Choice of Law and Insurance Bad Faith:

Don't Assume That You Don't Have an Insurance Bad Faith Case

by Fred A. Cunningham

How many of you have ever had a case in which liability is clear, your client is catastrophically injured, and the tortfeasor has enough coverage to fully compensate your client? Yeah. Neither have I. What if there were a way to change that? Would you be interested in finding out about it? If the answer is "yes", please read on.

In the United States, insurance bad faith laws range from the non-existent to the consumer-friendly. That why the choice of law issue is so important.

In law school, all of us were taught the doctrine of *lex loci contractus,* i.e., courts will apply the law of the state where the insurance policy was executed. With respect to issues of *interpretation* of an insurance policy, *lex loci contractus* almost always applies. However, with respect to issues of *performance vel non* pursuant to an insurance policy, do not assume that *lex loci contractus* applies. Making that assumption could be very costly to your client, and could expose you to a legal malpractice claim.

The bottom line is that when it comes to matters of *performance vel non* of an insurance contract, we have successfully argued for application of the insurance bad faith law of the state in which performance under the insurance policy was owed. As you might

expect, this can be a real game-changer for your client. Literally, your client can go from having no prospect or a small prospect of an extracontractual recovery to having the real ability to recover the full measure of his or her damages, depending upon the facts of the case.

Let me give you a real-life example of how this works. Our firm handled a case where a Pennsylvania insurer issued and delivered to its insureds, who were Pennsylvania citizens, a liability insurance policy with $25,000.00 limits. The insureds loaned their insured vehicle to their grandson, another Pennsylvania citizen, who drove the car to Tallahassee, Florida to begin his freshman year in college. Very early in his freshman year, the grandson was at a fraternity party when someone fired a gun. Fearing for his life, he got in the car and tried to flee the scene. Tragically, he hit and killed a 19 year-old pedestrian, who was also a college student.

The personal representative of the estate of the deceased teenager hired an attorney in Tallahassee and an attorney in West Palm Beach. The attorneys sent a written demand for the policy limits to the insurer in Pennsylvania. When the insurer did not settle the case, suit was filed in Tallahassee. The parties later entered a consent judgment to end the wrongful death litigation, and our firm represented the Pennsylvania insureds in their insurance bad faith lawsuit against the insurer.

The insurer filed a preemptive declaratory judgment action in the Northern District of Florida in Tallahassee. We counterclaimed for insurance bad faith. As the trial of the insurance bad faith case approached, the insurer filed a motion to determine applicable law. The insurer, relying upon *lex loci contractus,* argued that Pennsylvania insurance bad faith law should apply to the bad faith litigation. Having researched Pennsylvania insurance bad faith law, which was essentially an oxymoron at that time, we knew that the case would be very difficult, if not impossible, to win if we could not convince the court to apply Florida insurance bad faith law.

The leading case on the issue was a Florida Supreme Court case: *Government Employees Ins. Co. v. Grounds*, 332 So.2d 13 (Fla. 1976). In *Grounds*, the automobile liability insurance contract was entered into in Mississippi. However, The Florida Supreme Court affirmed the applicability of Florida law to the bad faith action because "the obligation of the contract breached by [the carrier] was the obligation to provide [the insured] with a good faith defense to the action. … the place of performance was Florida, where the cause of action against the [insured] was maintained and was defended by [the carrier.]" *Id.* at 14 – 15.

As luck would have it, our trial Judge in *Berry*, The Honorable William Stafford, had been the plaintiff's counsel in *Grounds*. In our case, Judge Stafford, relying on *Grounds*, ruled that the substantive law of an insurance bad faith action is determined by the state where performance under the insurance contract was actually to be "performed". In our case, that state was Florida, since that is where the wrongful death action was brought, maintained, and defended, and where negotiation for settlement between the adjuster and plaintiffs' counsel commenced. We won the trial. *See Teachers Insurance Co. v. Berry*, 901 F. Supp. 322 (N.D. Fla. 1995).

Berry was the first federal court case in Florida to apply the holding of *Grounds*. Previously, in *Adams v. Fidelity & Cas. Co.,* 920 F.2d 897 (11th Cir. 1991), the Eleventh Circuit Court of Appeal, in *dicta*, had cited *Grounds* for the distinction between interpretation and performance, but had not squarely applied its holding.

It is important to note that one of the facts relied upon by Judge Stafford was the fact that insurance bad faith in Florida is considered an action *ex contractu* rather than tort. In some states, an insurance bad faith action is considered a tort, not an action *ex contractu.* Obviously, you will need to consult the insurance bad faith law you are trying to apply to see whether it is considered to be *ex contractu* or a tort in that state.

