The Florida Senate

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Committee on Judiciary

INSURANCE BAD FAITH

Issue Description

Florida's "bad faith" law allows an insured person or someone who has been injured by an insured person to recover damages from an insurer for failing to settle a claim in good faith when the insurer could and should have done so. Florida has had bad faith remedies in place through the common law and statute for many years, targeted at protecting insurance consumers from unfair practices on the part of insurers. Some experts argue that Florida's bad faith law is an effective check on insurance companies, which generally have a considerable advantage over insureds in terms of bargaining power. However, others argue that the current bad faith system has gone beyond leveling the playing field and has created incentives for insureds or injured third parties to use strategies to allege that an insurer acted in bad faith, leaving insurers to navigate unfair, yet legal tactics to convert policy limits into unlimited insurance through the cause of action.

The purpose of this interim report is to review current practices based on the experiences of legal practitioners, insurance companies, and others with expertise in insurance bad faith, as well as case law, statutes, legal scholarship, and data associated with bad faith in Florida and other jurisdictions, in order to give legislators a basis for evaluating what potential changes, if any, are needed to Florida law.

Background

Insurance Requirements and Insurer Obligations

Insurance is a contract under which, for stipulated consideration, one party undertakes to compensate the other for loss on a specified subject from specified perils. The insurance contract is commonly referred to as a policy, and the consideration is called a premium. The party seeking to make the compensation is called the insurer, and the party paying the premium is the insured. Two major categories of insurance that are often relevant to bad faith are property insurance and liability insurance. Property insurance protects individuals from the loss of or damage to property and, also in some instances, personal liability pertaining to the property. One of the common lines of insurance in this category is homeowner's insurance. Automobile liability insurance covers suits against the insured for such damages as injury or death to another driver or passenger, property damage, and the like. It is insurance for those damages for which the driver can be held liable.[1]

In Florida, every owner or operator of an automobile is required to maintain liability insurance to cover a minimum of $10,000 in coverage for damage to another's property in a crash.[2] Additionally, every owner or registrant of an automobile is required to maintain personal injury protection, which covers medical expenses related to a car accident regardless of fault up to $10,000 per person and $20,000 per incident.[3] These are the only two types of automobile insurance required by Florida law.

A liability insurer generally owes two major contractual duties to its insured in exchange for premium payments—the duty to indemnify and the duty to defend.[4] The duty to indemnify refers to the insurer's obligation

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[1] BLACK'S LAW DICTIONARY 802-05 (6th ed. 1990).
[2] Section 324.022, F.S.
[3] Section 627.733, F.S.
[4] 16 Williston on Contracts s. 49:103 (4th ed.).

to issue payment either to the insured or a beneficiary on a valid claim.[5] The duty to defend refers to the insurer's duty to provide a defense for the insured in court against a third party with respect to a claim within the scope of the insurance contract.[6]

Statutory and Common Law Bad Faith

Florida courts for many years have recognized an additional duty that does not arise directly from the contract, the common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants.[7] Additionally, a Florida statute, enacted in 1982, recognizes a claim for bad faith against an insurer not only in the instance of settlement negotiations with a third party, but also for an insured seeking payment from his or her own insurance company.[8] The statute provides that any party has a claim and defines bad faith on the part of the insurer as: "Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests."[9]

In order to bring a bad faith claim under the statute, a plaintiff must first give the insurer 60 days' written notice of the alleged violation.[10] The insurer has 60 days after the required notice is filed to pay the damages or correct the circumstances giving rise to the violation.[11] Because claims that are purely between the insurer and the insured are only statutory, that cause of action does not exist until the 60-day curing period provided in the statute expires without payment by the insurer.[12] Claims where damages are owed to a third person, on the other hand, exist both in statute and at common law; thus the insurer cannot guarantee avoidance of a bad faith claim by curing within the statutory period.[13]

First- and Third-Party Claims

A first-party bad faith claim occurs when an insured sues his or her insurer claiming that the insurer refused to settle the insured's own claim in good faith.[14] A common example of a first-party bad faith claim is when an insured is involved in an accident with an uninsured motorist and does not reach a settlement with his or her own uninsured motorist liability carrier for costs associated with the accident.[15] First-party claims "typically involve allegations that the insurer improperly denied coverage, underpaid a loss or delayed payment without adequate justification."[16] Before a first-party bad faith claim was recognized in statute, Florida courts rejected such claims because the insured is not exposed to liability and thus there is no fiduciary duty on the part of the insurer as there is when a third party is involved.[17]

A third-party bad faith claim arises when an insurer fails in good faith to settle a third party's claim against the insured within policy limits, thus exposing the insured to liability in excess of his or her insurance coverage.[18] Third-party claims have been recognized in Florida under the common law for many years and can also be brought as a statutory claim under s. 624.155, F.S.

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[5] *Id.*
[6] *Id.*
[7] *Auto. Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938).
[8] Section 624.155, F.S.
[9] Section 624.155(1)(b)1., F.S.
[10] Section 624.155(3)(a), F.S.
[11] Section 624.155(3)(d), F.S.
[12] *Talat Enter., Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1284 (Fla. 2000).
[13] *Macola v. Gov't Employees Ins. Co.*, 953 So. 2d 451, 458 (Fla. 2006) (holding that an insurer's tender of the policy limits to an insured in response to the filing of a civil remedy notice, after the initiation of a lawsuit against the insured but before entry of an excess judgment, does not preclude a common law cause of action against the insurer for third-party bad faith).
[14] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[15] *See, e.g., Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991).
[16] Consumers Against Higher Insurance Rates-Washington, *The Impact of Engrossed Substitute Senate Bill 5726 on Insurance Rates* (Sept. 20, 2007) (on file with the Senate Committee on Judiciary).
[17] *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1125-26 (Fla. 2005) (citing *State Farm. Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995)).
[18] *Opperman*, 515 So. 2d at 265.

2011 Bad Faith Legislation

In February 2011, the Senate Committee on Judiciary held a workshop during which proponents and opponents of reform to Florida's bad faith law shared their opinions and experiences with the committee. Shortly thereafter, Senate Bill 1592 was filed, proposing significant amendments to s. 624.155, F.S.

Committee Substitute for Senate Bill 1592 created specific statutory standards for a bad faith claim against an insurer that would "apply equally and without limitation or exception to all common law remedies and causes of action for bad faith failure to settle." The bill specified that a bad faith claim would arise where the insurer acts "arbitrarily and contrary to the insured's interests in failing to settle claims within the policy limits if, under all the circumstances existing at the relevant time, it could and should have done so, had it acted fairly and honestly toward its insured." Only an insured person or that person's assignee would have a cause of action under the bill, thus eliminating a direct cause of action brought by a third-party claimant against an insurer without an assignment from the insured. In a bad faith action arising out of failure to settle with a third-party claimant, the insurer's duty to offer policy limits would not arise unless a plaintiff shows that during settlement negotiations the third party submitted a detailed written demand to settle with the insurer within policy limits which meets criteria specified in the bill. The bill also provided a process for insurers to facilitate settlement within policy limits in the event of multiple third-party claims. The bill passed the Judiciary Committee by a vote of 4-3, but was never heard in the Committee on Budget, which was the next committee of reference.[19]

The debate over the proposal to reform Florida's bad faith law is illustrative of the philosophical differences of opinion among the interested parties on the operation of the state's bad faith statute and common law. In general, many insurers and representatives of the insurance defense bar argue that the bad faith law creates an environment where it is impossible to settle claims within policy limits because plaintiffs have an incentive to strive for higher damages. However, many representatives of the plaintiffs' bar argue that Florida's long-standing bad faith law provides important protections for consumers while allowing sufficient opportunity to settle for insurers acting in good faith. These arguments will be explored in further detail in the following section.

