

Bad Faith Insurance Practices in Florida

I. **Insurer's General Duty to Act in Good Faith (Approximately 20 minutes)**

- A. In general, bad faith law defines acts of "bad faith" on behalf of insurance companies as delaying, withholding, or denying policyholder benefits that are based on legitimate claims filed under valid insurance policies. There are two main categories of bad faith claims:
1. Bad faith claim handling (reckless or outrageous claim handling, such as unreasonable delays or fraudulent conduct in handling a claim, apart from the actual denial of policy benefits)
 2. Bad faith refusal to pay money (failure to pay policy benefits without reasonable justification)
- B. As a result of the insurer's control over the settlement and defense of a suit against its insured, the insurer owes a fiduciary duty to its insured which requires the insurer to act fairly and honestly toward its insured, and with due regard for its insured's interests. *Auto Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938); *Campbell v. Gov't Employees Ins. Co.*, 306 So.2d 525 (Fla. 1974).
- C. This duty of good faith was expanded to require that:
"[a]n insurer, in handling the defense of claims against its insured, has a duty 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. For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured.... The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith." *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783 (Fla. 1980).
- D. Insurer's duty is defined in the Florida Standard Jury Instructions:
1. MI3.1: "An insurance company acts in bad faith in failing to settle a claim against its insured within its policy limits 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 his interests."
 2. MI3.2: " An insurance company acts in bad faith in failing to offer to pay [an amount up to] [the amount of] its policy limits toward settlement of a claim against its insured when offering that amount would have resulted in settlement of the claim, and under all of the circumstances, the insurance company should have offered that amount, had it acted fairly and honestly towards its [insured] [and] [the excess carrier of its policyholder] and with

due regard for their interests.

II. Insurer's Specific Duties (Approximately 40 minutes)

A. Duty to Advise/Inform

1. Under *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783 (Fla. 1980), the insurer has a duty to advise its insured of :
 - a. Settlement opportunities, including:
 - 1) Settlements within the policy limits;
 - 2) Settlements over the policy limits and the insured's right to contribute; and
 - 3) Settlements that require the insured do or provide things. i.e.; tax returns, financial affidavits, letter of apology, etc.
 - b. Probable outcome of litigation, including:
 - 1) Assessments of liability and damages
 - 2) Potential for an excess judgment
 - 3) Non-covered elements, such as punitive damages or claims for intentional torts.
 - c. The possibility of an excess judgment, including:
 - 1) Steps the insured may take to avoid such a judgment
 - 2) Retaining personal counsel
 - 3) The insured's right to contribute to a settlement in excess of policy limits.
 - 4) Any steps the insured may take to avoid such an excess judgment.
2. If the insured reasonably relies on the insurer to conduct settlement negotiations, and the insurer fails to disclose settlement overtures to the insured, the jury may find the insurer acted in bad faith. *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3rd DCA 1991)

B. Duty to Investigate

1. An insurer has the duty to fully investigate all claims. *Berges v. Infinity Ins. Co.*, 896 So.2d 665 (Fla. 2004), rehearing denied.
2. If, after an insurer learns of an accident, it fails to investigate to determine whether there will be a claim made against the policy, it may be precluded, by that failure to investigate, from arguing that other insurers breached their good faith duties by providing inadequate notice of the law suit. *Fox v. Canal Ins. Co.*, 566 So.2d 286 (Fla. 4th DCA 1990).
3. Pursuant to *Florida Statutes*, section 627.736, a PIP insurer is given thirty days to investigate a PIP claim and to either pay the claim or find facts that warrant a refusal to pay. If the PIP insurer does not do so, the claim is overdue and the statutory penalties (interest and fees) for failing to pay the claim timely are due. *January v. State Farm. Mut. Ins. Co.*, 838 So.2d 604 (Fla. 5th DCA 2003).

