INSURANCE DECISIONS *From Around the State*

by Gregory Yaffa

The future of bad faith in Florida is looking bright thanks to *Moore v. GEICO General Ins. Co.,* Fed.Appx. , 2016 WL 123831 (11th Cir. 2016) and *Fridman v. Safeco Ins. Co*., 41 FLW S62 (Fla. 2016).

Despite black letter law providing that "whether an insurer has acted in bad faith is a fact issue to be resolved by the jury" (*Berges v. Infinity Ins. Co.*, 896 So.2d 665 (Fla. 2004)), over the past few years especially, our federal courts seem to have been going out of their way to rule in favor of insurers and against injured claimants and insureds. With *Moore*, the Eleventh Circuit has made it crystal clear that Florida law, except in rare circumstances, mandates that the question of bad faith is for a jury to decide.

In *Moore,* the Eleventh Circuit Court of Appeals reversed a summary judgment entered by Judge Bucklew in the Middle District of Florida. *See Moore v. GEICO General Insurance Company*, 2014 WL 2938430 (M.D. Fla. 2014). In reviewing Judge Bucklew's 2014 opinion, one does not have to look far to uncover her apparent disdain of bad faith actions.

In this action, GEICO (after having already tendered its insured's full policy limits within 13 days of the crash – which was rejected by plaintiff's counsel) received a 21-day demand for the tender of the $20,000 BI limits; the $10,000 PD limits; a general release; and affidavits of no additional insurance. While GEICO tendered all of the available coverage, plaintiff's counsel argued that the releases and affidavits provided by GEICO constituted a counter-offer. The case was tried and resulted in a $4,000,000 excess verdict. Plaintiff's counsel alleged that GEICO acted in bad faith by 1) failing to advise the insureds of the demand and conditions of settlement; 2) submitting a release that included more than simply the named tortfeasors; 3) submitting a release that stated the check would be sent within 20 days of GEICO's receipt of the executed release (even though GEICO had already sent the check); 4) submitting affidavits that were not tailored to the facts of the case; and 5) refusing to enter into a *Cunningham* Agreement.

Judge Bucklew found that GEICO's actions, while "sloppy" and "bordering on negligent," did not amount to bad faith. The Court described the actions of plaintiff's counsel as an attempt to create a bad faith action. Additionally, the Court stated, "This is a tragic case for the underlying claimants. While money cannot remedy the situation, it adds insult to injury that the underlying tortfeasors did not have sufficient bodily injury insurance coverage. However, the underlying tortfeasors are to blame for the inadequate insurance, not GEICO, and the Court refuses to turn GEICO's limited insurance policy into an available deep pocket to pay the bodily injury claims."

In reversing the summary judgment, the Eleventh Circuit appropriately focused on the Florida Supreme Court decision in *Berges v. Infinity Insurance Co.,* 896

So.2d 665 (Fla. 2004). Specifically, the Court observed that *Berges* mandates a totality of the circumstances standard. Additionally, citing *Berges,* the Court pointed out 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." 865 So.2d at 677.

After reviewing the evidence in the case, the Court concluded that Judge Bucklew committed two errors in granting summary judgment. First, Judge Bucklew improperly made credibility determinations and improperly weighed the evidence. Second, Judge Bucklew improperly focused on the conduct of the claimant's attorney, rather than on the conduct of GEICO.

Hopefully the *Moore* decision will curtail the frequency with which the federal courts have been entering summary judgment in bad faith actions.

Following the Eleventh Circuit's lead, with *Fridman v. Safeco Ins. Co*., So.3d , 41 FLW S62 (Fla. 2016), the Florida Supreme Court appears to have finally cleaned up the mess caused by *King* and *Bottini* relating to first party bad faith actions.

In *King v. Government Employees Insurance Company*, 2012 WL 4052271 (M.D. Fla. 2012), the Middle District (Judge Moody) entered partial summary judgment in favor of GEICO, ruling that the underlying excess verdict in a UM bad faith claim was not the measure of damages in the subsequent bad faith case.