Findings and/or Conclusions

The Bad Faith Debate

Concerns Raised by Advocates for Reform

Critics of the law governing bad faith in Florida have stated that it "has helped to curb abuse and unfair practices" on the part of insurers, but "as quickly as bad-faith law developed to come to the aid of the disadvantaged party in a contract or fiduciary relationship, it has evolved into a litigation quandary that often misses its basic purpose."[20] Advocates for reform to Florida's bad faith law contend that the current system encourages plaintiffs' attorneys, while acting fully within the law, to regularly contrive situations designed to transform the amount of insurance the policyholder paid for into much larger settlements.[21] This is achieved for example, according to advocates, when the claimant's attorney acts as though he or she is willing to accept policy limits by sending a detailed demand letter to the insurer when the true intention is to reject the requested amount in order to pursue a more lucrative bad faith claim.[22] These demand letters may include conditions for accepting a settlement within the policy limits that the insurer is unlikely to be able to comply with, thus intentionally setting up the insurer to fail.[23] The demand letter may require information that the insured will not want to produce and that is beyond the insurer's control, such as sworn affidavits for his or her net worth, within a timeframe that the claimant

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[19] A companion bill, HB 1187, died in the House Civil Justice Subcommittee.
[20] Victor E. Schwartz and Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477, 1479 (2009).
[21] Transcript of Bad Faith Workshop, Senate Committee on Judiciary, 5 (Feb. 22, 2011) (on file with the Senate Committee on Judiciary).
[22] *Id.* at 6.
[23] *Id.*

presumably understands is not sufficient for the insurer to investigate and evaluate the merit of the claim.[24] The types of conditions requested in a "multi-conditional settlement demand," according to one commentator, "are limited only by the attorney's creativeness."[25] Additionally, insurers have reported that demand letters are often strategically written with vague and confusing language and that some attorneys will not respond to requests for clarification, allowing the deadline to lapse. Insurers have also indicated that claimants' attorneys frequently do not produce all pertinent medical records to aid the insurer in evaluating the claim. A pair of scholars have characterized this type of demand letter strategy in some cases as the practice of "enterprising plaintiffs' attorneys seek[ing] out technical violations…where there is no purposeful or malevolent will, or even a remotely unfair act."[26] The scholars further state that recognizing bad faith without an intentional act by the insurer severely undermines the substance of the law and "expand[s] the scope and boundaries of bad faith to encompass well-intentioned actions by insurers and…muddy the law's goal of giving notice of the type of conduct that will result in liability."[27]

Commentators have suggested that because this type of "set-up" is permissible under the current law, there should be a reciprocal duty of good faith on the part of the insured or third-party claimant in attempting to settle a claim.[28] Without such a reciprocal duty, it has been argued, the law "is sometimes exploited, resulting in the anomalous situation of insurers being unable to accomplish the very settlements the statute seeks to encourage."[29]

Finally, although much of the debate surrounding bad faith and the 2011 legislative proposal has focused on third-party bad faith claims, first-party insurers have also reported abuses. First-party insurers enjoy the advantage of the statutory 60-day cure period because a civil remedy notice (CRN) is required for that category of claims.[30] However, first-party insurers have indicated that most CRNs provide information that is so vague that the insurer is unable to rectify the complaint, which precludes the insurer from taking advantage of the cure period before a bad faith lawsuit is filed.[31] First-party insurers have argued that contract remedies should be sufficient to address first-party claims because additional remedies essentially render the terms of the insurance contract moot.[32] Some have suggested that on top of existing contract remedies, administrative fines should be an effective means of punishing insurers for bad faith conduct.[33]

The basic tenet of the insurance policy, as described by one commentator, is to make the insured whole, or to put him or her back to the same position as before the incident giving rise to the claim, whether it be a fire, hurricane, or car accident, for example.[34] The intended purpose of insurance is to indemnify, not to provide enrichment.[35] According to the same commentator, some opponents of bad faith reform have defined the consumer as the person with the insurance claim, but the people who pay higher premiums because of how some use the system to enrich themselves are also consumers worth considering in the conversation about reform.[36]

Counterarguments

In response to arguments that Florida's bad faith law has created an unfair environment for insurance companies, others contend that the current law provides necessary protections to consumers and that insurers set themselves

[24] *Id.*
[25] Victor E. Schwartz, *Restoring The Good Faith in Florida's "Bad Faith" Insurance Litigation*, 11 (2011) (issue paper, on file with the Senate Committee on Judiciary).
[26] Schwartz and Appel, *supra* note 20, at 1479.
[27] *Id.* at 1497.
[28] Gwynne A. Young and Johanna W. Clark, *The Good Faith, Bad Faith, and Ugly Set-Up of Insurance Claims Settlement*, 85 FLA. B.J. 9, 10 (Feb. 2011).
[29] *Id.* at 9.
[30] Section 624.155(3)(a), F.S.
[31] Meeting with first-party insurers and representatives (Aug. 15, 2011).
[32] *Id.*
[33] William G. Hamm et al., *The Impact of Bad Faith Lawsuits on Consumers in Florida and Nationwide*, 5 (Sept. 15, 2010); *see* s. 624.4211, F.S.
[34] Email from legal counsel for first-party insurer (Aug. 1, 2011).
[35] *Id.*
[36] *Id.*

up for bad faith by not acting fairly toward their insureds. Insurers cannot be set up for bad faith, according to this perspective, if the insurer "undertakes a prompt investigation of the loss, timely evaluation of the legal liability of the insured, communicates to the insured the material events of the adjustment process, and acts reasonably with regard to opportunities to settle the loss and protect the assets of the insured."[37] In response to the argument that the current law does not provide insurers with sufficient notice of what conduct constitutes bad faith, plaintiffs' practitioners have stated that the numerous court decisions on the subject sufficiently define what an insurer's obligations are.[38]

Regarding detailed demand letters, some attorneys have stated that non-monetary conditions are necessary to protect clients and shield themselves from potential malpractice allegations. If an attorney fails to thoroughly gather all relevant information from the insurer to make an informed decision about whether or not to accept a settlement within policy limits, and other assets are uncovered after the fact, he or she may be subject to a malpractice lawsuit.[39] Time demands, according to some, are "simply part of the process."[40] Whether or not a given time demand constitutes a "setup" is evaluated on a case-by-case basis under the totality of the circumstances—in some cases there may be a legitimate reason for a short window of time, while in other cases it may be a charade.[41] It has been argued that courts have discretion under the current law to defeat setup attempts that rely on unrealistic time deadlines and unreasonable terms that cannot be met because these facts bear on whether the insurer could have settled.[42]

Commentators have also noted that it is important to maintain the heightened fiduciary duty when evaluating the actions of the insurer in third-party cases because the insurer has the power to settle and protect the insured from liability or to refuse to settle and expose the insurer to liability above the policy limits.[43] Courts in some other states have examined and rejected a reciprocal covenant of good faith on the part of the insured. One court justified its holding by saying: "An insured seeks peace of mind and economic protection against calamity….Although the insured depends upon the insurer for protection, the insurer does not depend on the insured in the same manner."[44] The court further stated that "[i]nsurance contracts are usually adhesive in nature, since their terms are generally contained in form language dictated by the insurer….An insurer's breach can therefore frustrate the core purpose of insurance (protecting the insured from calamity) and leave the insured exposed to a disaster it has paid to avoid."[45]

With respect to the contention that contract remedies are sufficient to compensate plaintiffs for bad faith, some have countered that breach of contract remedies alone would not serve as a deterrent because the insurer would not have to pay more than the amount of the policy, creating an incentive to underpay claims.[46] If only contract remedies were available, potential plaintiffs would presumably not undertake lengthy and costly litigation even if they thought they were being treated unfairly and would thus be forced to take the amount offered regardless of whether it would cover the true value of the claim.[47]

Finally, some members of the plaintiffs' bar contend that although Florida may have insurance premiums that are higher than other states, cost should not be the only concern. According to this perspective, even though Florida's bad faith law may result in higher premiums, it is also the reason for a better insurance product for consumers

