Florida Bad Faith Caselaw

- A number of seminal cases on FL Bad Faith that have shaped the issues insurer's must contend with today
- 4 primary cases for discussion:
  - Boston Old Colony Ins. Co. v. Guttierez, 386 So. 2d 783 (Fla. 1980)
  - Powell v. Prudential Property & Cas. Co., 584 So.2d 12 (Fla. 3d DCA, 1991)
  - Snowden v. Lumbermens Mutual Cas. Co., 358 F. Supp 2d 1125 (N.D. Fla., 2003) (applying Florida law)
  - Berges v. Infinity Ins. Co., 896 So.2d 665 (Fla. 2004)

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Boston Old Colony

- FL Supreme Court (1980)
- Brief Facts:
  - Auto accident resulting in excess judgment against insured
  - BF claim filed by injured claimant (Gutierrez) to collect excess judgment amount ($1.4M)
  - FSC actually found in favor of insurer (i.e. No BF!)
- Why discuss case here?
  - Most cited case in FL BF jurisprudence
  - Established the various standards ("duties") owed by an insurer to an insured to avoid BF

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BOC cornerstones

- "An 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".
- "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".

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To be in Good Faith, an Insurer Must:

- advise the insured of settlement opportunities
- advise as to the probable outcome of the litigation
- warn of the possibility of an excess judgment
- advise the insured of any steps he might take to avoid same
- investigate the facts
- give fair consideration to a settlement offer that is not unreasonable
- settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.

Powell v. Prudential

- Third District Court of Appeal (1991)
- Also arose from serious MVA
- Court upheld jury verdict finding Prudential acted in BF in failing to settle claim against their insured

- Several important holdings that help frame BF litigation/tactics today

Powell "takeaways"

- Lack of a formal offer to settle does not preclude finding that insurer's failure to settle was in bad faith
- Bad-faith may be predicated on refusal to disclose policy limits
- Bad-faith failure to settle may be inferred from delay in settlement negotiations if delay is willful and without reasonable cause
- If insured's liability is clear and injuries are so serious that judgment in excess of policy limits is likely, insurer has affirmative duty to **initiate settlement negotiations**

Snowden v. Lumberman's

- Federal District Court (trial level opinion), applying FL law
  - Binding authority???
- Snowden sued their insurer alleging Lumberman's failed to timely tender policy limits on their behalf to settle a wrongful death claim
- Citing to both BOC and Powell, court found that Lumberman's acted in BF towards their insured

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Snowden "takeaways"

- the unwillingness of a victim to settle is a defense which the liability insurer must prove on a bad-faith failure to settle claim
- Under Florida law, there is no mechanical standard for the span of time which must pass before a liability insurer's failure to initiate settlement can be deemed bad faith …
- **… 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**

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Berges v. Infinity

- FL Supreme Court (2004)
  - Reversed a finding of no Bad Faith by the DCA
  - Case took 12 years to go through Courts
- Catastrophic MVA resulting in death of a mother and serious injuries to child
- Unrep'd (?) Father/Widower made claims to Infinity to settle
  - Dispute re: whether father had legal ability to settle claims without being appointed either Personal Representative of Wife's Estate or Legal Guardian for Child

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Berges holdings

- Although the purpose of a liability insurer's obligation to act in good faith is to protect an insured from an excess verdict, an offer to settle the tort claim is not invalid simply because there is a requirement of subsequent court approval of the settlement
- The focus in a bad faith case is not on the actions of the claimant, but on those of the liability insurer in fulfilling its obligations to the insured
- Where material fact remain in dispute, summary judgment is improper
  - i.e. Whether insurer is in BF is always a question of fact to be decided by a jury

Justice Wells' dissent

"I would approve the Second District's fair and reasonable decision. I write further to express my substantial concern about the **effect of the majority's decision in this case.**

I recognize that since this Court's decision in *Boston Old Colony Insurance Co. v. Gutierrez,* **bad faith claims** against liability insurers have served a useful role in the **regulation of Florida's insurers**. I know that there are real incidents of bad faith conduct on the part of insurers in the handling of insurance claims, which are deservedly a basis for bad faith damages. In other words, there is a place for a remedy against insurers that in **real situations** act in actual bad faith.

On the other hand, I must also recognize that there are **strategies** which have developed in the pursuit of insurance claims which are **employed to create bad faith** claims against insurers when, after an objective, advised view of the insurer's claims handling, bad faith did not occur. This is a strategy which **consists of setting artificial deadlines for claims payments and the withdrawal of settlement offers when the artificial deadline is not met**. **The goal of this strategy is to convert a policy purchased by the insured which has low limits of insurance into unlimited insurance Coverage"**.

Casualty Loss Reserve Seminar

The evolution of Florida claims handling due to unfavorable verdicts…

CLRS 2010- Claims Handling

- Serious Injuries- Low limits
  - Triage
  - Aggressive handling from Day 1
  - Keeping insured informed
  - Proactive tenders
  - Releases

CLRS 2010- Claims Handling

- Attorney Involvement:
  - The 627.4137 disclosure response…..
  - Proactive Tender
  - Reactive Tender
    - Multi-conditional Demands
    - Unilateral Demands
    - Standard Form vs. Mutual vs. Agreeable Releases

CLRS 2010- Claims Handling

- Attorney Involvement:
  - Affidavits
    - Course/ Scope Employment
    - Financial
    - Tax returns
    - Waiving PD/BI claims
  - EUO of insureds (possibility)
  - Release:
    - Only driver and not owner

CLRS 2010- Claims Handling

- Attorney Involvement:
  - Time frames vary
  - Mailed to different office and/or adjuster
  - Non responsive to requests for information/clarification
- MCC Situations:
  - Multiple injured parties/ low policy limits

CLRS 2010- Claims Handling

KEEP THE INSURED INFORMED!!!!!

