve ''setting artificial deadlines for claims payments and the withdrawal of settlement offers when the artificial deadline is not met [in order] to convert a policy purchased by the insured which has low limits of insurance into unlimited insurance coverage.'' *Id.* The ATRF report noted that ''[i]n concocting such claims, plaintiffs' lawyers often engage in 'gotcha' tactics, such as ducking claims adjusters' phone calls or coaching their clients to avoid meetings until the bad-faith deadline has passed without a settlement of the claim.'' (A pre-*Harvey* podcast discussing these issues, including tips for insurers handling claims in Florida, can be found *here*).

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The legal basis for the bad-faith setup is found in Florida case law—principally *Berges* and *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980)—holding that an insurer has an affirmative duty to settle on behalf of its insured, even without a demand within policy limits, where the insured's liability is clear and injuries are so serious that a judgment in excess of the policy limits is likely. *See, e.g.*, *Powell v. Prudential Property & Casualty Ins. Co.*, 584 So.2d 12 (Fla. 3d DCA 1991). In examining whether an insurer has acted in bad faith, Florida courts purport to apply a ''totality-of-the-circumstances'' test under which courts will consider ''whether an insurer has acted fairly and honestly toward its insured and with due regard for the insured's interests . . . .'' *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 62 (Fla. 1995).

It's Not Just the Law–It's Florida's Odd Rules of Procedure

Before the Fourth District Court of Appeal's ruling in *Harvey*, there had been only one appellate decision holding as a matter of law that there had been no insurer bad faith in the failure to settle context—the 2012 opinion in *Goheagan v. American Vehicle Ins. Co.*, 126 So.3d 1136 (Fla. 4th DCA 2012)—but that opinion was later withdrawn and superseded by one reversing the trial court, 107 So.3d 433 (Fla. 4th DCA 2012), and the Florida Supreme Court declined to review it. A procedural aspect of Florida law is partly to blame. As the court noted in *Byrd v. BT Foods Inc.*, 948 So.2d 921 (Fla. 4th DCA 2007), ''Florida places a higher burden on a party moving for summary judgment in state court, requiring the movant to: '[S]how conclusively that no material issues remain for trial.' '' *Id.* at 923–24 (citation omitted). Accordingly, virtually *any* evidence supporting an improper failure to settle—even a modest, readily-explainable delay in making payment—is enough for the plaintiff to survive summary judgment and present its bad-faith claim to a Florida jury.

The Fourth DCA's Opinion in Harvey Was a Ray of Hope for Insurers

The Fourth DCA's opinion in *Harvey* was viewed as a positive sign for insurers in the battle against bad faith setups. The appellate court held that the insurer was entitled to a directed verdict after a jury found bad faith on these facts: the insured was in an accident that killed the other driver. The claimant advised the insurer's claim handler that it would need a financial statement from the insured before agreeing to accept policy limits to settle the claim. The claim handler allegedly advised the claimant that the insured would not provide a financial statement, then delayed in advising the insured of the request, and finally failed to advise the claimant that the insured intended to comply. The claimant filed a lawsuit and obtained an $8.47 million judgment following a jury trial. In the bad faith lawsuit, the claimant and counsel testified that they would not have filed the lawsuit if they had known of the claimant's financial condition.

The Fourth DCA held that the trial court erred in denying the insurer's motion for directed verdict because there was insufficient evidence from which a jury could have found the insurer acted in bad faith. The court's opinion rested principally on two grounds:

- First, while the insurer certainly could have done a better job handling the claim, negligence alone is not enough to establish bad faith. There was no evidence that the insurer acted solely in its own interests or put its interests ahead of the insured's.

- Second, even if the claim was handled improperly, the insurer's errors did not proximately cause the excess judgment. The insured knew about the request for financial information at least 13 days before the lawsuit was filed but never provided the financial information that indisputably would have prevented the lawsuit from being filed. Since ''the insured's own actions or inactions result[ed], at least in part, in an excess judgment, the insurer cannot be liable for bad faith.''

