The Availability of Excess Damages in First-Party Bad Faith Cases: A Distinction Without a Difference

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Abstract

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KEYWORDS: first-party, excess, faith
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I. Introduction

Selling uninsured motorist insurance coverage is big business in the State of Florida. In 1989, insurers earned $451,151,260 as a result of the sale of uninsured motorist policies. This represents nearly five percent of the over $10 billion in premiums earned from all types of coverage.

When an insured purchases uninsured motorist coverage or any other type of insurance, the insured reasonably expects to have any

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1. FLA. STAT. §§ 627.727(1),(3) (1989) state:
   (1) No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motorist coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom . . . .
   (3) For the purposes of this coverage, the term “uninsured motor vehicle” shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
   (a) Is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency; or
   (b) Has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages.

2. 1989 Property & Casualty Statistical Report, 7 FLORIDA UNDERWRITER 36, 44-45 (July 1990). (Although references within the survey refer to “Priv. Pass. Auto.” the editor has informed this Author that the totals listed refer solely to uninsured motorist coverage.).

3. Id. at 37, 44-45.

legitimate claim promptly paid. Unfortunately, the insured may be dis-
appointed to find that his friendly insurer who holds him in its “good
hands” is applying the squeeze by refusing to pay a legitimate unin-
sured motorist claim. Until recently, the insurer, who claimed to be
“like a good neighbor,” could collect uninsured motorist premiums, de-
lay or refuse to pay a valid claim for the limits of the policy, and if
faced with a judgment in excess of the policy limits, pay only the policy
limits without liability for the excess.

In 1989, the United States District Court for the Southern District
of Florida decided Jones v. Continental Insurance Co., which permit-
ted insureds to recover damages in excess of the stated policy limits, as
a matter of law, in a first party bad faith action. Another federal dis-
trict court has refused to apply Jones insofar as it permits recovery of
excess damages as a matter of law, holding instead that these damages
are recoverable, if proven to have been causally related to the bad

Co. v. Barile Excavating & Pipeline Co., 685 F. Supp. 839 (M.D. Fla. 1988) (insurance company acting as surety on a performance bond); Forston v. St. Paul Fire and
Marine Ins. Co., 751 F.2d 1157 (11th Cir. 1985) (malpractice insurer-claim dismissed as premature); State Farm Fire & Cas. Co. v. Palma, 555 So. 2d 836 (Fla. 1990)
(personal injury protection benefits pursuant to section 627.736 (1983)); Kujawa v. Manhattan Nat. Life Ins. Co., 541 So. 2d 1168 (Fla. 1989) (life insurance); Schimmel
v. Aetna Cas. & Surety Co., 506 So. 2d 1162 (Fla. 3d Dist. Ct. App. 1987) (property
damage insurance covering household goods).

5. The author does not suggest that any connotation be placed on the use of the
male pronoun in gender neutral situations. “The use of he as pronoun for nouns em-
bracing both genders is a simple, practical convention rooted in the beginnings of the
English language. He has lost all suggestion of maleness in these circumstances.” W.

the insured to . . . put him in ‘good hands’ . . . or to be ‘on his side’ hardly suggests that
the insurer will abandon the insured in his time of need.”; See also Weese v. Nation-
contract of insurance, he buys insurance—not a lot of vexatious, time-consuming, ex-
pensive litigation with his insurer.”)(quoting Hayseeds, Inc. v. State Farm Fire and
Cas. Ins. Co., 352 S.E.2d 73 (W.Va. 1986)).


8. Bad faith is:
The opposite of “good faith,” generally implying or involving actual or
constructive fraud, or a design to mislead or deceive another, or a neglect
or refusal to fulfill some duty or some contractual obligation, not prompted
by an honest mistake as to one’s rights or duties, but by some interested or
sinister motive.

faith.  

Likewise, in the Florida state courts, decisions are in conflict. In *Wahl v. Insurance Co. of North America*  

10 the court permitted the recovery of excess damages as a matter of law,  

11 and in *McLeod v. Continental Insurance Co.*,  

12 the court refused to direct a verdict that excess damages are, as a matter of law, recoverable, and further refused to instruct the jury similarly.  

13 The questions whether excess damages are recoverable and if so, whether they are recoverable as a matter of law are currently awaiting appellate resolution.  

A cause of action for bad faith is not new in Florida. Indeed, it has existed in the third party context for over fifty years.  

14 Florida courts have defined a third party bad faith action as  

one brought by an insured against his insurer because of its failure to settle a third party tort claim for a reasonable sum . . . where a reasonably prudent person would do so, and the wrongful refusal to settle exposes the insured to liability in an amount in excess of the policy limits. . . .  