When GEICO failed to tender its insured's full UM policy limits of $25,000 (in response to both the insured's demand and the Civil Remedy Notice) GEICO's insured filed suit against the carrier and ultimately received a verdict in the amount of $1,638,171. As in every UM claim, the final judgment was limited to the amount of the policy limits.

The insured subsequently amended the UM complaint to add a count for bad faith. In granting partial summary judgment, the court focused on the conditions precedent to bringing a bad faith action, ("insureds must allege in their complaints that there has been a final determination of both liability and the extent of damages"). In light of the fact that the amount of the verdict was not reviewed on appeal, the court ruled that "GEICO is not bound by that amount in the subsequent bad faith action."

In *GEICO General Insurance Company v. Bottini*, 93 So.3d 476 (Fla. 2d DCA 2012), the Second District Court of Appeal affirmed a jury verdict of $30,872,266 on a $50,000 GEICO UIM policy. However, Judge Altenbernd wrote a concurring opinion in which he observed that §627.727(10), Florida Statutes, "does not explain how the finder of fact in the next lawsuit determines the 'total amount' of the claimant's damages." Thus, Judge Altenbernd opened the door to the argument that the excess verdict in a UM case is not the measure of damages, since the excess verdict in a UM case must be reduced to the policy limits specified in the contract. Judge Altenbernd stated:

> In this case, given that we decided to affirm on the issues relating to liability, GEICO essentially wants this court to write an opinion that affirms the judgment, but 'reverses' the verdict as to elements of damage not included within the judgment [the amount of the verdict in excess of the policy limits]. I simply conclude that this court does not have the power to issue such an opinion.

Finally, Judge Altenbernd stated:

> Accordingly, this concurrence permits both sides to know that at least one judge on this panel has not decided that the verdict is correct or incorrect as to damages awarded in excess of $1,050,000 [the amount GEICO conceded was reasonable] because that issue is not within our permissible scope of review. If I am refusing to do that which the law requires me to do, I would assume that by writ of mandamus the supreme court could order me to conduct such a review. If so ordered, I would perform that review.

Following *King* and *Bottini*, the Fifth District Court of Appeal issued its ruling in *Safeco Insurance Company of Illinois v. Fridman*, 117 So.3d 16 (Fla. 5th DCA 2013), in which the court held that it was error for trial court to allow UM case to proceed to excess verdict where the carrier, (on the eve of trial and after the expiration of a properly filed civil remedy notice) agreed to the entry of a judgment against it in the amount of the policy limits. Citing to *Bottini* and *King*, the Fifth DCA held that by confessing to a judgment in the amount of the policy limits, the UM case was rendered moot and that the full measure of damages (excess) can be determined in the subsequent bad faith action.

The dissent correctly pointed out that the majority completely misread 624.155 and 627.727, Florida Statutes and "failed to apply the numerous decisions rendered by the Florida Supreme Court that hold that the jury in a UM case is to determine the full extent of the injured victim's damages prior to the filing of any bad faith action."

On February 23, 2016, the Florida Supreme Court reversed the Fifth DCA's *Fridman* ruling, holding that an insured is entitled to a determination of liability and the full extent of damages in a UM action before filing a first party bad faith action.

Clearing the confusion created by the *King* and *Bottini* opinions, the Supreme Court held that the determination of damages awarded in the UM case is binding in the bad faith action.

Finally, the court concluded that the trial court did not err in retaining jurisdiction of the bad faith action. As such, this opinion should be used to support the notion that the proper remedy is to abate (not dismiss) a bad faith count included in the underlying UM action.

Gregory M. Yaffa
joined Domnick, Cunningham & Whalen, LLC in 2004 and currently practices in the areas of insurance company bad faith, personal injury and wrongful death. Greg is admitted to practice law not only in the State Courts of Florida, but also in the Florida Federal Courts, including the United States District Court, Middle District Court of Florida, the United States District Court, Southern District of Florida and the United States District Court.