

The background features a large, faint, circular seal of the State of Florida. The seal contains a central figure of a woman holding a scale, a palm tree, and a landscape with a ship. The text "GREAT SEAL OF THE STATE OF FLORIDA" is written around the top inner edge, and "IN GOD WE TRUST" is written around the bottom inner edge.

BAD FAITH LAW IN FLORIDA



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This handout is meant to provide a top-line overview of bad faith law in Florida. In Florida, bad faith law is a creature of both the common law and statute. Florida does not recognize a cause of action for first-party common law bad faith, only third-party common law actions. *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005). Statutory bad faith causes of action, however, exist for both first and third-party claimants. The statutory causes of action drive the majority of Florida bad faith litigation. As with many other states, Florida does not recognize a cause of action for “reverse” or comparative bad faith, which would be brought on behalf of the insurer. *Nationwide Prop. & Cas. Ins. Co. v. King*, 568 So. 2d 990 (Fla. 4th DCA 1990).

FIRST-PARTY BAD FAITH CLAIMS; STATUTORY VIOLATIONS ONLY

Fla. Stat. 624.155(1) creates the statutory cause of action for first-party bad faith. The statute, in pertinent part, reads as follows:

(1) Any person may bring a civil action against an insurer when such person is damaged [...]

(b) By the commission of any of the following acts by the insurer:

1. *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 towards its insured and with due regard for her or his interests [...]*

This statute was enacted in 1982 to explicitly authorize first-party bad faith causes of action. The language of Fla. Stat. 624.155 is clear, unambiguous, and creates a definite civil cause of action to “any person” who is injured as a result of an insurer's bad faith dealings.

Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263 (Fla. 5th DCA 1987). The “any person” language includes third-parties.

THIRD-PARTY BAD FAITH; STATUTORY VIOLATIONS

Third-parties have the right to assert statutory bad faith claims in Florida. *State Farm Fire & Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997). The third-party, however, must choose between a common law and statutory bad faith remedy, both actions cannot proceed simultaneously. Fla. Stat. 624.155(8).

Third-party claims lie for violations of the following provisions of Florida’s Unfair Insurance Trade Practices Act:

(i) *Unfair claim settlement practices.*

1. *Attempting to settle claims on the basis of an application, when serving as a binder or intended to become a part of the policy, or any other material document which was altered without notice to, or knowledge or consent of, the insured;*
2. *A material misrepresentation made to an insured or any other person having an interest in the proceeds payable under such contract or policy, for the purpose and with the intent of effecting settlement of such claims, loss, or damage under such contract or policy on less favorable terms than those provided in, and contemplated by, such contract or policy; or*
3. *Committing or performing with such frequency as to indicate a general business practice any of the following:*
 - a. *Failing to adopt and implement standards for the proper investigation of claims;*
 - b. *Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;*
 - c. *Failing to acknowledge and act promptly upon communications with respect to claims;*
 - d. *Denying claims without conducting reasonable investigations based upon available information;*
 - e. *Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of the insured within 30 days after proof-of-loss statements have been completed;*

- f. *Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement;*
 - g. *Failing to promptly notify the insured of any additional information necessary for the processing of a claim; or*
 - h. *Failing to clearly explain the nature of the requested information and the reasons why such information is necessary.*
4. *Failing to pay undisputed amounts of partial or full benefits owed under first-party property insurance policies within 90 days after an insurer receives notice of a residential property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage, unless payment of the undisputed benefits is prevented by an act of God, prevented by the impossibility of performance, or due to actions by the insured or claimant that constitute fraud, lack of cooperation, or intentional misrepresentation regarding the claim for which benefits are owed.*

In proving a third-party bad faith claim, the party must prove that the insurer failed to attempt to settle a tort claim against its insured pursuant to the following standard:

"[Insurer] could and should have [attempted to settle a tort claim], had it acted fairly and honestly toward its insured and with due regard for her or his interests [...]" 624.155(l)(b)(1).

COMMON LAW BAD FAITH; LIMITED TO THIRD-PARTY CLAIMS

Florida recognizes claims for third-party common law bad faith. *Auto Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938); *Thompson v. Commercial Union Ins. Co. of New York*, 250 So.2d 259 (Fla. 1971). The third-party's claim is not a separate cause of action, but is solely derivative of the insured's claim. An insurer does not owe a duty of good faith directly to the injured third-party. *Fidelity & Cas. Co. of N.Y. v. Cope*, 462 So.2d 459,461 (Fla. 1985). An insurer may be held liable for an excess judgment against its insured if, and only if, it has been found to have breached its duty of good faith to its insured. *Campbell v. Govt. Employees Ins. Co.*, 306 So.2d 525 (Fla. 1974).

