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DISCOVERY IN BAD FAITH ACTIONS

by Ted Babbitt

In Allstate Indem. Co. v. Ruiz, 30 Fla. L. Weekly S219 (Fla. April 7, 2005), the Supreme Court of Florida resolves numerous conflicts among the Districts concerning what can be discovered in a bad faith action. Justice Lewis, speaking for the majority, reviews the history of first party and third party bad faith actions.

The opinion notes that third party actions for bad faith arise when an insurance company fails to protect its insured against an action brought by a third party resulting in a verdict in excess of the insured's policy limits. That action arises from common law first recognized in Florida in Auto. Mut. Indem. Co. v. Shaw, 184 So. 852 (Fla. 1938). First party actions, on the other hand, arise when an insured sues under his or her insurance policy for the insurer's failure to properly process a claim made under that policy.

Until the enactment of Fla. Stat. 624.155 in 1982, a distinction existed between the common law duty of an insurer to its insured under first and third party actions. The duty to an insured under a third party action required good faith and fair dealing in the handling of that third party claim. See State Farm Mutual Automobile Ins. Co. v. Laforet, 658 So. 2d 55 (Fla. 1995). While, in a third party action the obligation to an insured created a fiduciary relationship similar to that as between an attorney and a client, historically, that fiduciary relationship did not exist in a first party action. That all changed with the enactment of §624.155 which made no distinction between first and third party

actions and required an insurer to treat its insured identically in both types of actions.

Despite the unity of responsibility created by Fla. Stat. 624.155, there still remained a difference between the discovery materials which could be obtained when a bad faith action was brought in a third party claim versus a first party claim. That distinction was crystallized in Manhattan National Life Insurance Co. v. Kujawa, 522 So. 2d 1078 (Fla. 4th DCA 1988), approved, 541 So. 2d 1168 (Fla. 1989). In that case the Fourth District quashed a discovery order compelling the production of the insurer's underlying legal file in a first party action basing its opinion on the lack of fiduciary relationship between insurer and insured in such an action. The Supreme Court, by approving that opinion, created a schism between first and third party bad faith actions with respect to the discovery that could be obtained.

In Allstate Indem. Co. v. Ruiz, supra, that distinction was eradicated. At Page 221, the Court holds:

> Today, however, we reconsider the wisdom of our decision in *Kujawa* and a fresh look at such decision convinces us that any distinction between first- and third-party bad faith actions with regard to discovery purposes is unjustified and without support under section 614.155 and creates an overly formalistic distinction between substantively identical claims. As we have previously acknowledged in *LaForet* and other decisions, section 624.155 very clearly provides first-party claimants, upon compliance with statutory requirements, the identical opportunity to pursue bad faith claims against insurers as has been the situation in connection with third-party claims for decades at common

> law. The Legislature has clearly chosen to impose on insurance companies a duty to use good faith and fair dealing in processing and litigating the claims of their own insureds as insurers have had in dealing with third-party claims. Thus, there is no basis to apply different discovery rules to the substantively identical causes of action.

Thus, the Court holds that in both first and third party bad faith actions, all documents contained in the underlying claim file and related legal files that were created up to the date of resolution of the underlying claim are discoverable and, in addition, any materials prepared after the resolution of the underlying claim may also be subject to discovery upon a showing of good cause after an in camera inspection by the trial court. The court cautions, however, that when coverage and bad faith actions are brought at the same time, the trial court must be wary of producing protected materials which prejudice the insurer in defending the coverage aspect before the bad faith action arises. In such circumstances, the Court cautions that the trial judge should use in camera review and perhaps even abate the bad faith action until such time as the coverage action is determined and the bad faith action ripens.

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