Oral Argument Indicated a Sharply Divided Florida Supreme Court

The Florida Supreme Court heard oral argument on *Harvey* in November 2017. Questioning from the bench was heated, pointed, and revealed a court split along ideological lines: The three ''liberal'' justices (Justices Pariente, Quince, and Lewis) hammered Geico's counsel with questions that made no attempt to conceal their views. (Not surprisingly, those three are the final justices remaining from the last ''real'' Democrat elected governor, Lawton Chiles.) Their questioning clearly telegraphed their belief that there had been sufficient evidence to support the jury's finding of bad faith, including that the insurer delayed in advising the insured of the issues, did not follow up with the insured after advising him of the claimant's request (contrary to her supervisor's instructions), and failed to pass along the insured's intent to comply despite the insured's request for her to do so. On causation, the three justices simply did not appear to agree that the insured's failures acted as a superseding cause sufficient to break the chain of causation.

Although less vocal at the argument, the three ''conservative'' justices—Justices Canady, Polston, and Lawson—appeared to lean toward affirming the lower court. Though Justice Labarga—the chief justice at the time—gave no indication which way he was leaning, he has been known to side more often with the liberal wing. In March 2018, Justice Canady was named to succeed Justice Labarga as chief justice, effective July 1, 2018, when Justice Labarga's term as chief ended. Supporters of the lower court opinion took hope from the fact that July 1 came and went without a ruling—surely the court was waiting to release an affirmance penned by the new chief justice. Their hopes were dashed when the opinion came out on September 20.

The Florida Supreme Court Killed the Buzz–for Now

The *Harvey* opinion etched the ideological lines into stone. As predicted, the three ''liberal'' judges voted to reverse, and the three ''conservative'' justices voted to affirm. The swing vote, Justice Labarga, joined in the vote to reverse, leaving the new chief justice to author a stinging dissent.

The majority opinion held that the Fourth DCA misapplied *Boston Old Colony* and *Berges* in at least three important ways.

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First, the majority eschewed any prospect of a clear boundary between reasonable claim handling and bad faith, reiterating a statement from *Boston Old Colony* that ''in handling the defense of claims against its insured,'' the insurer ''has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of its own business.'' Applying the standard here, the majority opined: ''There can be no doubt that had Geico been faced with paying the entire multimillion-dollar judgment returned by the jury in this case, an amount that was completely foreseeable given the clear liability and catastrophic damages [facing Harvey], it would have done everything possible to comply with the estate's reasonable demands.''

Second, one of the crucial aspects of the Fourth DCA's opinion had been its finding that the evidence showed that Geico was negligent at worst, which it concluded cannot in and of itself constitute bad faith. Existing cases long had stated that negligence was relevant to bad faith, but negligence alone is insufficient to support a finding of bad faith. While that statement had often been repeated, the Fourth DCA's *Harvey* opinion was among the first to expound on it in a useful holding. The majority rejected the Fourth DCA's opinion and dashed any hope that its own opinion might illuminate the law on this issue. Having conceded that negligence is not the standard for bad faith, the majority reiterated that ''because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith.'' Back to square one on that issue.

Third, the Fourth DCA had held that Geico's actions did not proximately cause the injury because Harvey knew about the estate's request for a financial statement for nearly two weeks, but he never provided the statement that indisputably would have prevented the estate from filing the lawsuit. The majority held that the Fourth DCA's holding misapplied its precedent and reiterated—three times in four paragraphs—its statement in *Berges* that ''the focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured.''

The majority conceded that proximate causation is a necessary element of a bad faith finding, but it concluded, somewhat hyperbolically, that the Fourth DCA's interpretation would allow an insurer to absolve itself of liability, no matter how egregious its own conduct, if it could ''put forth any evidence that the insured acted imperfectly during the claims process. . . .''

The lead dissent, authored by Chief Justice Canady with the concurrence of Justices Lawson and Polston (Justice Polston also dissented separately with the concurrence of the other two), concluded that the case should have been dismissed for lack of jurisdiction because the Fourth DCA's opinion did not conflict with *Berges* or *Boston Old Colony*. ''Indeed,'' the majority stated, ''the only conflict here is between the majority's decision and the prior precedents of this Court.'' The dissent rejected the majority's ''punitive'' ruling as mischaracterizing facts, relying on unsupported assumptions, and misreading case law for the proposition that an insured's own actions are irrelevant in any bad faith action.

