RECENT FEDERAL COURT
Summary Judgment Cases

by Gregory Yaffa

Rather than reporting on all insurance decisions from around the state, the focus of this article is on the recent string of Federal Court Summary Judgments entered in insurance bad faith cases. 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)), the Federal Courts appear to be going out of their way to rule in favor of insurers and against injured claimants and insureds. What follows are summaries of some of the more recent Summary Judgments that are worthy of discussion.

***Harris v. GEICO General Ins. Co.*, 961 F. Supp. 2d 1223(M.D. Fla. 2013)**

Claim where GEICO's insured (Harris) carried $100,000 in UM limits. When plaintiff's counsel filed a Civil Remedy Notice, Harris' medical bills totaled approximately $34,000, with Harris having undergone a percutaneous discectomy. GEICO failed to tender the full UM limits in response to the CRN. Negotiating during the cure period, GEICO increased its offer to $30,000. After the cure period expired and during litigation, Harris underwent a fusion surgery which triggered GEICO to tender the $100,000 UM limits. Harris rejected the tender and obtained a verdict in the amount of $336,351. The jury in the subsequent bad faith trial also returned a verdict for Harris, finding that "Harris proved to a preponderance of the evidence that GEICO acted in bad faith in failing to settle her claim during the 60-day safe harbor period." The Middle District granted GEICO's motion for judgment, holding that GEICO did not act in bad faith because 1) "Harris did not demonstrate permanent injury within a reasonable degree of medical probability during the safe harbor period"; and 2) "The jury award in the underlying case is not the proper measure of any damages Harris incurred as a result of any bad faith on GEICO's part." See *King v. Government Employees Insurance Company*, 2012 WL 4052271 (M.D. Fla. 2012).

***Coulter v. State Farm Mut. Auto Ins. Co.*, No. 4:12cv577-WS/CAS (N.D. Fla. 2014)**

No bad faith where State Farm failed to strictly comply with §627.4137, Florida Statutes, as record evidence existed showing State Farm's "well documented efforts" to provide a complete copy of the insured's policy and State Farm's "diligent and timely efforts to pursue a settlement" on behalf of its insured. Additionally, the court was not persuaded by Coulter's argument that State Farm acted in bad faith

by failing to provide Coulter with a satisfactory affidavit from State Farm's insured, when State Farm unsuccessfully attempted to secure an acceptable affidavit from plaintiff's counsel and plaintiff's counsel did not cooperate.

***Kincaid v. Allstate Ins. Co. and Allstate Prop. & Cas. Ins. Co.*, No. 14-10465 (11th Cir. 2014)**

No bad faith where Allstate "almost immediately" offered to tender its insured's $100,000 liability policy limits and aggressively sought to settle the case by repeatedly contacting plaintiff's counsel to attempt to facilitate a settlement and protect its insured. According to the Order granting Summary Judgment, Allstate contacted plaintiff's counsel thirty-one times attempting to negotiate a settlement and counsel only responded three times and refused to discuss settlement each time. After Allstate tendered the bodily injury liability limits, plaintiff's counsel returned the check and sent a 15-day demand that was confusing to Allstate. Because of the confusing nature of the demand (especially as to the type of release acceptable to the plaintiff), Allstate hired outside counsel to help Allstate comply with the demand and protect the insured. Defense counsel, also confused by the language of the demand, made numerous attempts to contact plaintiff's counsel. In doing so, defense counsel left both his cell and office phone numbers so that discussions could be had after hours. Despite having the cell number, plaintiff's counsel called defense counsel back on his office line at 9:26 PM one evening and 7:22 AM two days later, when the office was closed. Not able to communicate with plaintiff's counsel prior to the demand deadline expiring, defense counsel provided plaintiff's counsel with two different releases that he believed were compliant with the demand terms and invited any proposed changes to the release that Allstate selected. Additionally, when defense counsel provided the releases, he advised that the releases were not a material part of the settlement. Plaintiff's counsel responded by advising that he was filing suit because "a satisfactory release had not been provided." The Court stated, "*we find it hard to imagine how Allstate could be acting in bad faith when it had already offered the full policy limits, aggressively sought to settle the case at every turn, and even continued to argue at all points that it had reached a binding settlement... the district court correctly concluded that no reasonable jury could find that Allstate acted in bad faith.*"