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[37] Rutledge R. Liles, *Florida Insurance Bad Faith Law: Protecting Businesses and You,* 85 FLA. B.J. 8, 11 (Mar. 2011).
[38] *See* Transcript of Hearing for HB 1187, House Civil Justice Subcommittee, 78 (Apr. 4, 2011) (on file with the Senate Committee on Judiciary).
[39] Bad Faith Workshop, *supra* note 21, at 60.
[40] Rutledge R. Liles, *Insurance Bad Faith: The "Setup Myth,* 77 FLA. B.J. 18, 22 (Jun. 2003).
[41] *Id.*
[42] Liles, *supra* note 37, at 11-12.
[43] *Id.* at 10.
[44] *Agric. Ins. Co. v. Superior Ct.*, 82 Cal. Rptr. 2d 594, 600 (Cal. Ct. App. 1999) (quoted in Schwartz and Appel, *supra* note 20)*; see also Kransco v. Am. Empire Surplus Lines Ins. Co.*, 2 P.3d 1 (Cal. 2000) (invalidating a comparative bad faith defense).
[45] *Agric. Ins. Co.*, 82 Cal. Rptr. 2d at 600.
[46] Meeting with Florida Justice Association (Sept. 7, 2011).
[47] *Id.*

than in other states because of the high degree of accountability. In other words, it would be easy to reduce premiums if insurers were able to take the risk of withholding claim payments with hopes of securing a jury verdict within the insured's policy limits at the insured's expense.[48]

Progression of a Bad Faith Action

Parties and Processes Involved in a Bad Faith Case

A first-party bad faith case occurs between an insured person and his or her own insurance company; thus, in this context the insured person will always be the plaintiff. A first-party bad faith claim may occur in a number of circumstances, including a dispute over payment under a homeowner's insurance policy, uninsured motorist policy, or other policies that insure property. A third-party case occurs when the insured is exposed to liability to a third person and is most common when the insured person is in an automobile accident, injures a third person, and there is a dispute over how the insurer conducts settlement negotiations with that person. Although automobile accidents are the most common example, a bad faith claim could also arise, for example, in a premises liability context where a third person is injured on the insured's property.[49] Third-party bad faith claims often arise in situations where there is clear liability on the part of the insured, severe injury to the third party, and minimal policy limits available.[50] As discussed in more detail below, the plaintiff in a third-party bad faith case can either be the insured or the injured third party.

In all insurance claims, the insurance adjusting process, which is the process of investigating claims to determine the extent of the insurer's liability, plays an important role.[51] There are three types of insurance adjusters: company, independent, and public.[52] Company adjusters work directly for the insurer; independent adjusters contract with insurers to provide adjusting services; and public adjusters are independent contractors who work for the insured in settling claims.[53] The insurer typically arranges for a company or independent adjuster to investigate and adjust the claim.[54] However, an insured with a property insurance claim may choose to hire a public adjuster to assist in settling the insurance claim due to his or her expertise in filing claims and negotiating settlements with insurers.[55]

In a statutory bad faith action, a plaintiff must file a civil remedy notice (CRN) with the Department of Financial Services (DFS or the department) as a prerequisite to moving forward with the claim.[56] All first-party claims will require a CRN, as they are not recognized under the common law. Third-party claims can move forward with or without a CRN, but practitioners have indicated that most do not file a CRN in the third-party context because that would allow the insurer the advantage of having the 60-day statutory cure period. However, if the plaintiff begins with a statutory third-party claim by filing a CRN, and the insurer pays the policy limits after the initiation of a lawsuit against the insured, but before entry of an excess judgment, a common law cause of action against the insurer for third-party bad faith may still be pursued.[57]

Florida law requires that the CRN be filled out with specificity as outlined in statute and provides that it can be returned by DFS for a lack of specificity.[58] The statute requires that the form include the statute that the insurer violated, the facts giving rise to the violation, the name of any individual involved in the violation, reference to any relevant policy language, and a statement that the notice is given to perfect the right to pursue a civil remedy

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[48] *Id.*
[49] *See Auto-Owners Ins. Co. v. Conquest*, 658 So. 2d 928 (Fla. 1995).
[50] *See Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 13 (Fla. 3d DCA 1991).
[51] Office of Program Policy Analysis and Gov't Accountability, Florida Legislature, *Public Adjuster Representation in Citizens Property Insurance Corporation Claims Extends the Time to Reach a Settlement and Also Increases Payments to Citizens' Policyholders*, Report No. 10-06, 2-3 (Jan. 2010).
[52] *Id.* at 2.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Section 624.155(3)(a), F.S.
[57] *Macola v. Gov't Employees Ins. Co.*, 953 So. 2d 451, 458 (Fla. 2006).
[58] Section 624.155(3)(a)-(b), F.S.

under the statute.[59] In practice, the specificity requirement will be met if all of the fields on the electronic form, which include those statutorily required, are filled out.[60] The department does not check the forms for content.[61] Currently, forms are filled out online and cannot be submitted unless all required fields are completed.[62] Electronic filing of CRNs has been in place since 2007.[63] There is no limitation on who can complete a CRN form, but they are often submitted by the insured, a third-party claimant, or by an attorney or public adjuster on behalf of the insured or third party. Claimants are required to give notice both to DFS and the insurer,[64] but the department does not verify that insurers receive a copy of the CRN.[65] Once a CRN is filed with DFS, it is a public record and gives constructive notice to the insurer.[66]

In 2010, there were 11,001 CRNs citing s. 624.155(1)(b)1., F.S., the provision relating to insurers not attempting to settle claims in good faith, filed by the insured, with 98 percent represented by attorneys. Third parties filed 7,909, with 79 percent represented by attorneys. So far in 2011, there have been 7,292 CRNs that were filed by the insured, with 98 percent represented by attorneys. A total of 4,086 notices have been filed by third parties, with 96 percent represented by attorneys.[67]

Settlement Negotiations and Litigation

Although all cases are unique, the following is an example of how a typical bad faith case may unfold, based on conversations with practitioners with expertise in plaintiffs' and defense work.

In those insurance claims involving an attorney, using a third-party automobile accident scenario as an example, the attorney's initial involvement may begin with contact from an injured person after an accident. When an attorney is involved, he or she will send a letter of representation to the insurer and request disclosure of all of the insured's known policies and their limits within 30 days.[68] At that point, both the attorney and the insurance company will engage in separate investigations to determine key information, such as the amount of applicable insurance coverage and the extent of liability on the part of the insured. Once the attorney has enough information, he or she will send out a demand letter to the insurance company requesting payment of the policy limits, although in some cases no demand letter is sent.[69] If the insurer does not fully agree with the terms of a demand letter, proposed changes will constitute a counter-offer, which is generally tantamount to a rejection, making the settlement offer void if no agreement can be reached.[70]

If the insurer renders policy limits, it will typically be contingent on the claimant signing an agreement to release the insured from further liability. Insurance defense attorneys have indicated that the releases used in Florida are generally very brief to increase the likelihood of acceptance from the claimant. If the claim involving the automobile accident is settled within the insured's policy limits, no trial is necessary. However, if a settlement cannot be reached, the claim may be taken to trial for damages that may exceed the policy limits and thus expose the insured to personal liability. At this point, there are several directions the case could take: the parties could settle before the conclusion of the litigation and end the dispute entirely; the parties could agree to a consent judgment for a specified amount to end the underlying negligence case and proceed to the bad faith case; or the

[59] Section 624.155(3)(b)1.-5., F.S.
[60] Meeting with Department of Financial Services staff (Aug. 24, 2011).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Section 624.155(3)(a), F.S.
[65] Meeting with Department of Financial Services staff (Aug. 24, 2011).
[66] *Id.*
[67] Fla. Department of Financial Services, Division of Consumer Services, *Requested Data Related to Civil Remedy Filing Notices* (Sept. 30, 2011) (on file with the Senate Committee on Judiciary).
[68] Section 627.4137(1), F.S.
[69] *See Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991) (citing *Gen. Acc. Fire & Life Assur. Corp. v. Am. Cas. Co.*, 390 So. 2d 761, 765 (Fla. 3d DCA 1980)) (holding that an offer to settle is not a prerequisite to the imposition of liability for an insurer's bad faith refusal to settle, but is merely one factor to be considered).
[70] *See* Charles L. Knapp et al., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS, 176-77 (5th ed. 2003).

case could result in a jury verdict and go through the appellate process. If the case results in a consent judgment or a jury verdict above the insured's policy limits, a claim for bad faith is ripe.

