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Florida Amendment Should Make Courts More Insurer-Friendly

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Effective May 1, an amendment to Florida's rule on summary judgment may make Florida state courts seem less hostile to insurers.

This article explains how this seemingly innocuous rule amendment, which merely states that Florida courts will now apply the same summary judgment standards as are followed in federal courts, is likely to make a profound difference for insurers that are sued in Florida state courts.

Why do Florida state courts seem hostile to insurers?

Florida has long been reputed to be a "judicial hellhole" for tort defendants and insurers alike.[1] This reputation arose largely out of the prevalence of bad faith setups or, as described by Florida Supreme Court Justice Charles Wells in his dissent to the 2004 opinion in Berges v. Infinity Insurance Co., "strategies ... to create bad faith claims against insurers when ... bad faith did not occur."[2]

Bad faith setups typically involved "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."[3]

These strategies proliferated because Florida's Supreme Court was dominated by liberal justices who interpreted Florida Rule 1.510(c) as precluding summary judgment whenever the reasonableness of an insurer's actions was at issue and the plaintiff could identify even a

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single fact from which a jury might find that the insurer acted unreasonably.

Florida's governor reshapes the Florida Supreme Court.

The environment that fostered bad faith setups began to change in January 2019, when three of the remaining liberal justices on Florida's Supreme Court had to step down under Florida's mandatory retirement laws.

Incoming Gov. Ron DeSantis made good on a promise to reshape the Florida judiciary by appointing three conservative justices, Barbara Lagoa, Robert Luck and Carlos Muñiz, in January 2019. DeSantis later appointed Justices John Couriel and Jamie Rutland Grosshans to replace Justices Lagoa and Luck, respectively, when they were appointed to the U.S. Court of Appeals for the Eleventh Circuit.

As a result, all seven of the current Florida Supreme Court justices were appointed by Republican governors — although Justice Jorge Labarga was appointed by former Gov. Charlie Crist, who later switched parties and ran unsuccessfully for a second term as a Democrat.

The Florida Supreme Court reshapes Florida's standard for summary judgment.

The current justices made an indelible mark on Florida law and procedure on Dec. 31, 2020, when they issued two opinions addressing the differences between Florida and federal summary judgment procedure.

The first opinion, Wilsonart LLC v. Miguel Lopez,[4] involved a truck crash.

The trial judge had granted summary judgment for the defendant despite facts identified by the plaintiff that ordinarily would have precluded summary judgment under the Florida standard, holding that video evidence proffered by the defense so thoroughly undermined the plaintiff's facts that the case merited a rare summary judgment in favor of a tort defendant.

Although the certified question in Wilsonart was whether a special exception should be made for video evidence of the kind proffered in the trial court, the Florida Supreme Court asked for briefing on whether Florida courts should adopt the federal summary judgment standard.

In the second opinion, In re: Amendments to Florida Rule of Civil Procedure 1.510,[5] the Florida Supreme Court did, in fact, amend the Florida summary judgment rule, effective May 1, 2021, to adopt the summary judgment standard set forth in Celotex Corp. v. Catrett.[6]

The court noted that the Florida and federal rules "share the same overarching purpose: to secure the just, speedy, and inexpensive determination of every action," and that the critical language in the two summary judgment rules is "materially indistinguishable."

After receiving extensive comments and oral arguments, the court issued a second order dated April 29, 2021, confirming the adoption of the federal summary judgment standard but also adopting the text of the federal rule almost verbatim.

How does the amended rule differ from the former rule?

In amending the state rule, the court noted that, despite the similarities between the state and federal rules, "[t]hree particularly consequential differences stand out." The first two similarities that the court identified are essentially subsets of the third, and the third is the one of most interest to insurers litigating in Florida state courts.

The court noted that Florida courts had adopted "an expansive understanding of what constitutes a genuine (i.e., triable) issue of material fact" and had held that summary judgment could be avoided by identifying "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial."

By contrast, in the 1986 decision Anderson v. Liberty Lobby Inc., the U.S. Supreme Court has described the federal summary judgment test as whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party. ... If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."[7]

This difference, which may appear modest in writing, is likely to make a profound difference in practice, particularly in the context of bad faith setups.

How will the amendment affect insurers litigating in Florida state courts?

The 2012 opinion in Goheagan v. American Vehicle Insurance Co.[8] illustrates how the amended rule may benefit insurers in real life. Goheagan involved an accident case in which the insurer promptly reached out to the injured party in an effort to settle the claim and was told that she was in a coma and her mother had retained counsel.

The insurer attempted repeatedly to learn the identity of the mother's counsel in order to tender the policy limit, but the mother would not provide the information.

The mother, as personal representative for her daughter, obtained a seven-figure judgment against the insured driver — the applicable policy limits were $10,000 per person — and sued the insurer for unduly delaying in tendering the policy limits.

The insurer argued that it could not communicate with the injured party, who was in a coma, or with the mother, who was represented by counsel, and therefore could not be held responsible for failing to tender the policy limits since there was no one to whom it could tender the money.

The Fourth District Court of Appeal initially affirmed summary judgment for the insurer — at that time, the only appellate opinion affirming summary judgment for an insurer charged with bad faith — but reversed its position on rehearing.

The court held that a jury could have found that the insurer should have found some way to tender the policy limits — the mother's lawyer argued that the insurer could have gone to the hospital and tendered the check to the comatose daughter — and therefore the question of the insurer's bad faith should not have been decided on summary judgment.

There can be no doubt that the outcome in Goheagan would have been different under the federal summary judgment standard — the undisputed facts showed that there was no reasonable course of action that the insurer could have pursued, but didn't, in protecting its insured, and any evidence to the contrary rose nowhere close to the standard for avoiding summary judgment under the federal rules.

And Goheagan is not an outlier — there are dozens of similar reported opinions denying summary judgment to insurers based on sketchy evidence that would never survive summary judgment in federal court, and there is no way to calculate how many such claims result in insurers paying unwarranted settlements rather than facing a near-certain trial before a Florida jury.

As of May 1, insurers facing allegations of bad faith will have another option — a real chance at summary judgment — that should make Florida courts seem much friendlier than they used to.

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[1] As previously explained in https://news.bloomberglaw.com/us-law-week/insight-harvey-v-geicoarmageddon-in-florida-or-same-old-sunshine-state and https://www.wiley.law/news-1145.

[2] *Berges v. Infinity Ins. Co.*, 896 So.2d 665, 686 (Fla. 2005) (Wells, J., dissenting).

[3] Id.

[4] *Wilsonart LLC, et. al., v. Miguel Lopez*, etc., No. SC19-1336, 2020 WL 7778226 (Fla. Dec. 31, 2020).

[5] In re: Amendments to Florida Rule of Civil Procedure 1.510, No. SC20-1490, 2020 WL 7778179 (December 31, 2020).

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[7] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986).

[8] *Goheagan v. American Vehicle Insurance Company*, 126 So.3d 1136 (Fla. 4th DCA 2012) withdrawn and superseded on rehearing, 107 So.3d 433 (Fla. 4th DCA 2013).

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