THE CLAIM IS NOT SETTLED JUST BECAUSE A CHECK IS DELIVERED:

The Importance of Harvey v. GEICO General Insurance Company

by Fred Cunningham & Gregory Yaffa

Over the last decade or so, in insurance bad faith cases, federal courts in Florida have entered an alarming and unwarranted number of summary judgments against insureds and in favor of insurers. The vast majority of these summary judgments have been in *Powell* cases, where the injured party does not make a formal demand for an insured's policy limits.

Powell v. Prudential Property & Cas. Ins. Co., 584 So.2d 12 (Fla. 3rd DCA 1991), provides: "When liability is clear and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations." *Id.* at 14. *Powell* also stands for the proposition that any doubt about the outcome of a settlement effort should be resolved in favor of the insured. Finally, and quite significantly, *Powell* states that in a bad faith case with no demand letter, **the insurer has the burden** to prove that the case could not have settled for policy limits. In fact, *Powell* states that the insurer has to prove that there was **no realistic possibility of settlement within policy limits**.

Florida Standard Jury Instruction 404.4 provides:

> "An insurance company acts in bad faith in failing to settle a claim against its insured when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests."

Nevertheless, Florida's federal courts and the insurance industry seem to believe that all an insurance company should have to do to avoid acting in bad faith is to simply pay its insured's policy limits in a timely manner. See, e.g., *Novoa v. GEICO Indemnity Company*, 542 Fed. Appx. 794 (11th Cir. 2013), where the Court reached the following conclusion: "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 patent absurdity of the foregoing statement becomes even more clear when one realizes that only five years earlier, in *GEICO v. McDonald,* 315 F.Appx. 181 (11th Cir. 2008) the same court stated: "**The legal standard governing an insurer's settlement conduct is one of reasonableness**."

Obviously, the two pronouncements from the same court cannot be reconciled.

In *Berges v. Infinity Ins.Co.*, 896 So.2d 665 (Fla. 2004), The Florida Supreme Court aptly observed that the focus of an insurance bad

faith case is on the conduct of the insurer toward its insured, not on the conduct of the underlying claimant. However, no reasonable person could dispute that the claimant's attorney also owes a fiduciary duty to his or her client.

Despite this obvious truth, neither the courts nor the insurance industry have given any real consideration to the due diligence owed by the claimant's attorney to the claimant.

We hope that *Harvey v. GEICO Gen. Ins. Co.*, a case that we just tried and won in October, will be the case to set the record straight.

On August 8, 2006, while driving his 2003 Hummer H2, James Harvey was involved in a fatal collision with John Potts, who was operating a motorcycle at the time of his death. Mr. Potts was a 51-year-old locksmith, who left behind a wife of 25 years and three children. At the time of the accident, GEICO insured Harvey under an automobile liability policy, which provided bodily injury liability coverage in the amount of $100,000 per person and $300,000 per accident. Harvey had been insured with GEICO for over 20 years.

The accident was reported to GEICO on August 8, 2006, by Harvey's wife, Suzanne, who was also a named insured on the policy. Mrs. Harvey advised GEICO that Potts had died as a result of the accident. Thereafter, GEICO assigned the wrongful death claim to adjuster Fran Korkus

On August 10, 2006, an unknown GEICO adjuster documented that liability was resolved, and on August 11, 2006, Korkus sent an excess letter to Harvey, advising that the Potts wrongful death claim could possibly exceed his per person liability limits of $100,000 and that Harvey had the right to hire personal counsel at his own expense.

On August 14, 2006, Vivian Tejeda, who was Sean Domnick's paralegal, called Korkus and advised that the Estate of Potts was being represented by Mr. Domnick. Mr. Domnick and Ms. Tejeda knew that Mr. Harvey was driving a late-model Hummer. They also knew from the accident report that the car was owned by Mr. Harvey and a company called U.S. Multico, Inc., which turned out to be Mr. Harvey's company. Accordingly, during this phone call, Ms. Tejeda requested that Korkus make Harvey available for a statement. Ms. Tejeda's contemporaneous handwritten notes document that Korkus refused.

On August 17, 2006, **only nine days after the crash**, GEICO hand-delivered a check in the amount of Harvey's liability limits of $100,000.00, along with an Affidavit of Coverage and a General Release of All Claims. Korkus admitted that the Release provided was not appropriate, in that the property damage claim had not yet been resolved, and execution of the Release would have released the property damage claim.

Shortly after receiving the tender package from GEICO, Ms. Tejeda contemporaneously documented some concerns about resolving the case. Specifically, Ms. Tejeda's notes stated:

> "Tender Issues - check says full and final; Adj told me D on way to Appt/office - thinks returning from lunch - she has notice that he is or may be in the course and scope of his employer or business under 627.4137" - did she ask D if he was covered by a commercial policy? Other policy? What steps did she take to verify if further policies."