The attorney who handles the underlying case will usually not be counsel for the subsequent bad faith claim because he or she will likely be a witness in the bad faith trial. An insured having been found liable for a judgment above policy limits can bring a bad faith claim, or assign his or her right to sue the insurance company to the third party. Additionally, the third party can move forward without an assignment as a judgment creditor, but this scenario is uncommon due to the fact that attorney's fees would not be available under s. 627.428(1), F.S., which limits attorney's fees in insurance awards to "any named or omnibus insured or the named beneficiary." A third party who has received an assignment fits within the parameters of the statute because he or she has in effect stepped into the shoes of the insured.

Jurisdiction

In any type of litigation, there are two jurisdictional requirements that determine whether the case can be heard in state or federal court: subject-matter jurisdiction and personal jurisdiction.[71] Subject-matter jurisdiction refers to which court has the power to decide the type of dispute, while personal jurisdiction refers to the power to render a decree enforceable against the particular defendant.[72] The subject of a bad faith lawsuit would fall within the state court's jurisdiction because it is based on Florida law; however, such a suit could proceed in federal court in diversity cases, which are those where the parties are citizens of different states.[73] Many bad faith claims may involve a claim against a national corporation, in which case, for example, diversity could be destroyed by joining the local agent of the company having the same citizenship as the plaintiff. Similarly, diversity could be created if the national corporation were the only named defendant without the inclusion of the local agent.[74]

In federal proceedings, courts apply the substantive law of the state where the court is sitting and federal procedural law.[75] The U.S. Supreme Court has interpreted the federal rule for summary judgment as mirroring the standard for a directed verdict,[76] which states that a court can grant the motion if it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue."[77] The Florida standard for summary judgment, on the other hand, is more restrictive and may result in judges having less discretion to grant summary judgment. In Florida state courts, the moving party must overcome "all reasonable inferences" that there is an issue of material fact to be tried.[78] It has been suggested by practitioners that bad faith plaintiffs prefer the state court forum because of the lower likelihood of having the case disposed of on summary judgment, even in the event of a potentially weak case. Proponents for revision of Florida's bad faith law have stated that since the decision in *Berges v. Infinity Insurance Co.*,[79] which will be discussed in detail below, no state court has granted summary judgment in favor of an insurance company in a bad faith case based on an unreasonable condition or timeframe.[80] Senate professional staff was not able to independently confirm the accuracy of that assertion. Based on conversations with practitioners, insurance defense attorneys feel that the difference between state and federal court in bad faith cases is important to the point of being outcome determinative.

Relationship Between Insurer and Insured

In a first-party action, there is never a fiduciary relationship between the parties, but an arm's length contractual one based on the insurance contract. In third-party cases, it is important to note that when the insured brings such a claim, there is a shift in the relationship between the insured and the insurer from the time when the underlying insurance contract is at issue and when the bad faith claim is brought. During settlement negotiations and any

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[71] David Crump et al., CASES AND MATERIALS ON CIVIL PROCEDURE, 3-4 (4th ed. 2001).
[72] *Id.* at 3.
[73] *Id.*
[74] *Id.* at 165.
[75] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).
[76] *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).
[77] Fed. R. Civ. P. 50(a)(1).
[78] *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966).
[79] *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004).
[80] Transcript of Hearing for HB 1187, *supra* note 38, at 70.

subsequent legal actions incident to the insurance claim, the insurer is acting pursuant to its contractual duties to indemnify and defend the insured. Upon the filing of a claim for bad faith, the insurer and insured become adverse.

When the insured brings a bad faith claim after being held liable to a third party in excess of policy limits, the insurer owes no duty to the insured because they are adverse parties at that point. However, even though the posture of the parties in a bad faith case is adverse, it is the insurer's behavior during the time when it was acting under a duty to the insured that is examined by courts.

Analysis of Case Law

Filing a Bad Faith Claim

A claim against the insurer does not accrue until the there is a determination of damages.[81] In the first-party context, the underlying action against the insurer must be resolved in favor of the insured, because the insured cannot allege bad faith if it is not shown that the insurer should have paid the claim.[82] A third-party claim can be brought by the insured, having been held liable for a judgment in excess of policy limits,[83] or it can be brought by the third party either directly or through an assignment of the insured's rights.[84] Florida courts have interpreted s. 624.155, F.S., as authorizing a direct third-party claim because the statute makes an action available to "any party."[85] However, because a cause of action under s. 624.155, F.S., is predicated on the failure of the insurer to act "fairly and honestly toward its insured," the duty only runs to the insured; no such duty is owed by the insurance company to a third-party claimant.[86] Therefore, unless there is a judgment in excess of policy limits against the insured, "a third-party plaintiff cannot demonstrate that the insurer breached a duty toward its insured."[87]

The Florida Supreme Court has held, however, that there is an exception to the prerequisite of an excess judgment resulting from an underlying negligence claim. In *Cunningham v. Standard Guaranty Insurance Co.*, the Court found that the trial court had jurisdiction to decide the insurer's liability for bad faith handling of the claim prior to the final determination of the underlying tort action for damages brought by a motorist against the insured driver where the parties had stipulated that the bad faith action could be tried first.[88] In that case the parties agreed to try the bad faith claim first and if no bad faith was found, the parties would settle for policy limits and the insured would not be exposed to an excess judgment.[89] The Court concluded that there was no reason not to uphold the arrangement between the parties because, pursuant to the arrangement, "trying the bad-faith claim before the underlying negligence action would result in a full release of the insured if no bad faith were found, thereby avoiding a time consuming and expensive trial on negligence and damages."[90] Ultimately, the Court favored upholding the agreement because it kept with the spirit of the insurer handling the claim in the most prudent way possible to protect the insured, the encouragement of which is the policy reason for the existence of bad faith law.

A first-party bad faith claim will be brought by the insured person, because there is no third party involved in that context. Additionally, similar to the underlying negligence claim preceding a third-party bad faith claim, a first-party bad faith claim is often included with a breach of contract assertion. The Florida Supreme Court has held that before a plaintiff can proceed with a first-party bad faith action, there must be a determination of the insured's

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[81] *Blanchard v. State Farm Mut. Auto. Ins. Co.,* 575 So. 2d 1289, 1291 (Fla. 1991).
[82] *Id.*
[83] *See Powell v. Prudential Prop. & Cas. Ins. Co.,* 584 So. 2d 12 (Fla. 3d DCA 1991).
[84] *See Thompson v. Commercial Union Ins. Co. of New York,* 250 So. 2d 259 (Fla. 1971) (recognizing a direct third-party claim under the common law before the enactment of s. 624.155, F.S.); *State Farm Fire and Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997).
[85] *Zebrowski,* 706 So. 2d at 277.
[86] *Id.*
[87] *Id*. (citing *Dunn. v. Nat'l Sec. Fire & Cas. Co.*, 631 So. 2d 1103 (Fla. 5th DCA 1993)).
[88] *Cunningham v. Standard Guar. Ins. Co.,* 630 So. 2d 179 (Fla. 1994).
[89] *Id.* at 180.
[90] *Id.* at 182.

damages.[91] The determination of damages, however, does not necessarily have to be the result of litigation. Additionally, an exact amount does not have to be determined and does not have to exceed the policy limits.[92] "[A]n insured's breach of contract claim has been resolved sufficiently to bring a bad faith claim as long as the insurance carrier concedes liability on the claim, even when the carrier disputes the amount for which it is liable."[93] Payment of the insurance claim can satisfy the prerequisite for a first-party bad faith lawsuit.[94]

Meaning of "Acting Fairly"

In interpreting what it means for an insurer to act fairly toward its insured, Florida courts have held that when the insured's liability is clear and an excess judgment is likely due to the extent of the resulting damage, the insurer has an affirmative duty to initiate settlement negotiations.[95] If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.[96] Failure to settle on its own, however, does not mean that an insurer acts in bad faith, because liability may be unclear or damage minimal. Negligent failure to settle does not rise to the level of bad faith. Negligence may be considered by the jury because it is relevant to the question of bad faith, but a cause of action based solely on negligence does not lie.[97]

Conduct Affecting Bad Faith Liability

The Florida Supreme Court has defined the insurer's duty as a "fiduciary obligation to protect its insured from a judgment exceeding the limits of the insurance policy."[98] A fiduciary obligation is a high standard, which requires the insurer "to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business."[99] The fiduciary duty arises from the fact that in handling the defense of claims against its insured, the insurer requires the insured to relinquish "all control over the handling of the claim, including all decisions with regard to litigation and settlement."[100] In light of this heightened duty on the part of the insurer, Florida courts focus on the actions of the insurer, not the claimant.[101] However, the conduct of the claimant is not entirely ignored, because it is relevant to whether there was a realistic opportunity for settlement.[102] A court, for example, will look at the terms of a demand for settlement to determine if the insurer was given a reasonable amount of time to investigate the claim and make a decision whether settlement would be appropriate under the circumstances.

