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Fla. High Court Bolsters Policyholders In Bad Faith Cases

By **Jeff Sistrunk**

Law360 (September 24, 2018, 9:49 PM EDT) -- A divided Florida Supreme Court's recent decision reinstating a $9.2 million verdict against Geico over its handling of a fatal car crash claim strengthens policyholders' hand in bad faith cases by emphasizing that an insurer cannot escape liability by merely arguing it had complied with a "checklist" of obligations to its insured.

In the **opinion for the 4-3 majority**, Justice Peggy A. Quince said a panel of the state's Fourth District Court of Appeal had misapplied the state high court's well-established precedent on bad faith law and relied instead on conflicting, nonbinding federal law when it tossed the jury's bad faith verdict in favor of Geico General Insurance Co. policyholder James M. Harvey.

Attorneys who represent policyholders told Law360 that the majority opinion will be a valuable tool for insureds to wield in bad faith cases going forward.

Critically, the majority asserted that an insurer's obligations to its policyholder as set forth in the Florida high court's 1980 decision in Boston Old Colony Insurance Co. v. Gutierrez are not a "mere checklist." Among other things, Boston Old Colony requires an insurer to advise its policyholder of the potential for a claim to result in a judgment exceeding policy limits and to try to settle the claim, if possible.

"An insurer is not absolved of liability simply because it advises its insured of settlement opportunities, the probable outcome of the litigation, and the possibility of an excess judgment," Justice Quince wrote. "Rather, the critical inquiry in a bad faith [case] is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment."

The majority made clear that an insurer must "show that it did everything possible to protect its insured" in order to defend against a bad faith claim, said Boyle & Leonard PA managing shareholder Mark Boyle, who co-authored an amicus brief supporting Harvey on behalf of nonprofit policyholder advocacy group United Policyholders.

"The opinion is saying the insurer cannot just dump its money and not follow up with the rest of the necessary items to try to get the claim settled," Boyle said.

Walter Andrews, head of Hunton Andrews Kurth LLP's insurance coverage practice, said the Florida high court's decision came as a relief for policyholders. A ruling affirming the appellate panel could have "created devastating consequences for policyholders all around the state of Florida if insurers are allowed to put their own interests first and not to place their customers' interests up front," he said.

"The decision rightfully reminds insurers across the state that the interest of its insureds should be second to none and that insurers should properly look out for the interests of their policyholders in all instances as if they were looking out for their own interests," Andrews said.

But attorneys who represent insurance companies said Chief Justice Charles Canady raised legitimate concerns in a scathing dissenting opinion, one of two filed in the case. The chief justice wrote that the majority misinterpreted precedent and effectively adopted a negligence standard for finding bad faith that he warned "incentivizes a rush to the courthouse steps by third-party claimants whenever they see what they think is an opportunity to convert an insured's inadequate policy limits into a limitless policy."

While the high court majority disavowed the notion that it was adopting a simple negligence standard, attorneys say the opinion could still lead to an uptick in bad faith claims by policyholders.

"I can definitely see this loosening the bad faith standard in Florida," said Phelps Dunbar LLP associate Justin Shindore. "The majority is clear that this doesn't create a negligence standard, but this opinion should give insurers pause because negligence will certainly be relevant to a consideration of whether they acted in bad faith or not."

Kathy J. Maus, partner-in-charge of Butler Weihmuller Katz Craig LLP's Tallahassee office and a member of the International Association of Defense Counsel's insurance and reinsurance committee, said a surge in bad faith claims could ultimately lead carriers to raise premiums.

"The expense of bad faith claims is enormous," Maus said. "The threat is enormous. The payment of extracontractual damages because of this threat is enormous, which therefore impacts insurance premiums across the board."

The case stems from a 2006 automobile accident in which Harvey was found liable for the death of motorist James Potts. Harvey had an insurance policy with Geico that provided $100,000 in liability coverage, but the insurer informed him that he was likely to face excess claims far beyond that amount from Potts' widow and three children.

When the settlement process stalled, the Potts estate sued Harvey on a wrongful death claim and won nearly $8.5 million in damages after a jury trial. Harvey then sued Geico for bad faith and won the jury verdict at issue here.