On August 24, Mr. Domnick wrote to Korkus, advising that he was in receipt of GEICO's August 17 correspondence. Specifically, Mr. Domnick wrote:

> "We are in receipt of the check and release you had dropped off at my office last week. I saw the affidavit of coverage for GEICO as well. When you and Vivian Ayan-Tejeda, my paralegal, spoke, there was discussion about whether Mr. Harvey was in the course and scope of his employment. You, as I understand it, indicated you were uncertain. Ms. Tejeda asked for Mr. Harvey to be made available for a statement. You declined her offer."

Korkus received the August 24, 2006 letter on August 31, 2006. On that date, she faxed a copy of the letter to Harvey, along with a handwritten note, advising: "I will keep you advised."

Additionally, Korkus forwarded the letter to her supervisor, Tim Holleran, with the note, "FYI – please review and advise if I need to respond to this."

On August 31, 2006, (after receiving the fax), at 10:26am, Mr. Holleran wrote in the GEICO activity log:

> Fran...was there ever a request made that the insured be made available for a statement? I saw no reference to that on the file and if such a request was made, we'd surely not deny that request on our own. The decision whether the insured wanted to provide a statement would be made by him. After he consulted with his personal atty if he wished. We should speak with atty Domnick to find out what type of statement they'd like to take from the insured so we can pass that request on to the insured and his personal counsel. We should also make sure that we clarify whether any other policies (i.e. from the insured's employer or the Canadian policy that is referenced in an early August Alog note) are applicable to the loss. If so, our AOC should be modified accordingly.

After receiving this direction from her supervisor, on August 31, 2006 at 1:48pm, Korkus called Mr. Domnick and left a voicemail, as neither Domnick nor Tejeda was available. Eighteen minutes later, Mr. Domnick returned Korkus' call. Korkus documented the call as follows:

> Rcv'd rtn call from Domnick... asked atty what type of statement he would like from insd & I will call insd & tell him so he can decide. .. Atty said basically needs to know if insd has any add'l ins cov that will apply to this call so he can discuss the $100K p/l offer with client. Advised atty I will contact insd.

Mr. Domnick documented the call in his note system as well. Specifically, the notes reflect, "Just got call from the adjuster asking

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about what kind of statement we wanted from the insured. I told her we were curious about other coverage and assets just as you had told her the other day." Mr. Domnick then advised his assistant to memorialize the conversation in a letter to Korkus.

On August 31, 2006, Mr. Domnick documented the conversation in a letter to Korkus, which he faxed to her on that date. Specifically, the letter advised:

> This confirms our conversation in which you told me that you had received our recent letter regarding this matter. You asked me why we wanted a statement from Mr. Harvey. I told you the same reason that Ms. Tejeda has outlined previously as well as that referenced in my recent letter. We want to determine what other coverage or assets may be available to cover this incident. You were unable to confirm that he would be available for a statement.

On September 1, 2006, Korkus documented receipt of the August 31, 2006 letter in the activity log. Specifically, Korkus wrote. "Rcv'd fax from c-atty confirming conversation regarding the statement he wants to obtain from insured. Called and faxed to insd." In addition to faxing the letter to Harvey, Korkus also faxed the letter to her supervisor, advising "FYI – please review and advise."

On September 1, 2006, immediately after receiving the faxed letter authored by Mr. Domnick, Harvey called Korkus to advise that he wanted to speak with his personal counsel first (who was out of town for the Labor Day weekend) but wanted to make sure that Sean Domnick was kept informed. Specifically, at 12:53pm, Korkus documented the call as follows:

> Rcv'd call from insd... he rcv'd fax and said Geraghty is not available until Tuesday after this holiday weekend... **Insd does not want c-atty to think we are not acting fast enough and asked what we can do to let c-atty know we are working on this**...I told insd I will discuss ltr w/ mgmt & get back to him...insd reqt'd I fax him a copy of any response ltr before it is sent/fax'd. (Emphasis added).

On the same date, at 3:06pm, Mr. Holleran (Korkus' supervisor) responded in the activity log to Korkus' note on the letter she faxed to him. Specifically, the activity log entry states: "Is Mr. Harvey indicating that he is not sure whether he'll submit to giving a statement until he speaks with his personal atty next week? **If that is the case, we should send a letter to Mr. Domnick explaining this with a Cc going to the insured (and his personal attorney, if we have his address)"** (Emphasis added).

