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COMMON LAW BAD FAITH
by Ted Babbitt

When an insured is sued by a third party for damages in excess of the insured's policy limits and the insurer fails in good faith to settle the claim and there is a resultant excess verdict, a potential common law cause of action exists because of the bad faith of the carrier. See Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980), Allstate Indem. Co. v Ruiz, 899 So. 2d 1121 (Fla. 2005).

This common law cause of action does not apply to first party bad faith actions where an insurer fails to settle in good faith with its own insured in the context of such claims as uninsured motorist, PIP claims or other types of first party benefits. See Fidelity & Cas. Co. v. Cope, 462 So. 2d 459 (Fla. 1985), Talat Enters., Inc. v. Aetna Cas. & Sur. Co., 753 So. 2d 1278 (Fla. 2000).

In 1982 the Legislature enacted Fla. Stat. 624.155 which extended bad faith actions to first party claims. That statute was amended in 2005 to include certain notice provisions, which are required as a condition precedent to bringing a suit against an insurer for bad faith. The statute also provides that if the insurer cures its bad faith within sixty days after filing of the notice, no cause of action for bad faith exists.

In Macola v. GEICO, 31 Fla. L. Weekly S690 (Fla. Oct. 26, 2006), the Florida Supreme Court was faced with questions certified by the Eleventh Circuit as to whether the tendering of policy limits within the statutory sixty day period

not only precluded the statutory bad faith claim but also the common law bad faith cause of action. In that case, after suit had been filed, the defendant insured's attorney filed a notice under Fla. Stat. 624.155(3)(a) and the insurer offered its policy limits within the sixty day time limit. The case did not settle and the resulting judgment far exceeded the policy limits of the insured. The insured brought a cause of action both under the statute and under the common law theory of bad faith. The case was removed to Federal Court and the District Judge granted a summary judgment, holding that the insurer's action in offering the policy limits within the sixty day period precluded both the statutory cause of action as well as the common law action for bad faith. On appeal the Eleventh Circuit posed the certified question referred to above to the Florida Supreme Court. The Florida Supreme Court answered the question so as to require reversal and reinstatement of the common law cause of action.

In concluding that only the statutory claim for bad faith is precluded by an insurer paying the policy limits within the sixty day statutory period, the Court cited from Fla. Stat. 625.155(3)(d) that:

“[t]he civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. . . .”

The Supreme Court concluded that the statute clearly expresses a legislative intent to avoid double recovery but allow both the common law bad

faith action and the statutory action. In doing so, the Court made it clear at Page 692 that an insurer's cure of its bad faith within the sixty day period effectively eliminates the statutory claim:

“Because a cause of action for extracontractual damages for first-party bad faith was unavailable under the common law, we strictly construed the civil remedy statute and held that the tender of the policy limits within the sixty-day period cured any alleged violation of subsection (1)(b)(1). *See Talat*, 753 So. 2d at 1283-84. We explained that the only remedy was statutory and that the statute conditioned the remedy on notice by the insured and failure by the insurer to pay the damages within the cure period. *See id.* In other words, in the first-party context, “[t]he statutory cause of action for extra-contractual damages simply never comes into existence until expiration of the sixty-day window without the payment of the damages owed under the contract. *Id.* at 1284.

The Court was equally clear, however, that the elimination of the statutory claim in no way affects the ability to bring the third party bad faith claim under common law. At Page 692 the Court holds:

Accordingly, we answer the rephrased certified question in the negative. We hold that an insurer's tender of the policy limits to an insured in response to the filing of a civil remedy notice under section 624.155 by the insured, after the initiation of a lawsuit against the insured but before entry of an excess judgment, does not preclude a common law cause of action against the insurer for third-party bad faith.”

* * *

While GEICO's tender of the policy limits may be used by GEICO as evidence of its

good faith (or conversely by Quigley and Macola as further evidence of bad faith), the tender of the policy limits after the filing of the civil remedy notice did not eliminate the underlying tort action, which gave rise to the common law third-party bad faith cause of action against the insurer.” Id. at 693.

The distinction between a third party claim and a first party claim in the context of bad faith is an important one. With the advent of Thompson v. Commercial Union Insurance Co., 250 So. 2d 259, 264 (Fla. 1971), an injured third party could maintain a bad faith action directly against the insurer rather than it being brought by the insured. It is, thus, easy to confuse the line between first and third party actions. Nevertheless, the distinction exists for a reason. Bad faith actions against insurers in the third party context existed under common law. First party actions did not. When the Legislature enacted Fla. Stat. 624.155, it created that cause of action for first party claims and codified the Supreme Court’s holding in Thompson which permitted a third party action to be brought by the injured plaintiff without going through the defendant insured. What the Legislature gives, however, the Legislature can take away and the creation of the sixty day cure period did just that for first party actions. It did not, however, eliminate third party actions or the holding in Cunningham v. Standard Guar. Ins. Co., 630 So. 2d 179 (Fla. 1994) that permitted the plaintiff to bring those third party actions directly.

Thus, where a carrier fails to settle a claim when good faith demands a settlement and a resultant excess verdict is rendered, a common law cause of

action for bad faith may be brought either by the insured or the injured third party even though the carrier has cured its bad faith under the statutory cause of action.

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