One court held that dismissal of a bad faith claim was proper where the settlement demand in question gave a 10-day window, pointing out that "[i]n view of the short space of time between the accident and institution of suit, the provision of the offer to settle limiting acceptance to ten days made it virtually impossible to make an intelligent acceptance."[103] Although in this particular circumstance the court found that 10 days was not enough, it is not clear exactly what time period or other conditions for acceptance would be permissible, because courts look at the facts on a case-by-case basis and the current statute is silent on this point. In another case, for example, the appellate court found that a jury question as to bad faith still remained where there was a 10-day demand, despite the same court's previously expressed unhappiness with such a short time period.[104] The court explained that

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[91] *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1273 (Fla. 2000) (citing *Imhof v. Nationwide Mut. Ins. Co.,* 643 So. 2d 617 (Fla. 1994)).
[92] *Id.*
[93] *Plante v. USF&G Specialty Ins. Co.*, 2004 WL 741382, at *3 (S.D. Fla. 2004) (citing *Imhof*, 643 So. 2d 617).
[94] *Plante,* 2004 WL 741382, at *3 (citing *Brookins v. Goodson*, 640 So. 2d 110, 113 (Fla. 4th DCA 1994)) (holding that payment of the policy limits by the insurer constitutes admission of liability).
[95] *Powell v. Prudential Prop. & Cas. Ins. Co.,* 584 So. 2d 12, 14 (Fla. 3d DCA 1991).
[96] *Id.*
[97] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975).
[98] *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 668 (Fla. 2004).
[99] *Id.* (quoting *Boston Old Colony Ins. Co. v. Gutierrez,* 386 So. 2d 783, 785 (Fla. 1980)).
[100] *Id*.
[101] *Berges*, 896 So. 2d at 677.
[102] *Barry v. GEICO Gen. Ins. Co.*, 938 So. 2d 613, 618 (Fla. 4th DCA 2006).
[103] *DeLaune v. Liberty Mut. Ins. Co.,* 314 So. 2d 601, 603 (Fla. 4th DCA 1975).
[104] *Hartford Acc. & Indem. Co. v. Mathis*, 511 So. 2d 601, 602 (Fla. 4th DCA 1987) (citing *DeLaune,* 314 So. 2d 601).

under the facts of that particular case, "there was sufficient evidence from which the jury could have found a breach of the carrier's duty of good faith even predating the written demand for policy limits."[105] In Florida there is no set minimum time period before bad faith can be found. As one court has stated, "[r]ather than being fixed, this time period is variable. As the amount by which an anticipated claim exceeds policy limits increases, the amount of time before a prudent insurer would be expected to tender policy limits decreases."[106]

A commonly occurring situation that raises complicated questions about what is proper conduct on the part of the insurer to protect the insured's interests is when there are multiple claimants competing for compensation under a single policy. This situation can be an especially difficult where the damages of numerous claimants may add up to substantially exceed policy limits. The Fourth District has held that when negotiating with multiple claimants an insurer has a duty "to avoid indiscriminately settling selected claims and leaving the insured at risk of excess judgments that could have been minimized by wiser settlement practice."[107]

Berges v. Infinity Insurance Co.[108] is commonly regarded as a watershed Florida Supreme Court case that set the standard that is currently followed for insurer conduct in bad faith cases under the common law, and it has been widely cited by advocates for revision of the law as marking the end of the possibility of summary judgment in favor of the insurer.[109] Although the case is cited as taking bad faith jurisprudence further in the direction of favoring plaintiffs, the Court itself states that the decision was not an attempt to "alter bad faith jurisprudence" but serves as an articulation of long-standing case law on the subject.[110]

In *Berges*, the claimant delivered a demand letter for the $20,000 total policy limits as compensation for the death of his wife and injury to his daughter in a car accident to the insurer on the condition that the amount be paid within 25 days, which was never shared with the insured.[111] The insurer accepted the offer verbally within the deadline, but the written acceptance did not reach the claimant until after the deadline due to a mailing error, and the offer was revoked.[112] Further, there was disagreement as to whether the claimant's offer was valid as a matter of law because he had not yet obtained authority to consummate the settlement.[113] The subsequent trial for wrongful death and personal injury resulted in a jury verdict beyond the policy limits and was followed by a successful bad faith claim filed by the insured against his insurer[114] that eventually made its way to the Florida Supreme Court. One of the questions the Court considered was whether the trial court's denial of the insurer's motion for summary judgment in the bad faith case was proper. In addressing whether the jury finding of bad faith was supported by competent substantial evidence, the Court upheld the bad faith verdict and reiterated that "[i]n Florida, the question of whether an insured has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard"[115] and that "[e]ach case is determined on its own facts and ordinarily '[t]he question of failure to act in good faith with due regard for the interests of the insured is for the jury.'"[116] The dissent expressed the opinion that the Court "has the responsibility to reserve bad faith damages, which is limitless, court-created insurance, to egregious circumstances of delay and bad faith acts" and "not allow…claims that are the product of sophisticated legal strategies and not the product of actual bad faith." The problem in presuming that bad faith is inherently a jury question, as expressed in the dissent, is that:

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105 *Mathis*, 511 So. 2d at 602.
106 *Snowden v. Lubermens Mut. Cas. Co.*, 358 F. Supp. 1125, 1129 (N.D. Fla. 2003).
107 *Farinas v. Fla. Farm Bureau Gen. Ins. Co.*, 850 So. 2d 555, 560 (Fla. 4th DCA 2003).
108 *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004).
109 *See* Transcript of Hearing for HB 1187, *supra* note 38, at 97.
110 *Berges*, 896 So. 2d at 682.
111 *Id.* at 669-70.
112 *Id.* at 670-71.
113 *Id.* at 672.
114 *Id.* at 671.
115 *Id.* at 680 (quoting *State Farm Mut. Auto. Ins. Co. v. Laforet,* 658 So. 2d 55, 63 (Fla. 1995)).
116 *Id.* (citing *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980); *Campbell v. Gov't Employees Ins. Co.*, 306 So. 2d 525, 530-31 (Fla.1974)) (holding that "reasonable diligence and ordinary care [are] material in determining bad faith. Traditionally, reasonable diligence and ordinary care are considerations of fact—not of law").

> What the jury knows in these cases is that there is a tragically and grievously injured victim, that the insured had very low limits of insurance, and that if the jury finds against the insurer, then all of the victim's damages will be paid by the insurer. It is these very facts which are not allowed to be known by a jury in liability cases because of the known prejudicial influence these facts are known to have on jury verdicts.[117]

A second dissenting justice further argued that the insurer had no reasonable opportunity to settle because the claimant did not have the legal authority to execute the settlement until after his own deadline had passed. Thus, if the insurer had tendered the policy within the time limit, "the insured would not have been protected from further claims," leading to the conclusion that the evidence should have been found insufficient as a matter of law and never become a question for the jury.[118]

In 2011, the Third District decided *United Automobile Insurance Co. v. Levine*,[119] a case that advocates for reform consider an example of the unjust outcomes in the post-*Berges* common law. In that case, the insured, who was intoxicated, caused a car accident resulting in two deaths, including Levine, whose estate was the plaintiff in the case.[120] The insured had minimal insurance coverage totaling $10,000 per person for bodily injury and $10,000 for property damage.[121] Several days after the accident, the insurer tendered $10,000 to the Levine estate along with a "Hold Harmless and Indemnification" letter that was unclear as to whether it was a condition to accept the money.[122] The settlement was not successful, and a trial for bad faith ensued, where the insurer was precluded by the court from presenting evidence regarding the successful settlement with the estate of the other deceased claimant because doing so would "risk distracting the jury."[123] Additionally, to bolster its opinion that the parallel negotiations with another claimant were irrelevant, the court quoted the *Berges* court's statement 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.'"[124] Counsel for the insurer, on the other hand, argued that "where multiple claims arise out of the same incident, evidence of the insurer's handling of *all* claims is directly relevant to whether the insurer acted in bad faith."[125]