Despite Harvey **and** Mr. Holleran requesting that Korkus make sure that Mr. Domnick be kept apprised of the situation, it was undisputed that Korkus failed to do so. In fact, the activity log and deposition testimony document that between September 1, 2006 and the date the lawsuit was filed (September 13, 2006), neither Korkus nor GEICO did anything at all to follow up with Mr. Harvey or Mr. Domnick regarding the requested statement. Mr. Domnick was kept in the dark. Additionally, and inexplicably, despite knowing that Mr. Harvey had personal counsel very early on, GEICO never advised Mr. Domnick of this fact. Ms. Korkus admitted that there was no good reason for not telling Mr. Domnick that Mr. Harvey had personal counsel and that doing so would have been a good idea. Ms. Korkus knew that if she had told Mr. Domnick that Mr. Harvey had personal counsel, Mr. Domnick could have contacted Mr. Harvey's personal counsel regarding the issues about which Mr. Domnick was obviously concerned. Had Mr. Domnick known that Mr. Harvey had personal counsel, he could have contacted his personal counsel to discuss the information that he needed so that Mrs. Potts could have made an informed decision regarding settlement for the $100,000 liability limits. The first time the Mr. Domnick learned that Mr. Harvey had personal counsel was after the lawsuit had been filed.

On September 11, 2006, Mr. Domnick had a conversation with his client, Tracey Potts. Mr. Domnick documented, "I spoke with Mrs. Potts who is understandably upset by the refusal of the insurance company to give us the information we need to analyze this case. She has directed us to file suit."

On the same date, Mr. Domnick documented the conversation in writing to his client. Specifically the letter provided:

> …. as you knew, we were trying to determine if there was more coverage available than the $100,000 from GEICO. We had asked GEICO on August 11th to make Mr. Harvey available for a statement so we could see if he was in the course and scope of his employment and otherwise investigate other potential sources of coverage. The GEICO adjuster refused to allow this to happen.
>
> The adjuster and I subsequently spoke about ten days ago when she asked me why I wanted to speak with the insured. I reiterated what we had already told her on the phone and in a letter. I followed up that conversation on August 31st with another letter. We have not heard back from them.
>
> At this point, it is impossible for me to properly analyze the case because GEICO has not been cooperating in that evaluation.
>
> After discussing the above, you indicated that you were fed up with waiting for an answer. This has been difficult enough without being given the run around from GEICO. You have instructed me to file suit immediately…

On September 13, 2006, Mr. Domnick filed the lawsuit against Mr. Harvey. What followed has been an odyssey of Homerian proportions.

Initially, Mr. Domnick's complaint was filed solely against Mr. Harvey and his company, U.S. Multico. Based on the discovery conducted and the insistence of Mr. Harvey that the light was not functioning properly at the subject intersection, The Signal Group was brought into the litigation as a defendant. On June 2, 2008, a final judgment was entered in favor of the Potts Estate in the amount of $2,235,000,

with James Harvey being responsible for $745,000 (25 percent comparative), The Signal Group being responsible for $1,450,000 (50 percent comparative), and John Potts being held 25 percent comparatively negligent.

Following the judgment The Signal Group settled with the Potts Estate. Despite Mr. Domnick offering to settle with GEICO for $635,000 (the judgment less the $100,000 policy limits), GEICO refused.

Shortly thereafter, Mr. Domnick filed a motion for new trial based on juror misconduct. Apparently two jurors were untruthful when disclosing their criminal histories. The Court granted a new trial. However, this time it was only against James Harvey and his company, U.S. Multico, because the Potts Estate had now settled with The Signal Group.

The second trial resulted in a verdict of $8,470,000 against Mr. Harvey, with no comparative fault on the part of John Potts. Prior to the entry of final judgment (at which point, the court loses jurisdiction), Mr. Domnick moved to join GEICO to the judgment pursuant to Florida's nonjoinder statute. The trial judge granted the motion. Since GEICO was now a party, and the court had not yet entered final judgment, Mr. Harvey filed a crossclaim against GEICO for insurer bad faith. GEICO immediately removed the bad faith crossclaim to Federal Court. Shortly thereafter, on May 24, 2011, the trial court entered the final judgment against Mr. Harvey in the amount of $8,470,000 (cost judgment included).

Mr. Harvey, then moved to remand the removed crossclaim, which was granted. Now back in state court, GEICO then moved to dismiss and/or sever the bad faith claim so that it could then again attempt to remove the bad faith action. The trial court denied GEICO's motion.

GEICO then filed a Petition for Writ of Certiorari to the Fourth District Court of Appeal asking for a ruling that the lower court departed from the essential requirement of the law by denying GEICO's motion to dismiss Harvey's crossclaim for bad faith.

On January 23, 2013, The Fourth DCA granted GEICO's Petition, holding that the bad faith action was separate and independent from the underlying tort action and must be brought as a separate cause of action. *Harvey v. GEICO General Ins. Co.*, 109 So.3d 236 (Fla. 4th DCA 2013). The court's *ratio decidendi,* i.e., that a writ of certiorari was necessary to prevent irreparable harm to GEICO, was criticized by the court in *Safeco Ins. Co. v. Rader*, 132 So.3d 931 (Fla. 1st DCA 2014), which observed that there was no risk of irreparable harm to GEICO, since GEICO simply could have appealed the jurisdictional question if it had lost the bad faith case in state court.