The trial judge denied Geico's motion for a directed verdict, but on appeal, the Fourth District Court of Appeal panel ruled that Harvey's evidence had been insufficient to prove bad faith. The panel also found that an insurer cannot be found liable when an insured's own actions "at least in part" lead to an excess judgment.

Harvey's bad faith claims focused on the assigned insurance adjuster's multiple communication lapses, including not telling him promptly about the estate's request for a statement from him on his assets and not following through on his request she inform the Potts estate's attorney that he was open to cooperating in settlement talks.

The Florida Supreme Court majority based its conclusion in large part on evidence of the adjuster's shortcomings, citing the high court's 2004 ruling in Berges v. Infinity Insurance Co., which stated 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." In addition, it pointed to the Berges decision's observation that courts shouldn't upend a jury's bad faith verdict if it is supported by "competent, substantial evidence," as "it is not the function of [the appellate court] to substitute its judgment for the trier of fact."

According to attorneys who counsel policyholders, the majority opinion should counteract a recent judicial trend, particularly in federal courts applying Florida law, of judges deciding bad faith claims at the summary judgment stage or supplanting juries' findings after trial.

"In these types of failure-to-settle cases, directed verdicts should be rare, and limited to cases where the undisputed evidence shows the claimant has no bad faith remedy," said Ver Ploeg & Lumpkin PA shareholder Christine Gudaitis, who also represented United Policyholders. "In my experience, juries tend to get these things right. To supplant the jury's role in these cases would be detrimental to policyholders statewide."

By placing so much emphasis on the Geico adjuster's conduct, the high court majority will make it easier for other policyholders to seek evidence regarding an insurer's claims-handling history in the future, said Berger Singerman LLP partner Gina Lozier.

"That analysis will help policyholders in getting discovery from some insurance companies," Lozier said. "In a lot of cases, insurance companies will fight the release of personnel files in a bad faith action."

Phelps Dunbar partner Patricia McLean, who represents insurance companies, said the decision serves as a warning for carriers to meticulously document each step they take in handling a claim. Here, Geico's adjuster lacked contemporaneous notes of some crucial communications with Harvey and the Potts estate, according to the opinion.

"It is incredibly important for an insurer to document all the steps taken to fulfill its duties to the insured, not just in claim notes but in written communications to the insured," McLean said. "Florida is fraught with pitfalls and the potential for bad faith liability every step of the way."

In his dissent, Chief Justice Canady expressed concern that the majority ignored what he characterized as detrimental conduct by Harvey and his lawyer, namely their failure to take any independent steps to provide the Potts estate with Harvey's financial statement.

"The majority's inattention to these salient facts is wholly unwarranted," the chief justice wrote.

Attorneys who represent insurers say that, under Florida causation principles, the actions of both the policyholder and the injured third-party plaintiff should be considered in a bad faith case.

Doug McIntosh, president of McIntosh Sawran & Cartaya PA and a member of the IADC's medical defense and health law and professional liability committees, said insurers should now make it a point to request an additional jury instruction on "concurring cause and intervening cause" in bad faith cases, which Geico did not do.

"When you start exploring causation under the totality of the circumstances test, then the actions of everyone, including the claimant, the policyholder and their lawyers, should be relevant and admissible in the case," McIntosh said.

However, policyholder lawyer Rob Friedman of Friedman PA said that, at the end of the day, it is the insurer's actions or inaction that should be at the core of any bad faith analysis.

"It is up to the jury to decide whether the ways in which the insurance company dropped the ball substantially contributed to the excess verdict or not," Friedman said. "The simple fact that the policyholder perhaps did some things that also contributed to the excess verdict doesn't let the insurer off the hook."

According to attorneys for both policyholders and insurers, the Florida Supreme Court's decision will likely precipitate further litigation on just how far insurance companies must go to comply with the Boston Old Colony standards. While the majority said those standards are more than a checklist, it "muddied the waters" by failing to offer further guidance, said Maus.

"They have now said that, even though the insurer did meet all the requirements, it can still be held in bad faith," Maus said. "That raises the question of how an insurer can operate in the state of Florida and know it is meeting all its obligations to the insured in any case that doesn't settle."

--Editing by Kelly Duncan and Pamela Wilkinson.