The court concluded by stating that "[u]ntil there is a substantial change in the statutory scheme or the rationale explained in the majority opinion in *Berges*, however, juries will continue to render verdicts regarding an insurer's alleged bad faith when the pertinent facts are in dispute."[126] Advocates for reform have argued that this statement is an example of the court asking the Legislature to improve Florida's bad faith law.[127] Others, however, interpret this as merely a reiteration of the long-standing principle in Florida that bad faith is often an issue of fact to be appropriately decided by a jury.[128]

The *Levine* dissent summarizes the case by opining that the insurer did everything it could to protect its insured by paying an amount exceeding policy limits without notice or a demand, attempting to secure a release, and timely trying to determine who should be paid what amount for property damage.[129] These facts, according to the dissent, cannot be reasonably considered bad faith and should not have gone before a jury.[130]

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[117] *Berges*, 896 So. 2d at 686 n12 (Wells, J., dissenting) (citing s. 627.4136, F.S.; *Van Bibber v. Hartford Accident & Indem. Ins. Co.*, 439 So. 2d 880 (Fla.1983); *State Farm Fire & Cas. Co. v. Nail*, 516 So. 2d 1022 (Fla. 5th DCA 1987)).
[118] *Berges*, 896 So. 2d at 687 (Cantero, J., dissenting).
[119] *United Auto. Ins. Co. v. Estate of Levine ex rel. Howard*, 2011 WL 1135518 (Fla. 3d DCA 2011).
[120] *Id.* at *1.
[121] *Id.*
[122] *Id.*
[123] *Id.* at *2.
[124] *Id.* at *3 (quoting *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 677 (Fla. 2004)).
[125] Brief of Appellant at 19, *United Auto. Ins. Co. v. Estate of Levine ex rel. Howard*, No. 3D09-3234 (Fla. 3d DCA Jun. 23, 2010) (citing *Farinas v. Fla. Farm Bureau Gen. Ins. Co.*, 850 So. 2d 555, 561 (Fla. 4th DCA 2003)).
[126] *Levine*, 2011 WL 1135518, at *5.
[127] *See* Transcript of Hearing for HB 1187, *supra* note 38, at 77.
[128] *Id.* at 86.
[129] *Levine*, 2011 WL 1135518, at *7 (Wells, J., dissenting).
[130] *Id.* at *6.

Discovery

As discussed previously, in a first-party action there is never a fiduciary relationship between the insurer and the insured, but an arm's length contractual one based on the insurance contract. At the time of the action itself, the insurer and the insured are adverse parties, but the nature of the claim raises complicated issues relating to the availability of certain evidence for discovery. Bad faith cases create unique issues during discovery because there are necessarily two separate phases of litigation—first regarding the underlying insurance claim and second regarding the bad faith claim. The Florida Supreme Court has held that first-party bad faith claimants are entitled to discovery of all materials contained in the underlying claim and related litigation file up to the date of the resolution of the underlying claim, which is the same as the standard for third-party claims.[131] The Court reasoned that insurers are required to produce claim file materials regardless of whether they may be considered work product because they are generally the only source of direct evidence on the central issue of the insurance company's handling of the claim.[132] In general, adverse parties are not compelled to produce materials prepared in anticipation of litigation without a showing to the court that the party seeking discovery needs the materials to prepare his or her case and cannot obtain the equivalent by other means without undue hardship.[133] Although plaintiffs are not required to make such a showing under Florida law for the contents of the claim file, they are required to do so in order to compel production of materials in preparation of the bad faith claim itself.[134]

In a recent Florida Supreme Court case, the Court clarified that although otherwise privileged work product may be discoverable in a first-party bad faith case, the same does not extend to attorney-client privileged information.[135] In making this distinction, the Court reasoned that "attorney-client privilege, unlike the work-product doctrine, is not concerned with the litigation needs of the opposing party." The Court further explained that "undue hardship is not an exception, nor is disclosure permitted because the opposing party claims that the privileged information is necessary to prove their case."[136] Additionally, the Court acknowledged the likelihood of cases arising where the insurer's attorney both investigates the claim and renders legal advice, resulting in the requested materials possibly implicating both the work-product doctrine and attorney-client privilege concurrently. In such cases, the trial court is directed to "conduct an in-camera inspection to determine whether the sought-after materials are truly protected by the attorney-client privilege."[137]

Assessing the Impact of Bad Faith

It is difficult to quantify statewide activity in the area of bad faith claims or the effect—negative or positive—that these claims have on the insurance marketplace, the operations of insurers, or the interests of insureds and third parties. Among the factors complicating measurement is the fact that annual statewide data published by the state courts system on civil filings in circuit court is not segregated by bad faith lawsuits versus other kinds of lawsuits involving contracts and indebtedness. Further, parties may settle a bad faith lawsuit before a case proceeds to trial and judgment or may take bad faith allegations into consideration in settling the underlying insurance policy claim without a bad faith lawsuit ever being filed. In addition, by statute an insurer may not use bad faith judgments and settlements as a justification for a rate or rate change. Also, there are likely a variety of factors that affect issues such as the time involved in investigating a claim, the number of days required to close a claim, or the claim amount paid. Nevertheless, some insurers argue that the prospect of bad faith liability can create a litigious or adversarial climate during the claims-settlement process and can affect that process.

Input from Representatives of Insurance Industry

As part of the research for this interim report, professional staff of the committee invited insurers and industry associations to offer qualitative and quantitative data that may be relevant to assessing the impact of bad faith on

[131] *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1129-30 (Fla. 2005).
[132] *Id.* at 1128.
[133] Fla. R. Civ. P. 1.280(b)(3).
[134] *Ruiz*, 899 So. 2d at 1130.
[135] *Genovese v. Provident Life & Accident Ins. Co.*, 2011 WL 903988, at *2 (Fla. 2011) (discussing *Ruiz*, 899 So. 2d 1121).
[136] *Genovese*, 2011 WL 903988, at *3 (quoting *Quarles & Brady, LLP v. Birdsall*, 802 So. 2d 1205, 1206 (Fla. 2d DCA 2002)).
[137] *Genovese*, 2011 WL 903988, at *4.

the state's insurance marketplace. Professional staff received responses from four insurers, individually, as well as two insurance industry associations on behalf of their respective members. Some of the information shared by the respondents is presented in this section of the interim report as indicia of activity in the area of bad faith specifically or in operations of insurers more broadly. However, it should be noted that Senate professional staff has not independently verified the information. Additionally, comparisons among the information may not be possible because it is not known if respondents used the same methods, definitions, or parameters for gathering and describing the information.

Although not dispositive on the subject of bad faith, but perhaps indicative of the potentially contentious nature of claims processing, the responding insurers and associations reported that attorney involvement in the claims process can be significant. For example, two responding insurance companies ("Insurer 1"[138] and "Insurer 2") respectively estimated that, as of July 2011, 90 percent and 77 percent of claims processed featured attorney involvement.[139]

A third insurance company ("Insurer 3") reported that, in the last three years, aggregate expenses for 11 bad faith cases against the company totaled nearly $7.5 million. The company said that these were non-meritorious cases involving minimal policy limits and that the expenses included outside attorney fees and court and expert costs. Since 2008, 309 claim files for this insurer have been reviewed by an extra-contractual examiner, supervisor, upper-level manager, in-house counsel, and often outside counsel, resulting in high payroll and legal fees. According to the company, the average life of a claim file resulting in a lawsuit is two years and two months; the average life of an extra-contractual file is six years and seven months.[140]

An insurance trade association representing several insurers reported that its member companies saw plaintiff attorney involvement in 33 percent of bodily injury claims as of June 2011 and 63 percent of uninsured and underinsured motorist claims. These percentages were up from 30.5 percent and 47.1 percent respectively for all of 2006.[141] The association members also received 51,944 demands in 2010 and 30,213 as of July 2011, up from 27,135 in 2006, with a steady increase each year. In 2006, 4.75 percent of the demands were conditional, compared to 13.76 percent in 2010 and 15.13 percent of those received as of July 2011. The association reported 61 bad faith lawsuits opened in 2009; 64 in 2010; and 46 as of August 18, 2011.[142] In its response, Insurer 1 reported receiving 3,089 demands for payment of policy limits in 2010.[143]