The injured third party, after becoming a judgment creditor, may then institute suit against the tortfeasor's liability insurer for the portion of the judgment which exceeds the insured's available coverage based upon a violation of Florida Statute section 624.155(1)(b)(1). This third party is, in effect, a third party beneficiary of the insurance contract. 


10. No. 87-1187-CA(17) (Fla. 19th Cir. Ct. 1987).  

11. No. 87-1187-CA(17), Excerpt of Proceedings at 20 (Fla. 19th Cir. Ct. 1987).  


14. McLeod v. Continental Ins. Co., 15 Fla. L. Weekly 2785 (1990)(The Second District Court of Appeal certified the following question to the Supreme Court as one of great public importance: WHAT IS THE APPROPRIATE MEASURE OF DAMAGES IN A FIRST-PARTY ACTION FOR BAD FAITH FAILURE TO SETTLE AN UNINSURED MOTORIST INSURANCE CLAIM?). *Id.* at 2787. On January 10, 1991, the Eleventh Circuit Court of Appeals certified the identical question to the Florida Supreme Court in Jones v. Continental Insurance Co., 920 F.2d 847 (11th Cir. 1991).  


between the defendant and the defendant's insurer.\textsuperscript{17} Throughout the United States, courts have rendered a plethora of decisions in bad faith cases - particularly third party bad faith cases. The same is not true of first party bad faith, which has arguably existed for less than 20 years in the United States and only since 1982\textsuperscript{19} or 1983\textsuperscript{20} in Florida.

While the insurer/insured relationship in third party bad faith cases is relatively settled,\textsuperscript{21} the same cannot be said for the insurer/insured relationship in first party bad faith cases,\textsuperscript{22} where an insured seeks payment of his own claim from his insurance company. Within the past decade, cases such as \textit{Jones, Wahl, McLeod}, and \textit{Cocuzzi v. Allstate Insurance Co.}\textsuperscript{23} have drawn the attention of the insurance industry and the trial bar. Of particular interest to both plaintiffs and defendants are those decisions addressing the damages recoverable in a first party bad faith case, especially damages in excess\textsuperscript{24} of the uninsured motorist coverage.

This Note will first provide a brief overview of bad faith law in the United States and particularly in Florida. The overview will begin with

\textsuperscript{17} Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491, 495 (Fla. 3d Dist. Ct. App. 1989).
\textsuperscript{18} First party bad faith exists where “the insured is seeking payment of his own claim from the insurance company.” \textit{Jones v. Continental Ins. Co.}, 670 F. Supp. 937, 940 (S.D. Fla. 1987).
\textsuperscript{19} \textsc{Fla. Stat.} § 624.155 (1982).
\textsuperscript{23} No. 89-613-Civ-ORL-19 (M.D. Fla. 1989).
\textsuperscript{24} The author addresses only those damages assessed in excess of the stated policy limits. Excess damages are those types of damages which exceed the policy limits but would be covered under the terms of the policy as opposed to punitive damages assessed as a penalty for prohibited conduct. \textit{See Fla. Stat.} § 624.155(4) (1989).
third party bad faith through its evolution into first party bad faith, including a discussion of the availability of excess damages - essential to an understanding of the Jones v. Continental Insurance Co.\textsuperscript{25} cases. Next, this Note will examine the court's opinions in Jones along with reference to Cocuzzi, McLeod and Wahl. Finally, the impact of Jones as well as prior and subsequent cases and section 624.155 will be analyzed. The author will present an argument that the language of section 624.155 leaves no other reasonable conclusion except that excess damages are recoverable, as a matter of law, in first party bad faith cases and that Florida courts should permit insureds to recover excess damages in first party bad faith cases.

II. Background

Uninsured motorist coverage, also referred to as underinsured motorist coverage,\textsuperscript{26} is unlike any other type of insurance. In Florida,\textsuperscript{27} as in most states,\textsuperscript{28} uninsured motorist coverage is mandatory in all insurance policies, subject to the express rejection of such coverage by the insured.\textsuperscript{29} Uninsured motorist coverage has been described as a "hybrid" or a blending of first and third party insurance.\textsuperscript{30} It bears a resemblance to first party insurance, specifically medical insurance, but it also functions in the third party form because it becomes effective when the uninsured motorist is legally at fault.\textsuperscript{31} Uninsured motorist coverage then becomes, in effect, the liability insurance coverage for the uninsured motorist.