Third-party common law claims can be established in the following four (4) situations:

1) *A third party obtains a judgment against an insured for an amount in excess of the insured's liability or indemnity limits;*

2) *A third-party claimant and an insurer agree to submit the question of bad faith for determination by a court after stipulating that the claimant will settle the claim against the insured for policy limits if the court finds that the insurer did not act in bad faith;*

3) *An insured consents to an excess judgment and a third-party claimant agrees that the judgment will only be collected from the insurer; or*

4) *An excess insurer becomes subrogated to the rights of an insured by paying more than it would have paid absent the primary insurer's alleged bad faith. Perera v. US. Fid. & Guar. Co., 35 Fla. 1. (Fla. 2010).*

CONDITIONS PRECEDENT; NOTICE & CONTRACTUAL LIABILITY

As a condition precedent to filing a lawsuit for statutory bad faith, the Florida Department of Insurance, as well as the insurer, must be given sixty (60) days written notice of any alleged violation. Following this notice, the insurer has the opportunity to cure the alleged bad faith violation. Fla. Stat. 624.155(3)(d). If the insurer pays the damages during the “cure period,” then there is no basis for the bad faith lawsuit. *Talat Enterprises, Inc. v. Aetna Cas. & Surety Co.*, 753 So. 2d 1278 (Fla. 2000). However, at least one Florida court has found an insurer’s tender of the policy limits to an insured in response to the filing of a notice violation, 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. *Macola v. Geico*, Case No. SC05-1021 (Fla. Sup. Ct. October 26, 2006) Also, an insurer's failure to timely respond to a notice of a bad faith violation creates a rebuttal presumption that the contents of the notice are true and, presumably, the insurer has committed bad faith. *Imhof v. Nationwide Mut. Ins. Co.*, 643 So. 2d 617 (Fla. 1994).

POTENTIAL BAD FAITH VIOLATIONS; MITIGATING FACTORS

Violations giving rise to bad faith causes of action include the following:

- 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 to its insured and with due regard for the insured's interests;
- Making claims payments to insureds not accompanied by a statement setting forth the coverage under which payments are being made;
- Failing to promptly settle the claim, when the obligation to settle the claim has become reasonably clear;
- Despite absence of a settlement demand, a liability insurer fails to initiate settlement negotiations when liability is clear enough, and damages serious enough, that an excess judgment is probable. *Powell v. Prudential Property & Casualty Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991); *MacHalette v. Southern-Owners Ins. Co.* 2011 WL 3703368;
- Refusing to disclose policy limits to a liability claimant;
- Rejecting a reasonable demand for settlement that would release one of two insureds. *Contreras v. U.S. Security Ins. Co.*, 927 So.2d 16 (Fla. 4th DCA 2006);
- Faced with multiple competing claims, failing to fully investigate all of the claims, failing to keep the insured informed about the claims process, failing to seek to settle as many claims as possible within the policy limits, and failing to minimize the magnitude of possible excess judgments without indiscriminately settling selected claims. *Farinas v. Florida Farm Bureau Gen. Ins. Co.*, 850 So.2d 555,560-61 (Fla. 4th DCA 2003);

Florida courts consider the "totality-of-the-circumstances" when analyzing alleged violations. *State Farm Mut. Auto. Ins. Co. v. LaForet*, 658 So. 2d 55 (Fla. 1995). This includes consideration of the following factors:

- Efforts or measures taken by the insurer to resolve coverage disputes promptly, or to limit any potential prejudice to the insured;
- The substance of the coverage dispute or weight of legal authority on the coverage issue;
- Diligence and thoroughness in investigating the facts specifically pertinent to coverage;
- Whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided.

The insurer should settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would settle. *Macola v. Gov't Employee Ins. Co.*, 953 So.2d 451 (Fla. 2006). The claimant's unwillingness to settle the claim is relevant to whether the insurer acted in bad faith under a totality of the circumstances and is a factor that must be considered. *Barry v. Geico General Ins. Co.* 938 So.2d 613 (Fla. 4th DCA 2006).