C. Duty to Settle

1. Determining when settlement is reasonable: a claim for bad faith failure to settle is founded upon the obligation of the insurer to pay when all conditions under the policy would require an insurer exercising good faith and fair dealing towards its insured to pay.
2. Automobile liability insurer owed a duty to insured to investigate the facts of accident that killed driver and severely injured passenger, give fair consideration to a reasonable settlement offer for the policy limits, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. *Berges v. Infinity Ins. Co.*, 896 So.2d 665 (Fla. 2004)
3. An insurer has a duty to initiate settlement negotiations where liability is clear and injuries are so serious that a judgment in excess of policy limits is likely. As a result of the delay in settlement negotiations, the court found potential for bad faith and shifted the burden to the insurer to prove that the settlement was not possible within the policy limits. *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So.2d 12 (Fla. 3rd DCA 1991).
4. An insurer may consider its own interest in determining whether or not to settle. However, the insurer must protect the insured's interests at least as zealously as it protects its own. *Springer v. Citizens Cas. Co. Of N.Y.*, 246 F.2d 123 (5th Cir. 1957). In failing to do so, the insurer becomes liable in excess of the policy provisions if it acts fraudulently or in bad faith in refusing to settle. *Thomas v. Lumbermens Mut. Cas. Co.*, 424 So.2d 36 (Fla. 3rd DCA 1982).
5. Under Florida law, there is no bright line rule for the amount of time which must lapse before a liability insurer's failure to initiate a settlement will be deemed bad faith. Note an inverse relationship between the amount by which the anticipated claim exceeds policy limits and the amount of time before a prudent insurer would be expected to tender policy limits. *Snowden ex rel. Estate of Snowden v. Lumbermens Mut. Cas. Co.*, 358 F. 2d 1125 (N.D. Fla. 2003).

D. Duty to Defend/Indemnify

1. Insurer has a duty to defend a claim against its insured which is covered under the policy of liability insurance.
2. Refusal to defend:
 - a. If the insurer wrongfully refuses to defend the insured, the insurer may potentially be liable for a judgment against the insured that exceeds policy limits. The prevailing rule appears to be that such excess liability will only be imposed if the insurer's conduct amounts to bad faith.
 - b. Once an insurer wrongfully withdraws from the defense of a case or wrongfully denies coverage, the insured has the right to refuse to allow the insurer to re-enter the case and take charge of it. *BellSouth Telecommunications, Inc. v. Church & Tower of*

Florida, Inc., 936 So.2d 40 (Fla. 3rd DCA 2006).

- c. An insured is permitted to enter into a consent judgment and bind its insurer after the insurer refuses to defend. If the insurer refuses to defend, the insured is entitled to take whatever steps are necessary to protect himself from a claim. *Zurich American Ins. Co. v. Frankel Enterprises, Inc.*, 509 F.2d 1303 (S.D. Fla. 2007).
- E. Duty to Disclose: Pursuant to *Florida Statutes*, section 627.4137, an insurer which either does or is able to provide liability insurance must, within thirty days of a written request of a claimant, provide a statement, under oath by a corporate officer or the insurer's claims manager or superintendent containing the following information:
1. The name of the insurer.
 2. The name of the insured.
 3. The limits of the liability coverage.
 4. A statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement.
 5. A copy of the policy.

III. **Bad Faith at Common Law (Approximately 15 minutes)**

- A. Injured third party: While bad faith occurs between an insurer and its insured, Florida law allows an injured third party to bring a bad faith cause of action directly against the insurer because the injured third party, as the beneficiary of any successful bad faith claim, is the real party in interest. *Thompson v. Commercial Union Ins. Co.*, 250 So.2d 259 (Fla. 1971).
- B. First party insured:
1. At common law, first party insureds could only maintain a cause of action against an insurance company in the context of a breach of contract.
 2. To prevail under this type of action, a first party insured would need to prove:
 - a. A contractual obligation of the insurance company to pay the damages
 - b. Actual incurrence of the damages by the insured
 - c. Failure of the insurance company to pay the damages
 3. Generally, recovery under this type of action was limited to the actual amount due under the policy and did not include attorney's fees and costs.
- C. A common law claim for bad faith for refusing to settle can only be maintained if the underlying tort action results in a judgment in excess of the policy limits because the action is deemed to accrue when the insured becomes obligated to pay the judgment in excess of the policy limits. *Kelly v. Williams*, 411 So.2d 902 (Fla. 5th DCA 1982), rev. den. 419 So.2d 1198 (Fla. 1982). The excess judgment requirement may be waived by the parties. *Cunningham v. Standard Guar. Ins. Co.*, 630 So.2d 179 (Fla. 1994).