***Houston v. Progressive American Ins. Co.*, No. 8:13-cv-194-T-35AEP (M.D. Fla. 2014)**

Relying on *Valle v. State Farm Mut. Auto Ins. Co.*, 394 Fed. Appx. 555 (11th Cir. 2010), Court finds no bad faith in this multiple claimant case. Progressive's insured (who carried a $10,000/$20,000 BI policy) caused a multi-vehicle crash that resulted in potential injuries to ten people. Within three days of the loss, Progressive determined that five of the potential ten claimants suffered no injuries at all. Within five days of the loss, Progressive hired defense counsel to represent the insureds. On December 23, 2009, (within 11 days of the loss), Progressive globally offered the full $20,000 per-occurrence policy limits to all five injured claimants and scheduled a global settlement conference to take place on February 11, 2010. On January 11, 2010, the Houstons filed suit against Progressive's insureds based on the severity of A.H. III's (minor child) injuries. The evidence showed that this child had what appeared to be the most significant injuries of all of the potential claimants (airlifted from the scene). In light of these injuries, Progressive was informed by plaintiff's counsel that the Houstons would not be attending the global settlement conference set for February. Despite this, Progressive went forward with the settlement conference and successfully settled all of the claims for $5,000, except for the Houstons' claims, who did not attend. When Progressive tendered the remaining $15,000 to the Houstons, they rejected the untimely tender, arguing that Progressive should have: 1) immediately tendered the full $10,000 per-person limit to A.H. III, as his claim was clearly the most significant and presented the largest exposure to Progressive's insured; and 2) once Progressive discovered that A.H. III, filed suit and was not going to attend the global settlement conference, Progressive should have abandoned the "global" effort and wiped out the exposure presented by A.H. III's claim.

The Court was not so convinced. Relying on misinterpretations of the law (*Laforet* - "In Florida, insurers owe a duty to their insureds to refrain from acting solely on the basis of their own interests in settlement"; and *Novoa* - "to fulfill the duty of good faith, an insurer does not have to act perfectly, prudently, or even reasonably. Rather, insurers must 'refrain from acting solely on the basis of their own interests in settlement'"), the Court completely disregarded the holdings of *Farinas*, *Marsh*, *Harmon* and *Davis* and granted SJ in Progressive's favor.

The Court's skepticism is readily apparent throughout the opinion, especially in its language, "*To be sure, there could perhaps be a multiple competing claimant circumstance in which the injuries to a specific victim are so grave, the injuries to the remaining potential claimants are so minor, and the concomitant documentation and information before the insurer of those injuries is so clear, that a duty arises on the part of the insurer to jettison the global settlement approach, which it unquestionably has the discretion to choose, and make a full tender to the gravely injured victim. As explained below, however, this is not such a case*."

***Moore v. GEICO General Ins. Co.*, No. 8:13-cv-1569-T-24 AEP (M.D. Fla. 2014)**

The Middle District's apparent disdain for bad faith actions seems to continue throughout this opinion. Here, the Court again relying on *Novoa*, found that GEICO's actions, while "sloppy" and "bordering on negligent," do not amount to bad faith. 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 only 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. 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*."

***Abruscato v. GEICO General Ins. Co.*, No. 3:13-cv-962-J-39JBT (M.D. Fla. 2014)**

Despite finding that "*reasonable jurors could conclude that GEICO's investigation was inconsistent with its good faith duty to fully investigate claims against its insured and that the Abruscato's alleged choice to settle Mrs. Spear's claims was uninformed*," the Middle District entered summary judgment in favor of GEICO, holding that GEICO did not act in bad faith. This was a multiple vehicle crash, resulting in three deaths and six more injured. When GEICO was unable to settle all of the claims within GEICO's insured's $100,000 liability limits, GEICO settled two of the death claims within policy limits, thereby leaving GEICO's insured exposed to the remaining death claim and injury claims. The death claim proceeded to trial, resulting in a multimillion dollar judgment against Abruscato. The main allegation in the bad faith action was that GEICO did not wipe out the largest death claim when it had an opportunity to do so because GEICO failed to take into account the fact that one of the decedents that it did settle with was intoxicated at the time of the crash and therefore comparatively negligent. Citing to *Marsh*, the Court reiterated that GEICO "had discretion in how it elected to settle claims, including the ability to settle certain claims to the exclusion of others." The Court held that "GEICO was reasonable, as a matter of law, for assigning Mr. Abruscato 100 percent fault for the accident and no fault to Mr. Spear, Mr. Abruscato's claim against GEICO for settling in bad faith cannot proceed."