On November 20, 2013, after having received Mr. Harvey's entire file and recognizing that his personal counsel may have committed legal malpractice in that he had been retained and aware of Mr. Domnick's request for a statement of Mr. Harvey during the relevant time frame, Harvey filed a new bad faith claim in state court against GEICO along with a legal malpractice claim against Mr. Harvey's personal counsel.

As anticipated, GEICO alleged fraudulent joinder of a non-diverse party (personal counsel) and again removed the action to federal court. On August 4, 2014, United States District Court Judge Kenneth Marra remanded the action back to state court.

Rather than pursuing the Motion to Sever the legal malpractice claim from the bad faith claim, GEICO decided to litigate the action in state court.

Finally, after nearly two years of litigation, on October 23, 2015, (more than nine years after the crash), a Palm Beach County jury found that GEICO had acted in bad faith, despite hand-delivering the policy limits within nine days of the loss. The trial was only against GEICO, as Mr. Harvey settled the legal malpractice action for a confidential amount. With accrued interest, through the date of the verdict, the Final Judgment totaled more than $10,563,169.31. GEICO will receive a set-off for the amount recovered from the legal malpractice claim.

GEICO's defense was multifaceted. First, GEICO attempted to paint Mr. Domnick as a greedy trial lawyer who never would have recommended that his client settle for $100,000 where his fee would have been a miniscule $33,333.33, rather than collect a fee on $8.5M.

Second, GEICO alleged that Mr. Domnick never would have recommended settlement for the policy limits because Mr. Harvey had assets. The truth of the matter was that virtually all of Mr. Harvey's assets were jointly held with his wife, and since his wife was not a party, these were uncollectable. The only asset that was arguably collectible was the U.S. Multico operating account, which at the time of the loss contained approximately $85,000. Mr. Domnick testified that if that was all that was there, he still would have recommended that The Potts Estate settle for the policy limits because of the nature of operating accounts and that there would likely have been nothing left in the account when it came time to try to collect.

Third, GEICO tried to point the finger at its own insured and his personal counsel by arguing that it could not force Mr. Harvey to give a statement and he was never willing to do so. GEICO alleged that all it had to do was let Mr. Harvey know that Mr. Domnick wanted a statement and that was enough. The jury was smart enough (with a little coaxing) to see through this argument. The evidence was that Mr. Harvey was willing to give the statement, but simply wanted to speak with his personal counsel first. GEICO knew this, and despite Ms. Korkus being told by Mr. Harvey and her supervisor to keep Mr. Domnick informed, she failed to do so. Most importantly, Mr. Domnick satisfied the proximate cause requirement with his testimony that he would not have filed suit on September 13, 2006, if he had known that Mr. Harvey and his personal counsel were going to meet to discuss giving the statement.

Finally, GEICO was critical of Mr. Domnick because he did not outline any conditions that Harvey must meet in order for The Estate to be willing to accept the $100,000 check for the policy limits. GEICO alleged that this was proof that he never wanted to settle the claim. However, neither Ms. Korkus nor anyone else from GEICO, ever asked Mr. Domnick if he wanted the information within a certain time frame or had any other conditions.

Because this was a *Powell* case and GEICO raised the unwillingness of The Potts Estate to settle for the policy limits, GEICO was required to prove that there was no realistic possibility of settlement within policy limits. Despite delivering the check within nine days of the loss, GEICO could not meet this burden.

During the bad faith trial, we also focused on the fact that Korkus, only one year earlier, had failed to follow her supervisor's instructions, which had resulted in excess exposure to an insured and to GEICO. The claims handler's performance reviews also documented that this adjuster had a longstanding problem maintaining her workload.

GEICO has already filed its Motion for New Trial, and we fully expect that GEICO will file an appeal. While James Harvey and the Potts Estate would certainly like closure to this nine-year odyssey, GEICO's expected appeal could have far reaching ramifications as it could help fix the current federal court summary judgment problem and clarify the law that *Powell* requires much more than simply initiating settlement negotiations. Every adjuster and expert deposed in the case conceded that a claim is not settled just because the policy limits are paid and that a claim is not settled until a release is received from the injured party.

Finally, we hope and expect that the appeal will also acknowledge that the claimant's attorney has a fiduciary duty to his or her client that is every bit as important as the fiduciary duty owed by the insurer to the insured. That fiduciary duty required Mr. Domnick to try to get the information he was seeking. We hope that the law will finally acknowledge this obvious truth.

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