IV. Statutory Bad Faith (Approximately 55 minutes)

- A. Pursuant to *Florida Statutes*, section 627.4136, it is a condition precedent to the accrual of a cause of action against a liability insurer by a third party insured under the terms of the liability insurance contract, including an action for bad faith, that he first obtain a settlement or verdict against a person who is an insured under the terms of the policy for a cause of action which is covered by the policy.
- B. Civil Action: Enacted in 1982 by the Florida legislature. This extended the common law bad faith cause of action to first party insureds. Pursuant to *Florida Statutes*, section 624.155, any person may bring a civil action against an insurer when he is damaged by:
1. A violation by the insurer of certain provisions of the Unfair Insurance Trade Practices Act (UITPA),
 2. The insurer's failure to return motor vehicle policy premiums upon cancellation, or
 3. By the commission of the following acts by the insurer:
 - a. Not attempting in good faith to settle claims, when under all circumstances, the insurer could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests,
 - b. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made, or
 - c. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
- C. Unfair Claims Settlement Practices: Listed in *Florida Statutes*, section 626.9541. Any person may bring a cause of action under the Civil Action provision of *Florida Statutes*, section 624.155, against an insurer if the insurer:
1. Attempts 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. Makes 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. Commits or performs any of the following: *Dadeland Depot, Inc. v. St. Paul Fire Ins. Co.*, 945 So.2d 1216 (Fla. 2006) eliminated the need to prove the insurer committed the actions with such frequency as to indicate a general business practice.

- 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.
- D. Notice of Civil Action: Florida Statutes, section 624.155
- 1. Proper notice of the alleged violated must be filed at least sixty days with both the insurer and the Department of Financial Services.
 - 2. The notice must be on a form provided by the Department of financial Services and include the following information:
 - a. The statutory provision, including the specific language of the statute, which the insurer allegedly violated.
 - b. The facts and circumstances giving rise to the violation.
 - c. The name of any individual involved in the violation.
 - d. Reference to specific policy language that is relevant to the violation, if any. However, if the person bringing the civil action is a third party claimant, he is not required to reference the specific policy language if the insurer has not provided a copy of the third party claimant pursuant to the claimant's written request.
 - e. A statement that the notice is given in order to perfect the right to pursue the civil remedy.
- E. Insurer's Response to Notice of Civil Action: Florida Statutes, section 624.155; the "cure" provision. No civil action under the Insurance Code will lie if, within 60 days after filing the required notice, the damages are paid or the circumstances giving rise to the violation are corrected.
- 1. Note that a disability insurer's payment of the full contractual damage amount to the insured within 60 days of receiving notice of the insured's bad faith action served as a cure, and precluded the insured's bad faith

action under Florida law. *Franklin v. Minnesota Mut. Life Ins. Co.*, 97 F. 2d 1324 (S.D. Fla. 2000).

2. However, an insurance company cannot end a bad faith action against it simply by tendering to the insureds the policy limits, where the insureds claim the company, in bad faith, failed to accept the injured party's offer to settle the claim within policy limits, exposing the insureds to ultimate judgment in excess of the policy limit. *Hollar v. International Bankers Ins. Co.*, 572 So.2d 937 (Fla. 3rd DCA 1990).
3. *Macola v. Government Employees Insurance Company*, 953 So.2d 451 (Fla. 2006), and the Florida Supreme Court's Interpretation of the "cure" provision:
 - a. A cure of the civil remedy does not preclude a common law cause of action for bad faith.
 - b. The Court found that although an insurer is afforded an opportunity to "cure" an alleged violation of the bad faith statute under *Florida Statutes*, section 624.155(3)(d), the statute further provides that it does not "preempt any other remedy of cause of action provided for pursuant to... the common law of this state."
 - c. Additionally, the Court noted that although a common law cause of action is not preempted by the bad faith statute, it does not permit a claimant to obtain a judgment under both remedies.
 - d. The Court found that to allow a tender after the time period to settle has expired to cure any alleged bad faith would be inconsistent with the body of common law case law that permits the recovery of an excess judgment as damages in a common law third party bad faith case. In this case, the "cure" would not eliminate the underlying tort claim and the potential for an excess judgment would be inconsistent with *Florida Statutes*, section 624.155(8), which does not allow a preemption of any other remedy.
 - e. Because "the tender of the policy limits to the insured when the underlying tort action is still pending does not eliminate the underlying tort action or the insured's exposure to an excess verdict," the Court found that if the insurer's tender of its policy limits after the time to settle expired were to preclude a common law cause of action for third party bad faith, the insured would be in a "worse position than he or she would have been in had the legislation not enacted Section 624.155."
 - f. The Court held:

"[A]n insurer's tender of the policy limits to an insured in response to the filing of a civil remedy notice under section 624.155 by the insured, 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.”