Thankfully, this string of Summary Judgments has not been entirely one sided. In the following cases, the Federal Courts denied insurers' Summary Judgment Motions and allowed the actions to go to the jury.

***Merrett v. Liberty Mutual Ins. Co.*, No. 3:10-cv-1195-J-12MCR (M.D. Fla. 2013)**

Questions of fact exist, precluding summary judgment, where plaintiff lost part of his leg and the defendants' insurer tendered $50,000 bodily injury liability limits within two weeks of the loss, but included hospital on the check and an entity on the release that was not insured by Liberty Mutual. Additionally, plaintiff alleged that Liberty Mutual violated the adjuster's code of ethics by hand delivering the policy limits to plaintiff while in the hospital, medicated and coping with the loss of part of his leg.

***Jaimes v. GEICO General Ins. Co.*, No. 12-14427 (11th Cir. 2013)**

Jury's finding of bad faith affirmed where GEICO failed to timely communicate an offer of its insured's $10,000 liability limits to settle the claim of a minor passenger who lost a finger, despite GEICO's knowledge that the value of the claim exceeded its insured's policy limits. Despite plaintiff making no demand (*Powell* case); evidence that GEICO sent numerous letters (to multiple addresses) and left voicemails in attempt to settle the claim; and alleged evidence of a "set-up," the jury found that GEICO acted in bad faith.

***Diperna v. GEICO General Ins. Co.*, No. 6: 12-cv-687-Orl-36KRS (M.D. Fla. 2013)**

Questions of fact exist, precluding summary judgment, where GEICO failed to comply with all conditions of demand letter. The plaintiff suffered an avulsion fracture to a cervical vertebra. The conditions of the demand included: 1) offer of $10,000 liability limits; 2) mutually agreeable release; 3) financial affidavit to be executed by insured; and 4) affidavit of no additional insurance. While plaintiff's counsel did receive tender of the check, he did not receive the financial affidavit (insured testified that he signed it and sent it directly to plaintiff's counsel) or the affidavit of no additional coverage.

***Government Employees Ins. Co. v. Prushansky*, No. 12-80556-CIV-MARRA (S.D. Fla. 2014)**

Questions of fact exist, precluding summary judgment, where GEICO failed to provide plaintiff's counsel with a release that did not include indemnity language as plaintiff's counsel requested. There was conflicting testimony as to GEICO's willingness to remove the indemnity language and as to plaintiff's willingness to settle upon discovering that the insured was drunk and under the influence of drugs at the time of the loss.

***Maharaj v. GEICO Casualty Company*, No. 12-80582-CIV-MARRA/MATTHEWMAN (S.D. Fla. 2014)**

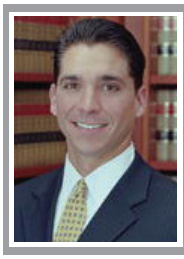
Just as in *Prushansky*, questions of fact exist where GEICO failed to provide a release that did not include property damage and indemnity language despite plaintiff counsel's requests. Despite counsel's requests, GEICO provided a release without the property damage language, but still included the indemnity clause. Similarly, there was conflicting testimony as to plaintiff's willingness to settle (6 year-old with below knee amputation).

***Kropilak v. 21st Century Security Ins. Co.*, No. 8:12-cv-1816-T-EAK-TGW (M.D. Fla. 2014)**

Questions of fact exist, precluding summary judgment, where 21st Century tendered its insured's $10,000 liability limits within 37 days of the loss absent a demand. Additionally, plaintiff alleged that the carrier's failure to agree to a $150,000 consent judgment was evidence of carrier's bad faith (judgment was $160,597.07). Despite referencing *Johnson v. GEICO* (no bad faith when insurer tendered within 33 days of loss), the court noted, "whether 21st Century's failure to tender the policy limits until thirty-seven days after the accident and its failure to negotiate a settlement on the excess policy limits, were reasonable under the contexts of this case, are material issues of fact to be submitted to the jury."

***Soto v. GEICO Indemnity Co.*, No. 6:13-cv-181-Orl-40KRS (M.D. Fla. 2014)**

Questions of fact exist, precluding summary judgment, where GEICO failed to accept plaintiff's demand for its insured's $10,000 liability limits, but rather offered $2,000 to settle claim. Plaintiff obtained a judgment against GEICO's insured in the amount of $105,825.



Gregory M. Yaffa
joined Slawson Cunningham Whalen & Gaspari 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.