Thereafter, In *Shin Crest PTE, Ltd. v. AIU Ins. Co.*, 2008 WL 728388 (M.D. Fla. 2009), in a suit against a Taiwanese manufacturer of a defective chair sold by Wal-Mart, Judge Susan Bucklew reached the same result. She applied Florida insurance bad faith law, despite the fact that the parties had agreed in the insurance contract that Taiwanese law governed breach of contract and declaratory judgment claims on the contract. Relying on Grounds, *supra,* the Court concluded that "matters concerning performance are governed by the law of the place of performance." *Id.* at *2. Florida was the place of performance "because that is where the lawsuits against [the insureds] were maintained and defended by [the carrier.]" *Id.*

We have been able to use the aforementioned law in several cases to persuade courts to apply Florida bad faith law to actions in which the insurance policy was executed outside the state of Florida by an insured who was not a Florida citizen. As Florida has recognized common law bad faith since 1938, and as Florida insurance bad faith law is quite developed, winning application of Florida insurance bad faith law is typically a real game-changer in the case.

If you can get Florida insurance bad faith law to apply to your case AND you can obtain jurisdiction over a foreign insurer in Florida, then you and your client are in the best possible position. Florida law has also spoken on the jurisdiction issue.

The case of *Virginia Farm Bureau Mutual Ins. Co. v. Dunford*, 877 So. 2d 22 (Fla. 4th DCA 2004), also handled by our firm, is instructive. *Dunford* involved an **automobile accident that occurred in Florida, but with a tortfeasor who resided in Virginia and was insured under a liability policy issued in Virginia**. The court did not address whether Virginia or Florida bad faith law would apply to the contractual duties but did make findings regarding where the insurance contract was performed for purposes of Florida's long arm jurisdiction. Interpreting Florida Statutes §48.193(1)(g), which provides for jurisdiction where a defendant is alleged to have breached a contract by failing to perform acts in Florida that were required under the contract to have been performed in Florida, the court held that defending the insured in a Florida court was "a contractual obligation to be performed in Florida." *Id.* at 23 – 24. Similarly, the court found that the minimum contacts necessary to support jurisdiction based on the fact that the insurer conducted its duty to defend the insured in a Florida court.

Notably, the court focused on the "activity of the insurer" and distinguished two cases relied upon by the carrier because neither case "involved excess judgments resulting from bad faith occurring in the state in which the suit against the insured was filed." *Id.* at fn. 1. **In this regard, the Court suggested again in its conclusion that the insurer's breach of any duty under the contract occurred in the state where a judgment was obtained against the insured, not necessarily the state where the claimant resided: "[The carrier] should have foreseen that a breach of that duty in Florida, resulting in a Florida judgment, would subject it to being haled into a Florida court.**" *Id.* at 25.

Recently, in *Betzoldt v. Auto Club Group Ins. Co.*, 124 So.2d 402 (Fla. 2d DCA 2013), the court agreed with *Dunford*, and held that a Michigan insurer, which issued insurance policies only to Michigan drivers, was subject to personal jurisdiction in Florida in a third-party bad faith case arising out of the Michigan insured's car crash in Florida. The court stated: "*Dunford* is nearly on all fours with this case". *Id.* at 405. *Betzoldt* is a lengthy, scholarly opinion which is recommended reading for anyone who is interested in this interesting jurisdictional issue.

Conclusion

So, if you are interested in trying to maximize your client's recovery, as your ethical obligations require, how might you try to use the information contained in this article?

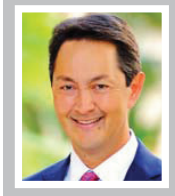
First, recognize that *lex loci contractus* should not control the issue of which state's insurance bad faith law should apply. The law of the state where performance is owed under the contract should apply.

Second, research the insurance bad faith law (if any) of each and every state which reasonably could be argued to be the place of performance. As the issue of performance really depends upon the state in which the case can be settled, your ethical obligation to the client may even require you to consider co-counseling with or referring the matter to a competent lawyer in a state with consumer-friendly insurance bad faith law. Doing so might benefit the client, and receiving 25% or 50 percent of the fee in a case with an extracontractual recovery might be more beneficial to you than receiving 100 percent of the fee in a case with inadequate insurance coverage.

Third, consider the issue of obtaining personal jurisdiction over the insurer. While you could obtain personal jurisdiction over an insurer in a state other than the state whose insurance bad faith law you wish to apply, doing so can lead to a judge applying the law of another state. I have never been comfortable with that. *Ceteris paribus*, I would rather obtain personal jurisdiction over the insurer in the state of the insurance bad faith law I am seeking to have applied.

If you do not consider these issues, you may fail to obtain the best possible recovery for your client. If that happens, and the client discovers your failure to consider these issues, you may have exposure to your client for legal malpractice. Nobody wants to see that happen.

If you have any questions or comments about anything in this article, please feel free to contact me.



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