V. Standard for Evaluating Bad Faith Claims (Approximately 15 minutes)

- A. In Florida, the standard for evaluating bad faith claims is whether the insurer acted fairly and honestly toward its insured with due regard for the insured's interests. *General Star Indem. Co. v. Anheuser-Busch Co., Inc.* 741 So.2d 1259 (Fla. 5th DCA 1999).
- B. The question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the “totality of the circumstances” standard. *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla.1995).
 - 1. Trial court must consider all the circumstances involved in the denial of coverage.
 - 2. These factors may include, but are not limited to: *Shannon R. Ginn Const. Co. v. Reliance Ins. Co.*, 51 F.2d 1347 (S.D. Fla. 1999).
 - a. The insurer’s effort to resolve the coverage issues promptly or otherwise limit potential prejudice to the insured,
 - b. The substance of the coverage disputes or the weight of legal authority on the coverage issue, and
 - c. The insurer’s diligence/thoroughness in investigating the claims.
- C. The “fairly debatable” standard does not apply. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 63 (Fla.1995).
- D. The same standard applies to both first party and third party claims, as well as to both statutory and common law claims. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 63 (Fla.1995).

VI. Factors Indicative of Bad Faith (Approximately 15 minutes)

- A. Insurer’s failure to make a proper investigation of the claim. *Gov’t Employees Ins. Co. v. Grounds*, 311 So.2d 164 (Fla. 1st DCA 1975).
- B. Insurer’s possession of information indicating a strong case against the insured. *Springer v. Citizens Cas. Co. Of N.Y.*, 246 F.2d 123 (5th Cir. 1957).
- C. Insurer’s failure to negotiate seriously. *Lib. Mut. Ins. Co. v. Davis*, 412 F.2d 475 (5th Cir. 1969) (abrogation on other grounds recognized by, *Venn v. St. Paul Fire and Marine Ins. Co.*, 99 F.3d 1058 (11th Cir. 1996).
- D. Insurer’s failure to settle within a deadline set by the claimant’s attorney. *Kivi v. Nationwide Mut. Ins. Co.*, 695 F.2d 1285 (11th Cir. 1983).
- E. Insurer’s rejection of settlement. *Lib. Mut. Ins. Co. v. Davis*, 412 F.2d 475 (5th Cir. 1969) (abrogation on other grounds recognized by, *Venn v. St. Paul Fire and Marine Ins. Co.*, 99 F.3d 1058 (11th Cir. 1996).
- F. The fact that the insurer concealed from the insured or misrepresented the facts disclosed by its investigation. *Springer v. Citizens Cas. Co. Of N.Y.*, 246 F.2d 123 (5th Cir. 1957).
- G. The fact that the insurer concealed from the insured the terms of settlement offers. *Campbell v. Gov’t Employees Ins. Co.*, 306 So.2d 525 (Fla. 1974); *Gov’t Employees Ins. Co. v. Grounds*, 311 So.2d 164 (Fla. 1st DCA 1975).

- H. Insurer's action in spite of advice of counsel that the case ought to be settled. *American Fire & Cas. Co. v. Davis*, 146 So. 2d 615 (Fla. 1st DCA 1962).
- I. Insurer's action in spite of advice of counsel that a jury verdict in excess of the policy limits is likely. *Campbell v. Gov't Employees Ins. Co.*, 306 So. 2d 525 (Fla. 1974) (insurer made settlement offer well below policy limits).
- J. Insurer's negligence. *Campbell v. Gov't Employees Ins. Co.*, 306 So.2d 525 (Fla. 1974)
- K. The fact that the insurer was reinsured for a major part of its liability. *American Fid. & Cas. Co. v. Greyhound Corp.*, 258 F.2d 709 (5th Cir. 1958) (reinsurance showed some motive for rejecting settlement offer).
- L. Factors in determining bad faith under Florida law:
 1. Efforts or measures taken by an insurer to resolve a coverage dispute promptly or in such a way as to limit any potential prejudice to the insured;
 2. Substance or coverage dispute or weight of legal authority on coverage issue;
 3. Insurer's diligence and thoroughness in investigating facts specifically pertinent to coverage;
 4. Efforts made by insurer to settle liability claim in face of coverage dispute. *Pozzi Window Co. v. Auto-Owners Ins.*, 446 F.3d 1178 (11th Cir. 2006).

