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Florida Supreme Court: When it Comes to UM Damages Verdicts and Bad Faith, "What is Good for the Goose is Good for the Gander"

Florida's highest court recently held that an insured is entitled to a jury determination of liability and the full extent of damages, even if in excess of policy limits, prior to litigating a first-party bad faith action arising from an underlying uninsured/underinsured motorist ("UM") case. *Fridman v. Safeco Ins. Co. of Illinois,* No. SC13-1607 (Fla. Feb. 25, 2016). The court also held that such a determination is binding on the insurer in a subsequent bad faith action where the parties had an opportunity for appellate review of any trial errors.

Background

Fridman filed a claim for UM policy limits of $50,000 with his insurer, Safeco Ins. Co. of Illinois ("Safeco"), after he was injured in an automobile accident with an underinsured motorist. After Safeco refused to pay his claim, Fridman filed a Civil Remedy Notice alleging violations of Fla. Stat. 624.155(1)(b)(1) for "[f]ailure to pay UM policy limits of $50,000 in a clear liability crash with over $12,000.00 of property damage to insured's vehicle" and over $24,000 of medical expenses and significant injuries requiring future medical treatment.

When Safeco failed to timely respond, Fridman brought suit to determine liability under the UM policy and the full extent of damages he suffered in the accident. More than four years after the automobile accident, and while the UM action was pending, Safeco tendered a check for $50,000, filed a "confession of judgment" and moved for entry of confession of judgment. Fridman opposed the entry of a confessed judgment, arguing that a jury verdict would determine Safeco's potential liability in a future bad faith claim. The trial court agreed and denied Safeco's motion. At trial, the jury found the underinsured driver to be negligent and entirely responsible for Fridman's damages, determined by the jury to be $1,000,000. Safeco appealed.

In *Safeco Insurance Co. of Illinois v. Fridman,* 117 So. 3d 16, 19-20 (Fla. 5th DCA 2013), the appellate court vacated the $1,000,000 jury verdict, finding that the UM action became moot after Safeco tendered the its policy limits and "confessed judgment" in that amount. The appellate court reasoned that "where no dispute exists as to the policy limits or available coverage, the amount of the judgment in the UM case may not exceed the policy limits." Fridman appealed to the Florida Supreme Court.

The Florida Supreme Court's Decision

The Florida Supreme Court quashed the appellate court's decision. First, the court explained how the legislative history of statutory bad faith actions demonstrates that "the damages in section 624.155 bad faith actions shall include any amount in excess of the policy limits." The court explained how the filing of a Civil Remedy Notice, or "CRN," is a condition precedent to an insured's filing of a statutory bad faith action under Fla. Stat. 624.155 and provides the insurer with 60 days to cure its alleged violation by paying the damages requested in the CRN or correcting the violation asserted. If the insurer fails to respond within the 60-day window, bad faith is presumed.

Second, the court explained the intertwined nature of the UM verdict and first-party bad faith actions. The court cited lengthy precedent demonstrating that a determination of liability and the full extent of the insured's damages must be determined in order to state a claim for bad faith. Thus, while the Fifth District held, and Safeco argued, that the determination of the full extent of damages, including those in excess of the policy's UM limit, should be determined in the subsequent bad faith case rather than the UM action, the insured may have these issues decided by a jury in the UM action. While the alternatives are that the insured obtain such determinations through agreed settlement, arbitration or stipulation before the bad faith case, "the availability of other alternatives does not change the insured's entitlement to a determination of liability and the full extent of damages in the first instance." Further, the court made clear that the UM trial court may reserve jurisdiction to allow an insured to formally amend his complaint to add a claim for bad faith at the conclusion of the UM proceedings.

The court dispensed with the Fifth District's mootness argument, quoting heavily from Judge Sawaya's Fifth District dissent. "[T]he amount of damages in the UM case does not become moot by virtue of an insurer's 'confession of judgment' and tendering of policy limits. Such a position as that taken by the Fifth District majority would 'countenance the actions of an insurer that confesses judgment at the last hour in an effort to avoid a trial that would reveal, through the jury's verdict, the true extent of the insured's injuries and provide a basis to award damages in the inevitable bad faith action the insurer foresaw on the horizon."

Finally, the court held that so long as the parties have had the opportunity to appeal timely raised errors in the UM verdict, the determination of damages obtained in the UM action will become a binding element of damages in the subsequent bad faith litigation against the same insurer. The court explained that forcing the parties to relitigate the issue of damages a second time would be a waste of judicial and litigant resources, running the risk of inconsistent verdicts and causing significant judicial inefficiency. "Where the insurer participated fully in the first trial with an opportunity to challenge the plaintiff's evidence and a powerful motive to suppress the amount of damages, Florida's policy is not to give multiple bites at the same apple absent some legal infirmity in the first trial." The court explained that this policy protected both insurers and insureds from the opposing party's trying to relitigate the issue of damages in the bad faith case, concluding "[t]ruly, this is an appropriate example of the classic adage what is good for the goose is good for the gander."

Implications

Fridman is notable for policyholders because it endorses a streamlined approach to UM litigation that, in turn, may lessen the cost of litigation. Either party may be bound by a determination of liability and damages in the UM trial so that only the issue of bad faith liability is to be determined in the subsequent bad faith action. Further, not only does such an approach reduce litigation cost by potentially avoiding a second, duplicative trial, but determining potential damages at the outset may provide the parties with a greater incentive to settle their dispute, thereby avoiding the cost and burden of a second trial altogether.

Also significant for policyholders and insurers alike is confirmation of the trial court's ability to retain jurisdiction to facilitate any subsequent amendments to the pleadings. The court found support in *Allstate Indem. Co. v. Ruiz,* 899 So. 2d 1121, 1129-30 (Fla. 2005), for the proposition that when coverage and bad faith claims are brought simultaneously, both abatement and retaining jurisdiction to determine the insured's right to amend are appropriate procedural tools. This holding may also be important for policyholders outside the UM context. For example, insureds in first-party property cases may request that the trial court retain jurisdiction after a trial on damages to determine the insured's right to add a claim for bad faith. Such a procedure would provide policyholders the benefit of having a judge already well versed in the facts of the case preside over a subsequent bad faith action.

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