According to another trade association, which provided statewide data, the estimated number of days between the first injury report and the final payment of a claim when an attorney is involved in a third-party automobile bodily injury claim is 295.9 days; if an attorney is not involved, the average time is 183.3 days. For first-party uninsured/underinsured motorist, the time difference is 299.4 days with an attorney as opposed to 219.3 without legal representation.[144] Defense costs as a percent of earned premiums for all claims, not just bad faith, between 2005 and 2010, are calculated at 4.4 percent in Florida for personal auto liability compared to 3.8 percent in the rest of the country and 3.4 percent in six states used for comparison.[145]

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[138] Data for Insurer 1 is limited to personal automobile policy, third-party liability bodily-injury claims only.
[139] *Insurer Responses to Request for Data: Submitted to the Senate Committee on Judiciary* (Aug. 2011) (on file with the Senate Committee on Judiciary).
[140] *Id.*
[141] Personal Insurance Federation of Florida, Inc., *Response to Senate Committee on Judiciary Interim Project Florida Insurance Bad Faith* (Aug. 31, 2011) (on file with the Senate Committee on Judiciary).
[142] *Id.*
[143] *Insurer Responses, supra* note 139.
[144] Property Casualty Insurers Association of America (PCI), *PCI Response to Florida Senate Judiciary Committee Request on Data Related to Bad Faith Insurance* (Aug. 19, 2011) (citing Insurance Research Council 2007 data) (on file with the Senate Committee on Judiciary). Insurer 1 and Insurer 2 reported average times between opening and closing claims of 150 to 200 days and 218 respectively.
[145] PCI, *supra* note 144 (citing National Association of Insurance Commissioners (NAIC) Database); comparison states are CA, KY, MA, MT, NM, and WV.

The association reported that the average claim amount paid in Florida for all bodily injury claims in 2010 was $18,396 compared to $12,423 in the comparison states, and $14,222 for the rest of the country.[146] The amount paid for uninsured and underinsured bodily injury claims for 2007 was $28,963 in Florida, $16,720 in comparison states, and $23,663 in the rest of the country.[147] Data provided by the trade association also states that between January 1, 2002, and August 5, 2011, there were 36 bad faith cases in Florida resulting in settlements, jury verdicts, or judgments in the amount of at least $1 for all lines of insurance combined. There were eight settlements resulting in a total of $17,832,650; 18 jury verdicts totaling $73,314,212; and 10 judgments totaling $39,716,559. In the same time period, there were 24 additional cases resulting in decisions for defendant insurance companies and no damages.[148]

A fourth insurance company ("Insurer 4") provided information on bad faith claims for personal automobile lines, with a comparison between Florida and all other states. Between 2004 and 2008, Insurer 4 reported 158 bad faith claims in Florida and 703 in all other states combined. After 2006, the company saw a spike in Florida bad faith claims, increasing from 28 in that year to 48 by 2008. There was also an increase over the same time period for all states, going from 149 to 174. In 2008, the most recent year that data was provided by the company, Florida bad faith claims comprised 28 percent of the total bad faith claims from all states.[149]

With respect to qualitative responses, Insurer 2 reported that bad faith is the primary concern for an automobile insurance carrier operating in Florida because "[t]he courts have validated subjectivity in the interpretation of what may constitute bad faith and thus created a venue in which there can be no assumption that any standard of claims handling may not be considered as bad faith before a jury." Favorable common law in Florida combined with increased verdicts have encouraged plaintiffs to test the boundaries in bad faith litigation, according to the insurer. The fact that virtually any bad faith case will go to a jury places a burden on the insurer to settle almost every bad faith allegation or face the costs associated with lengthy trials.[150]

Further, Insurer 2 described the risk-benefit analysis that it does when receiving demands for policy limits along with limited information regarding the claim. According to the insurer, it has two unappealing choices in this situation. The first choice is to pursue additional information and reject the time conditions with the benefit of validating the value of the claim and the risk of incurring the expenses of litigation combined with a potential excess verdict and bad faith exposure. The second choice is to pay the amount demanded to avoid litigation at the risk of overpaying the claim.[151]

Outside bad faith counsel for Insurer 3 (counsel) provided suggestions for improving Florida's bad faith law. First, counsel recommended that a cure period for third-party bad faith claims similar to that required for first-party claims under s. 624.155, F.S., should be considered, including a requirement for plaintiffs to respond to requests for information. Counsel stated that a safe harbor provision similar to that found in s. 766.1185, F.S., for medical malpractice cases would be a positive change in bad faith law. The medical malpractice safe harbor period is extended until all information regarding the claim is fully discovered. According to counsel, many plaintiffs and their attorneys in bad faith cases are not forthcoming with information that is vital for the insurer to evaluate claims because they stand to benefit financially if policy limits are not tendered within the timeframe specified in a demand. Secondly, counsel points out that interpleader is only available once a claim is in litigation, but claims involving multiple claimants are negotiated before the suits are filed. Interpleader is a procedure that allows an insurer faced with conflicting claimants to compel them to come into the lawsuit and litigate their entitlement against each other.[152] Counsel suggests that a special cure period for multiple claimant cases once suit

[146] *Id.* (also citing Fast Track Monitoring System @ 1st Quarter 2011); comparison states are CA, KY, MA, MT, NM, and WV.
[147] PCI, *supra* note 144 (citing NAIC and Fast Track Monitoring System @ 1st Quarter 2011); comparison states are CA, GA, IL, LA, MT, and NY.
[148] PCI, *supra* note 144 (citing Westlaw Jury Verdict Database, *available at* http://www.westlaw.com).
[149] *Insurer Responses, supra* note 139.
[150] *Id.*
[151] *Id.*
[152] Crump et al., *supra* note 71, at 311; Fla. R. Civ. P. 1.240.

is filed on one claim would help balance any inequity.[153] Finally, counsel recommended that insurers should be allowed to prove comparative bad faith on the part of claimants as a complete defense or slight comparative negligence to preclude attorney's fees.[154]

Commissioned Study on Economic Effects (Hamm Study)

One of the common reasons cited by advocates for reform to Florida's bad faith law is that the current scheme results in higher costs of doing business that are ultimately passed on to insurance consumers in the form of higher rates. Others argue, however, that although Florida may have higher premiums, the increased cost is justified as it is in exchange for better mechanisms for paying claims and better consumer protections through stronger bad faith deterrents than other states.[155]

In 2010, a report requested by the U.S. Chamber of Commerce's Institute for Legal Reform was published to examine the economic effects of Florida's bad faith system.[156] In reference to the principal author, this report will be referred to as the Hamm Study. The study begins by explaining the complexity of bodily injury claims by detailing some of the subjective aspects of such claims that make them difficult and sometimes time-consuming to value. According to the study, doubt as to fault and application of facts to the policy language can lead to honest disagreement between insurers and claimants.[157] The study explains the terms first party and third party as they are used in the study. The definition of first party is the same as previously discussed in this interim report; the explanation of third party, on the other hand, includes those claims that arise "when an individual who has been injured by another party brings a complaint against the responsible party's insurance company."[158] When Florida courts refer to a third-party claim, it can include any claim involving a third party regardless of whether the bad faith lawsuit is brought by the third party or the insured.