VII. Denial of Insurance Coverage (Approximately 35 minutes)

- A. Wrongful denial of claim: If an insurer wrongfully denies coverage that actually exists, the insurer has breached the insurance contract. As such, the insurer will not be allowed to rely upon a contractual provision prohibiting the insured from settling the claim with a responsible party in order to relieve itself from liability. *Gallagher v. Dupont*, 918 So.2d 342 (Fla. 5th DCA 2005).
- B. Proper denial of claim
 1. Simply because an insurer denies a claim or declines to pay an amount demanded does not result in an automatic finding of bad faith. The insured must demonstrate that the actions of the insurer were actually in bad faith, as defined by the relevant statutory provisions. *Dadeland Depot, Inc. v. St. Paul Fire Ins. Co.*, 945 So.2d 1216 (Fla. 2006).
 2. An insurer has a right to deny claims, if it in good faith believes the claims are not owed on the policy. There is no cause of action for bad faith as long as the denial was in good faith. It does not matter if the insurer's denial was later found to be mistaken by a court or arbitration. *Vest v. Travelers Ins. Co.*, 753 So.2d 1270 (Fla. 2000).
- C. Coverage issues:
 1. The circumstances involved in the denial of a claim should be taken into account in determining bad faith. An insurer faced with coverage issues will be evaluated on:
 - a. Whether the insurer was able to obtain a reservation of the right to deny coverage

- b. Efforts taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds
 - c. The substance of the coverage dispute or the weight of legal authority on the coverage issues
 - d. The insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage
 - e. The efforts made by the insurer to settle the liability claim in the face of the coverage dispute. *Robinson v. State Farm Fire & Casualty Co.*, 583 So. 2d 1063, 1068 (Fla. 5th DCA 1991).
2. Pursuant to *Florida Statutes*, section 627.426, the Florida Claims Administration Statute, an insurer has a limited time period to do one of four things:
- a. Acknowledge coverage and assume the defense of a suit without reservation of rights;
 - b. Give written notice to the insured of its refusal to defend the insured;
 - c. Obtain a non-waiver agreement following a full disclosure of the coverage defenses sought to be preserved; or
 - d. Send a reservation of rights letter and appoint mutually agreeable defense counsel.

D. Reservation of Rights Letter:

- 1. Letter written by an insurance company offering to defend its insured while still maintaining the right to deny coverage at a later date. The letter should reserve the insurers rights to (1) seek a judicial declaration of coverage and (2) recoup defense costs should a declaratory action determine no coverage exists.
- 2. The letter should be written in context, including applicable policy language and a discussion of potential coverage issues.
- 3. However, where the insurance company reserves its right to deny coverage, it loses the option of controlling both the defense and settlement opportunities. *Taylor v. Safeco Ins. Co.*, 361 So. 2d 743 (Fla. 1st DCA 1978) (insured free to reject defense by insurance company under reservation of rights); *Nationwide Mut. Fire Ins. Co. v. Keen*, 658 So. 2d 1101 (Fla. 4th DCA 1995).
- 4. Pursuant to *Florida Statutes*, section 627.426(2), a liability insurer is not permitted to deny coverage based on a particular coverage defense unless:
 - a. Within 30 days after the liability insurer should have known of the coverage defense, written notice of the reservation of rights to assert that coverage defense is given to the named insured by certified or registered mail sent to the last known address of the insured or by hand delivery; and
 - b. Within 60 days of sending the reservation of rights or receipt of a summons and complaint naming the insured as a defendant

(whichever is later), the insurer

- 1) Gives written notice to the named insured of its refusal to defend the insured
- 2) Obtains from the insured a nonwaiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations, and liabilities of the insurer during and following the pendency of the subject litigation; or
- 3) Retains independent counsel which is mutually agreeable to the parties.