GOOD FAITH CONDUCT

The duty of "good faith" in Florida provides that insurers owe "a duty to their insureds to refrain from acting solely on the basis of their own interest in settlement." *State Farm Mut. Auto Ins. Co. v. Laforet*, 658 So.2d 55. 58 (Fla. 1995). The duty of good faith obligates an insurer to handle claims brought against its insureds with "the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business." *Boston Old Colony v. Gutierrez*. 386 So.2d 783 (Fla. 1980).

UNDERLYING BREACH OF CONTRACT REQUIRED

The existence of contractual liability and the determination of the extent of contractual damages are elements of the bad faith action and, therefore, must pre-exist the bringing of such a bad faith action. *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000) Bringing a cause of action in Florida for a violation of 624.155(1)(b)1 is premature until there is a determination on liability and extent of damages owed on the first-party insurance contract. *Mutual Ins. Co. v. The Farm, Inc.*, 754 So. 2d 865 (Fla. 3d DCA 2000). An action for bad faith is barred when the complaint fails to allege that the insured's damages have been determined. *Imhofv. Nationwide Mut. Ins. Co.*, 643 So. 2d 617 (Fla. 1994). Some Florida courts hold that a premature bad-faith claim must be dismissed without prejudice, while others hold that such premature claims should be abated. Compare e.g. *Liberty Mut. Ins. Co. v. Farm, Inc.*, 754 So. 2d 865 (Fla. 3d DCA 2000). Florida courts have found the simultaneous litigation of a coverage action and either a bad faith claim or an unfair settlement practices claim "would clearly ... [prejudice an insurer]" because evidence of the latter claims "could well jaundice the jury's view of the coverage issue." *Mainstream Constr. Group, Inc.*, 864 So. 2d at 1272 (citing *Lane v. Provident Life & Accident Ins. Co.*, 71 F. Supp.2d 1255 (S.D. Fla. 1999)). Such simultaneous litigation is also inappropriate because the plaintiff cannot obtain discovery of the insurer's claim file, business policies, or claims practices until after coverage is determined. *Mainstream Constr. Group, Inc.*, 864 So. 2d 1272 (citing *Old Republic Nat'l Title Ins. Co. v. Home American Credit, Inc.*, 844 So. 2d 818 (Fla. 5th DCA 2003)).

DAMAGES; CONSEQUENTIAL, PUNITIVE, ATTORNEY'S FEES

Consequential damages are available in statutory bad faith claims. Fla. Stat. 624.155(4) & (8). The damages includes those which are a "reasonably foreseeable" result of a violation

and can include damages in excess of the policy limits; *McLeod v. Cont'lns. Co.*, 591 So. 2d 621, 626 (Fla. 1992). In reaching damages in excess of policy limits, the damage elements can include the claimant's total damages, interest on unpaid benefits, costs and attorney's fees. *State Farm Mut. Auto. Ins. Co. v. LaForet*, 658 So. 2d 55 (Fla. 1995).

Punitive damages can also be assessed in statutory and common law bad faith cases. *Dunn v. Nat'l Security Fire & Cas. Co.*, 631 So. 2d 1103, 1108-09 (Fla. 5th DCA 1993). Punitive damages can be awarded where the violations are so frequent as to indicate a general business practice. Fla. Stat. §624.155(5). They must be willful, wanton, and malicious, or in reckless disregard of the rights of the insured. *Id.* Fla. Stat. 768.73 limits punitive damages to three times the amount of the compensatory or \$500,000, whichever is greater. Furthermore, the punitive damages phase of trial of bad faith trials should bifurcated. *WR. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994).

Finally, attorney's fees are recoverable in statutory bad faith cases. Specifically, Fla. Stat. §624.155(4) finds an insurer becomes liable for plaintiff's reasonable attorney's fees and court costs upon adverse adjudication at trial or upon appeal in a statutory bad-faith action.

ATTORNEY-CLIENT PRIVILEGE MATTERS

Where there is "disclosure of confidential communications about" a matter, a witness can make "a limited waiver of the attorney-client privilege as to that issue." Where instead a witness does not "disclose any specific discussions with counsel" as to an issue, then "his admission that the issue was discussed with counsel," standing alone, "is insufficient to support a waiver of the privilege." *Teachers Insurance Co. v. Loeb*, 75 So. 3d 355, 2011 WL 5842796 (Fla. 1st DCA November 22, 2011).