The Hamm Study contends that Florida's bad faith law creates a financial incentive for litigation even when the claim is weak by "rendering the policy or coverage limits moot, so that the insured may recover more than the amount of insurance for which he or she has paid."[159] According to the study, this leads to increased insurance fraud because the heightened potential exposure deters insurers from conducting thorough investigations. It is unclear to what extent insurers may fail to investigate potential fraud because all Florida insurers are required by law to maintain anti-fraud plans including procedures for when the insurer suspects possible fraud. Additionally, insurers are required to report such acts to the Division of Insurance Fraud of the Department of Financial Services.[160]

In examining the economic impact of third-party bad faith lawsuits, the Hamm Study focuses on personal automobile insurance costs because it is the only line of insurance for which reliable nationwide data is available.[161] The measure of claims costs used in the analysis is the bodily injury pure premium, which is the average annual cost of settling bodily injury claims per insured vehicle.[162] According to the study, it estimated the economic and financial impact of third-party bad faith lawsuits in Florida by controlling other factors that may affect pure premiums in individual states. This was done through a statistical technique known as econometric analysis, which allows economists to isolate the influence of a single factor, which in this case is the ability to file a third-party lawsuit.[163] The Hamm Study comes to the conclusion that after adjusting for other factors that can influence premiums, allowing individuals to file third-party bad faith lawsuits is associated with a 30.2 percent

[153] *Insurer Responses, supra* note 139.
[154] *Id.*
[155] Florida Justice Association, *supra* note 46.
[156] Hamm et al., *supra* note 33.
[157] *Id.* at 3.
[158] *Id.* at 4.
[159] *Id.* at 5-6.
[160] Section 626.9891(3), F.S.
[161] Hamm et al., *supra* note 33, at 14.
[162] *Id.*
[163] *Id.* at 17.

increase in the median bodily injury insurance pure premium per vehicle.[164] Although the study recognizes that s. 627.0651, F.S., bars insurance companies from including bad faith awards or settlements in their rate bases, it does not apply to settlements offered to reduce the risk of such actions before they are pursued.[165]

In measuring the impact of first-party bad faith litigation, the Hamm Study acknowledges that the data is incomplete nationally and that there is significant variation among states, creating difficulty in making comparisons.[166] The study compares Florida's uninsured/underinsured motorist pure premiums to states without a defined first-party bad faith cause of action: Kansas, Michigan, Minnesota, New York, and Washington, D.C.[167] The Hamm Study concludes that Florida's average premium for this coverage is 188 percent higher than the average for the states without first-party bad faith. The study further states that some of the differences may be attributable to "unobservable differences across states" and that "[i]t is also possible that these unobservable differences cause the difference to be understated" in the analysis.[168] Some have noted, on the other hand, that Florida is one of the few states that does not require bodily injury insurance, which may skew uninsured/underinsured premiums upward.[169]

Bad Faith in Other States

Although it is difficult to make a meaningful comparison between Florida bad faith law and that of other states because of the complex interrelation of various factors and other laws making each state different, some advocates have suggested that Florida's bad faith law stands out from most other states. One atypical aspect of Florida law that is identifiable is the ability for a third party to file suit without an assignment. However, it is unclear if this has any significant impact because there is little practical difference between a case brought directly or through an assignment other than the availability of attorney's fees, as mentioned previously. This is a distinction that has been referred to as "purely academic."[170]Additionally, because attorney's fees are not available without an assignment, such cases are rare. Proponents for reform argue that Florida's law is flawed in that it allows for unfair advantages and gamesmanship in favor of plaintiffs. Opponents, on the other hand, counter that Florida's strong bad faith law puts it in a unique posture to effectively protect consumers by holding insurers accountable for their conduct. In recent years, some states have made significant changes to their bad faith laws, both through legislative reform and decisions made by the courts. Following are examples of the changes made to bad faith laws in West Virginia and California.

West Virginia

In 2005, West Virginia's insurance commissioner conducted a study and issued a report detailing the effects of third-party causes of action on insurance markets in the state.[171] The study was required pursuant to 2004 legislation enacted in the state Legislature.[172] The report begins by stating that West Virginia extended more rights to third-party claimants than the vast majority of other states by allowing them, like Florida, to directly sue an insurance carrier for acting in bad faith during the settlement process. Most states, according to the report, provide an administrative remedy for third parties.[173] One important difference to note between the laws in Florida and West Virginia is that West Virginia courts allowed a private cause of action for third parties through the uniform Unfair Trade Practices Act (UTPA), which the report found was erroneous based on the legislative history. Florida, however, does not derive its third-party bad faith cause of action from its version of the UTPA,[174] but

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[164] *Id.* at 18.
[165] *Id.* at 19 n34.
[166] *Id.* at 21.
[167] *Id.* at 22.
[168] *Id.*
[169] Florida Justice Association, *supra* note 46; *see* Jerome F. Vogel, *Effect of Mandatory Bodily Injury Liability Coverage on Uninsured Motorist Premiums* (Mar. 14, 2001) (study conducted at the request of the Academy of Florida Trial Lawyers).
[170] Offices of the Insurance Commissioner, West Virginia, *Third Party Causes of Action: Effects on West Virginia Insurance Markets*, n44 (Feb. 2005).
[171] Insurance Commissioner, *supra* note 170.
[172] W. Va. Code s. 33-2-15b.
[173] Insurance Commissioner, *supra* note 170, at 4.
[174] Section 626.9541, F.S.

rather from a separate section of statute, s. 624.155, F.S., which clearly states the Florida Legislature's intent for a private cause of action. All reported third-party bad faith cases in West Virginia have cited to West Virginia's UTPA statute at W. Va. Code s. 33-11-4(9)(f), which provides that no person shall fail to attempt "in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."[175]

Based on economic theory, the West Virginia report states that the existence of third-party bad faith affects several major incentives. The increased incentives listed are: 1) claimants pursuing weak claims more vigorously based on the increased likelihood of intimidating the insurer; 2) insurers settling claims at higher amounts because of the threat of a lawsuit; 3) parties retaining lawyers more because of another available cause of action; 4) claimants perpetuating insurance fraud due to the discouragement of aggressive settlement practices by the insurer; and 5) consumers not purchasing insurance based on rising costs.[176] The report concluded that the fact that West Virginia had third-party bad faith resulted in an overly litigious insurance environment and higher rates.[177] Ultimately the report recommends the elimination of a private cause of action brought by a third party for bad faith in favor of an administrative remedy through the Insurance Commission.[178] The following year, the West Virginia Legislature amended the law to reflect the report's recommendation.[179]

California

In 1979, the California Supreme Court decided the *Royal Globe* case,[180] which held that a third-party accident victim had the right to bring a claim against the insured's insurance company if the insurer was alleged to have engaged in unfair claims settlement practices.[181] *Royal Globe* was overturned by the *Moradi-Shalal*[182] decision in 1988. A study on bad faith in California found that the adoption and subsequent reversal of *Royal Globe* affected the severity and frequency of bodily injury claims in the state.[183] According to the study, before the recognition of a third party's right to bring a bad faith claim, trends in the average payment of bodily injury claims and the relative frequency of such claims were similar to corresponding trends in other states with similar laws. After 1979, however, there were sharp increases in these numbers as compared to other states.[184] Additionally, the study found that after *Royal Globe* was overturned, "these trends reversed dramatically."[185] In 1999 the California Legislature enacted a law to reinstate bad faith claims brought by a third party. The new law was overturned by referendum the following year.[186]

Options and/or Recommendations

Florida's current bad faith law is a complicated combination of statutory and common law that affects a number of varied interests and thus sparks philosophical, economic, and policy debate from different perspectives. As this report has discussed, some argue that Florida's bad faith law offers important and properly balanced protections to insurance consumers while remaining fair to insurers. Others insist that the law's valid intentions have been distorted by excessive litigation and unfair gamesmanship, making it difficult for insurers to settle claims. This report presents information on the legal landscape for insurers, insureds, and third parties but does not offer specific recommendations for legislative action on bad faith. A policy decision for the Legislature is whether the current law is being applied as intended to effectively encourage good faith settlement practices and should remain unchanged or whether the current system encourages abuse and should be changed.

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[175] Insurance Commissioner, *supra* note 170, at 8.
[176] *Id.* at 34.
[177] *Id.* at 46.
[178] *Id.* at 47.
[179] W. Va. Code s. 33-11-4a.
[180] *Royal Globe Ins. Co. v. Superior Court*, 592 P. 2d 329 (Cal. 1979).
[181] Angela Hawken et al., RAND Institute for Civil Justice, *The Effects of Third-Party, Bad Faith Doctrine on Automobile Insurance Costs and Compensation*, xiii (2001).
[182] *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 758 P. 2d 58 (Cal. 1988).
[183] Hawken et al., *supra* note 181, at xiv.
[184] *Id.*
[185] *Id.* at xv.
[186] *Id.* at 1.