VIII. Time Limited Demands (Approximately 15 minutes)

- A. The focus on any time demand case will be the reasonableness of the insurer's failure to settle. Where the insurer does not settle the case in the time period prescribed by the plaintiff in good faith and on reasonable grounds, the insurer should not be found to have acted in bad faith.
- B. When faced with a ten-day time-demand letter on a \$10,000 policy of liability insurance, the court held that the limited time within which to accept the offer was totally unreasonable under the circumstances and implied that there might have been a "set-up." *DeLaune v. Liberty Mutual Insurance Company*, 314 So. 2d 601 (Fla. 4th DCA 1975)
- C. After a only a lapse of one month from the initial demand for policy limits, during which time the insurer verified the claim, and the tender of the policy limits a day after the time demand period expired, the court held that the insurer had not violated its common law duty of good faith. *Clauss v. Fortune Insurance Company*, 523 So. 2d 1177 (Fla. 5th DCA 1988).
- D. A time-limited demand may be used by plaintiffs' lawyers in an attempt to "set-up" the insurer for bad faith. So doing would cause the insurer to potentially be liable for a judgment in excess of the policy limits.
- E. When confronted with a time-limited demand, an insurer should take all reasonable and necessary steps to investigate the claim. After such an investigation, the insurer should determine whether payment of the policy limits is warranted within the time period prescribed by the plaintiff. In the event such an investigation and determination cannot take place within the time limit, the insurer should ask for an extension of time. A plaintiff's failure to allow such additional time may indicate the plaintiff's "true motives." Note, a counteroffer is a rejection of the offer.

IX. Bad Faith and Multiple Claimants or Insureds (Approximately 30 minutes)

- A. Multiple Claimants: when there are multiple claimants and minimal policy limits, "it follows that, insofar as the insureds' interest governs, the fund should not be exhausted without an attempt to settle as many claims as possible." *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475 (5th Cir. 1969). The law in this area has recently been in a state of change.
 1. Initially, it was generally held that where multiple claims arise out of one

accident, the liability insurer has the right to enter reasonable settlements with some of those claimants, regardless of whether the settlements deplete or even exhaust the policy limits to the extent that one or more claimants are left without recourse against the insurance company. *Harmon v. State Farm Mut. Auto. Ins. Co.*, 232 So.2d 206 (Fla. 2nd DCA 1970).

2. The general standard of care an insurer must exercise when handling claims against an insured is “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 Ins. Co. v. Gutierrez*, 386 So.2d 783 (Fla. 1980).
3. The *Harmon* and *Boston Old Colony* rules were combined by the *Farinas* court to require an insurer investigate fully all claims at hand to best limit the insured’s liability and settle as many of those claims as possible within the policy limits. Additionally, an insurer has the duty to avoid indiscriminately settling selected claims and leaving the insured at risk of excess judgments that could have been minimized by wiser settlement practices. *Farinas v. Florida Farm Bureau General Ins. Co.*, 850 So.2d 555 (Fla. 4th DCA 2003).
 - a. An insurer can enter into *reasonable* settlements with some claimants to the exclusion of others based on an exercise of its discretion. *Farinas v. Florida Farm Bureau General Ins. Co.*, 850 So.2d 555 (Fla. 4th DCA 2003).
 - b. Reasonableness is determined based on the general rules of *Boston Old Colony* and *Florida Statutes*, section 624.155(b)(1) and includes full investigation of claims, communication with the insured, minimizing magnitude of excess judgments against the insured. *Farinas v. Florida Farm Bureau General Ins. Co.*, 850 So.2d 555 (Fla. 4th DCA 2003).
4. An insurer was provided with specific guidelines in keeping with its good faith duty where multiple claims arise out of one accident. An insurer may exercise its discretion in how it elects to settle claims, however, the insurer must:
 - a. Fully investigate all claims arising from a multiple claim accident
 - b. Seek to settle as many claims as possible within the policy limits
 - c. Minimize the magnitude of possible excess judgments against the insured by a reasoned claim settlement
 - d. Keep the insured informed of the claims resolution process. *Gen. Sec. Nat. Ins. Co. v. Marsh*, 303 F.2d 1321 (M.D. Fla. 2004).

- B. Multiple Insureds: *Contreras v. U.S. Sec. Ins. Co.*, 927 So.2d 16 (Fla. 4th DCA 2006). Personal representative of deceased pedestrian offered to settle for policy limits and release owner of vehicle. However, personal representative refused to release driver of vehicle. Insurer claimed that securing release for only one of its insured would necessarily provoke bad faith. Court disagreed.

1. Insurer can be held liable for bad faith arising out of its refusal to accept an offer to settle with the owner of the vehicle but not the driver.
2. If an insurer is given a reasonable period of time in which to settle, and it is entirely clear that within that time the plaintiff is not going to release the driver, the insurer as a matter of law cannot have breached a duty of good faith to the driver.
3. However, having now fulfilled its obligation to the driver, the insurer was obligated to take the necessary steps to protect the owner from what was certain to be a judgment far in excess of the policy limits.
4. If an insurer is unable to obtain a release for all defendants, they can still settle with one without being in bad faith.