On the key issues, Chief Justice Canady reiterated the court's existing precedent that ''negligent claims handling does not equate to bad faith,'' and flatly charged that the majority opinion ''muddies the waters between negligence and bad faith and bolsters 'contrived bad faith claims,' '' citing a dissent by retired Justice Wells in *Berges*.

So—What Now?

The question now is whether, as some fear, the *Harvey* opinion signals open season on insurers. In the short term, probably not. The dissent's pointed statement that the majority ''muddies the waters'' misses the mark slightly because those waters were muddied long ago. The Fourth DCA's opinion had attempted to clarify the line between negligence and bad faith by emphasizing statements in existing precedent—including *Berges* and *Boston Old Colony*—that lent themselves to clear lines. The majority essentially kicked up the old mud by conceding the existence of those statements but then reiterating the wishy-washy snippets from the same prior opinions that created the muddy water in the first place.

The majority opinion is built on three statements from *Berges* and *Boston Old Colony*:

- That ''in handling the defense of claims against its insured,'' the insurer ''has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of its own business.''
- That ''the focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured.''
- That ''because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith.''

These statements, along with Florida's focus on the totality of the circumstances of each case and its stringent standards for summary judgment, are the cornerstones on which the Florida bad faith lawsuit industry was built. As the dissents observed, the majority conceded but essentially ignored statements from the same opinions and their progeny that negligence alone is insufficient to support a finding of bad faith, and that the bad faith plaintiff must prove that the insurer's actions—not the insured's—were the proximate cause of any injury to the insured. Instead, the majority read the facts in a light highly favorable to the plaintiff and concluded that the Fourth DCA's opinion conflicted with existing precedent.

In the months ahead, plaintiff lawyers will argue that *Harvey* redecorated the Florida landscape with signs welcoming allegations of bad faith, and they will cite the *Harvey* opinion repeating the same statements from *Boston Old Colony* and *Berges* that they have cited for years. Their opponents will argue that *Harvey* merely corrected an aberrational application of the law under a unique set of facts, and they will cite *Harvey* conceding the validity of the same statements from prior cases that *they* have always cited. Those arguments may be aided by carefully reviewing the facts in *Harvey*, where the insurer's actions, if mere negligence, were close to the line. *Goheagan*, for example, would have been a better case for review.

What will courts do? Some might read *Harvey* as the dissent does, an unprecedented expansion of bad faith

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liability in Florida. Others likely will recognize the majority opinion as business as usual. The best reading of *Harvey* is that it confirms what history has taught—that Florida's law on bad faith lacks bright lines, and a third-party bad faith case can rarely be decided in state court at the summary judgment stage. So it likely will be business as usual, and insurers should follow sound claim handling practices.

Here's Where the Story Gets Interesting

The Florida Supreme Court now has passed up two opportunities to rein in bad-faith settlement claims—first, when it declined to review the *Goheagan* opinion, and even more forcefully in its opinion in *Harvey*. The ideological split in the *Harvey* opinion puts added weight on Florida's looming constitutional dispute over who will appoint three new justices in January 2019. The sitting governor, Rick Scott (R), is due to leave office effective on Jan. 8, 2019, the same day the three ''liberal'' justices are mandated to retire under Florida law. Governor Scott has long said that he intends to name their replacements on his last day in office, which likely would ensure that the court becomes, and remains for years, more like the dissenting coalition in *Harvey*.

Prior lawsuits by public interest groups to stop Scott from making the nominations were dismissed on ripeness grounds. Just this month, Scott apparently resolved the ripeness concern by initiating the formal process to name his chosen replacements. Whether by coincidence or design, on the same day the current court handed down the *Harvey* opinion, public interest groups filed a lawsuit to stop Scott from making the nominations. The future of Florida law on bad faith and many other issues may turn on the outcome of that lawsuit, especially since the race to replace Scott as governor is shaping up to be among the closest and most ideologically polarizing races in the country.

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