Presentation completed by John Graziano Director of Florida Claims for Infinity Insurance Company.

Casualty Loss Reserve Seminar
September 21, 2010

Personal Auto and Past Court Rulings: Florida

Considerations when establishing reserves for the State of Florida

Al Neis

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Florida tort considerations

- Bad Faith accusations/awards against insurance Cos are expensive.
- When it is decided that there is Bad Faith the policy limits are no longer applicable.
- Insured has a $10,000 policy yet the insuring Co may have a multi-million dollar exposure.
- Plaintiff attorneys generally do not spend a large amount of time developing a case for small amounts, so these are generally big losses.

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- Reflecting these potential exposures in the carried reserves for the State of Florida or any other jurisdiction may be done in different forms.
  - They can be separately identified as case reserves or
  - as a separate aggregate reserve, or
  - as a portion of the total carried reserves!

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- Establishing case reserves for each potential exposure.
  - Does a case reserve for an amount in excess of the policy limit indicate an admission of guilt in the Bad Faith accusation?
  - A Plaintiff Attorney's discovery will attempt to find evidence that the company knows it acted in Bad Faith.

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- Setting a separate aggregate reserve to cover the Company's expected payments in excess of limit is a possibility.
  - According to the IRS, "all reserves need to be actuarially determined".
  - Does the IRS, outside auditor or State Ins Dept need to know there are separate reserves for the exposures?
  - Different techniques are required for this high severity low/frequency exposure versus the techniques for setting reserves for the different policy limits.

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- Including the potential costs in your overall projected needed IBNR or Case Development.
  - A multi-million dollar loss may generate an unusual historic link factor, which generally should be ignored as not indicative of future expected development, but do you miss the potential Bad Faith exposures in the inventory.
  - Will the overall needed reserve decrease by a comparable amount when the large payment is made?
  - Are the Bad Faith costs in excess of the limit covered by an Excess carrier or a Reinsurer?

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Florida tort considerations

- Approaches in estimating the needed reserve when Bad Faith exposures exist, include:
  - Management set a Bulk reserves for total cost
  - Including Bad Faith case reserves and paids in the total data and projecting a total reserve inclusive of these exposures.
    - Project loss cost capped at some limit to used as a base in projecting these excess costs
    - Using a data set of just the Bad Faith losses
    - Using information on individual cases and estimating the cost of future accusations to be raised on existing occurrences

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- One approach is for some "in the know people" to meet with the President, CEO or CFO and determine an amount given to financial reporting to be posted.
  - IRS is not happy with this approach!
  - How does it get allocated to accident year, business unit, Company, etc?
  - Is there any actuarial determination?

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- Project total needed reserves by accident year without any special considerations.
  - Include case reserves established for each potential exposure and include these case reserves and paid data in the total state's history.
- Project total needed reserves by accident year without any special considerations.
- Treat as "normal loss cost" for doing business, thus the reserve for these exposures is inherently included.
- Cannot include these loss costs in data used for rate filings.

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Florida tort considerations

- Project loss cost capped at some limit or threshold, then project the number to exceed threshold and their expected severity using the total data as a base for the excess estimate.
  - The excess amount can be considered the reserve needed to cover the Bad Faith exposures.
  - Severity of the excess amounts are quite volatile!

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Florida tort considerations

- Segment or partition data to only include loss payments in excess of policy limits.
  - Project an expected annual cost from the partition of these losses.
  - Again, the historical link factors are extremely volatile as the total data is small.
  - You can apply techniques used for other high severity/low frequency products.

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- Establish a total reserve on known individual cases and estimating the cost of future Bad Faith accusations to be raised.
  - The more information you have as to these exposures the better equipped you are to establish the needed reserves.
  - This is no different than any other reserve projection.

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- One way to gather more information:
  - After several hours in a bar sit down with the Company attorneys and hear their discussions on the exposures where BF accusations have been made and their legal arguments.
  - Interpret this information and look at prior successes or failures in settling past claims with similar exposures. Gathering the history is subjective.
  - Then apply some probability to each feature incorporating the attorneys' opinions as to the potential cost to settle and information of prior settlements.

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- After listening to the Attorneys
  - Keep a list of the exposures discussed and your estimate of what the costs may be.
  - Minimize the people who know what is estimated for the individual exposures. This will limit the possibility of discovery by the plaintiff as to reserves the Company is carrying.
  - The total amount is then needed to be included in the financial results.
  - Use a consistent approach when posting the reserve as to the accident years and businesses that include these amounts
  - The reserve can still be reported in total in the P&L release.

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- You still need to establish an estimate as to the number or amount of Bad Faith exposures expected for the more recent accident years.
- Generally, the exposures discussed with the attorneys will be for past accident years and the more recent years' exposures probably will not have been identified as of your review.
- This amount should be included in total case reserves as future expected case development.

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- As the Appointed Actuary you need to include these potential costs in your estimate of the Company's liability.
  - The significance naturally does depend on the Company size. Are these exposures part of the consideration in determining the Material Adverse Deviation (MAD)?
  - The relationship with your reinsurer is important as to which of these exposures may pierce the retention and how do they want you to report on them.
  - States of Florida and California have requirements around the inclusion of these costs in rate indications.
  - Defense and Cost Containment (DCC)??

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- Your Company's attorneys are great sources of information and have very interesting arguments.
- These discussions allow you to understand your coverage and the legal jurisdictions with which you are dealing.
- Although they don't do well with the projections you develop and present.

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Florida tort considerations

- Our objective was to inform you of some considerations to be aware of when establishing the needed reserves for the State of Florida
- Thank you!