X. Damages (Approximately 20 minutes)

- A. Recovery may comprise all those damages which reasonably flow from the alleged violation, including those amounts which are the natural, proximate, probable, or direct consequence of the insurer's bad faith actions. *McLeod v. Continental Insurance Co.*, 591 So.2d 621 (Fla.1992), superceded by statute on other grounds.
- B. However, absent a finding of bad faith, an insurer's damages should be limited to coverage under the policy. *Gov't Employees Ins. Co. v. Robinson*, 581 So.2d 230 (Fla. 3rd DCA 1991).
- C. Punitive Damages:
 1. No punitive damages will be awarded under *Florida Statutes*, section 624.155, the Civil Action, unless the acts giving rise to that violation occur with such frequency as to indicate a general business practice, and those acts are:
 - a. Willful, wanton, and malicious;
 - b. In reckless disregard for the rights of any insured; or
 - c. In reckless disregard for the rights of a beneficiary under a life insurance contract.
- D. Emotional Damages:
 1. May be recoverable, but only if they can be causally related to Unfair Claims Settlement violations with appropriate evidence. *Butchikas v. Travelers Indemnity Co.*, 343 So.2d 816 (Fla.1976)
 2. Emotional distress is not recoverable on a common law cause of action in the absence of conduct sufficiently egregious so as to support an award of punitive damages. *Conquest v. Auto-Owners Insurance Company*, 733 So. 2d 71 (Fla. 2nd DCA 1998)
- E. Court Costs and Reasonable Attorney's Fees:
 1. Pursuant to *Florida Statutes*, section 624.155, the Civil Action, upon adverse adjudication at trial or upon appeal, the insurer will be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff.
 2. Regardless of whether or not an insurer acted in good faith, it is

responsible for attorney's fees where the claimant proves a wrongful denial of his claim. *Travelers Ins. Co. v. Rodriguez*, 387 So.2d 341 (Fla. 1980)

XI. Bad Faith and In House Counsel (Approximately 10 minutes)

- A. An attorney acting as in-house counsel for an insurer is placed in the unique position of being paid by the insurance company, but representing the insured. As such, their primary duty of care should be to the insured.
- B. The attorney should disclose to the insured all facts and circumstances which are likely to affect the performance of his duty to the insured.
- C. In situations where conflicts of interest and loyalty are apparent, the insurer must fulfill its obligation to provide the insured with a competent defense, regardless of the insurer's desire to control the defense. In situations where an insurer and its insured have opposing interests, courts will invariably chose to protect the interest of the insured.
- D. While the communications between an insurer and attorney insurer hired to represent insured were not privileged under the attorney-client privilege, the communications between insurer's employees or agents and insurer's in-house counsel were protected as attorney/client communications. *Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So.2d 905 (Fla. 3rd DCA 2004).

XII. Ethical Concerns for Insurance Defense Counsel (Approximately 15 minutes)

- A. Client consent is required when an audit of legal bills is requested.
- B. An insurance company may decide to request an audit of an attorney's bills for several reasons: fear of irregularities, cost cutting, or evaluation.
- C. The defense attorney must remember that although the insurance company is paying his fees, his client is the insured.
- D. "Given the requirements of Rule 4-1.6, Florida Ethics Opinion 93-5, and other applicable precedent, the inquiring attorney cannot allow the insurer or third party auditing companies to audit and review detailed billing statements and/or files of his clients who are insured by this insurance company without first obtaining permission from his clients. Whether the insurance contract between insurer and insured grants such permission to the insurer is a legal question upon which Bar ethics counsel cannot provide an opinion." Florida Bar Staff Opinion 20762, issued March 9, 1998.
- E. Waiver of the attorney-client privilege. The issue of whether legal bills are protected by the attorney-client privilege is not addressed in the Florida advisory opinions. In general, whether bills are protected by attorney-client the privilege depends upon the situation. The privilege protection is not automatic. An attorney-client privilege may be claimed successfully where correspondences, bills, ledgers, statements, and time records reveal client motive, client secrets, litigation strategy, or the specific nature of legal research which might reveal strategy or client secrets. The privilege may be waived by an audit.