A clear understanding of the current status of Florida first party bad faith\textsuperscript{32} law must begin with a brief review of the principles of Flor-

\textsuperscript{26} FLA. STAT. § 627.727(3)(b) (1989).
\textsuperscript{27} Id. § 627.727 (1989).
\textsuperscript{28} All states require some form of uninsured motorist coverage. The District of Columbia, although not requiring uninsured motorist coverage to be purchased by insureds, does require insurers to contribute to an uninsured motorist fund. See, D.C. CODE ANN. § 35-2114 (1988).
\textsuperscript{29} FLA. STAT. § 627.727(1) (1989).
\textsuperscript{30} KEETON, INSURANCE LAW § 4.9(e) (1988).
\textsuperscript{31} Id.; Florida Statute section 627.727(1) (1989) requires uninsured motorist coverage "for the protection of persons insured hereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . ." 32. \textit{See supra} note 18 and accompanying text.
ida third party bad faith law. The Florida Supreme Court, in *Auto Mutual Indemnity Co. v. Shaw*, first pronounced that an insurance contract contains an implied covenant of good faith and fair dealing between the parties in the context of a third party claim. The insurer, in conducting the defense of its insured, must exercise that degree of care which a person of ordinary care and prudence would exercise in the management of that person's own business.

A. Duty of Good Faith Extended to First Parties

In 1980 the Florida Supreme Court expanded the parameters of bad faith in *Boston Old Colony Insurance Co. v. Guttierrez*. Building on the fiduciary relationship announced in *Shaw*, the court in *Boston Old Colony* recognized that in a third party situation, where the insured's fate was in the hands of the insurer, the insurer must “exercise such control and make such decisions in good faith and with due regard for the interests of the insured.” If the insurer breaches this common law duty of good faith in a third party situation, the insurer may be liable for amounts in excess of the policy limits and for punitive damages, if the insurer's conduct so warrants. In Florida, there-

35. *Id.* at 830, 184 So. at 859.
36. *Id.*
38. 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.

*Id.* at 785.
39. *Id.; see also* Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475 (5th Cir. 1969); The *Boston Old Colony* court recognized that the good faith duty required an insurer to “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.” *Boston Old Colony*, 386 So. 2d at 785.
fore, an insured in a third party bad faith action may recover not only amounts in excess of the policy limits, but also extra-contractual damages.

In contrast to third party bad faith, there was no common law cause of action for first party bad faith prior to 1982. In Baxter v. Royal Indemnity Co., the First District Court of Appeal distinguished first party insurance from third party insurance, stating that the fiduciary relationship interest in the third party scenario was not present in the first party context. Rather, the relationship was actually that of debtor and creditor where the parties occupied an adversarial relationship toward one another, preventing any extra-contractual recovery by the insured. Justice Dekle, in his dissent, pointed out the fallacy of disparate treatment of first and third party bad faith:

[I]t would be anachronistic to hold that an insurer owes a duty of good faith in handling the liability claim of a third person totally unrelated to the parties to the contract of insurance while at the same time holding that the insurer owed no such obligation of good faith to its own insured, who has paid premiums . . . for the specific purpose of protecting himself . . .


43. Extra-contractual damages typically wind up in the pocket of the insured as opposed to a third party. Neyer, supra note 42.


45. Id. at 656.

46. Id. at 657.

47. Id.


49. Baxter, 317 So. 2d at 731 (Dekle, J., dissenting).
With one exception, it remained the rule in Florida until 1982 that a cause of action for first party bad faith did not exist. In 1983, the Florida Legislature enacted section 624.155, which has come to be known as the "bad faith" statute. This statute provides that "[a]ny person may bring a civil action against an insurer when such person is damaged by several specifically delineated acts. For purposes of first party bad faith in general and for this note in particular, section 624.155(1)(b)1 is the focus. This section permits any person to bring an action against an insurer when damaged by the insurer "[n]ot 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 and with due regard for his interests."

However, the insurer is not left without protection. As a condition precedent to a bad faith action pursuant to section 624.155, the insured must give 60 days prior notice to the insurer and the Department of Insurance on a form provided by the Department of Insurance. This notice must delineate the specific statutory provision allegedly violated, the facts and circumstances of the violation, the name of any individuals involved in the alleged violation, reference to any specific relevant policy language and a statement that the notice is given in order to pursue the remedy authorized by section 624.155. With the passage of section 624.155, Florida had codified the previously announced common law cause of action for third party bad faith.

But this codification had little practical effect on the common law prohibition against first party bad faith. It was a year until the federal courts in Florida began recognizing a statutory cause of action for first

51. FLA. STAT. § 624.155 (1982).
52. FLA. STAT. § 624.155(1).
53. FLA. STAT. § 624.155(1)(b)1.
54. FLA. STAT. §§ 624.155(2)(a),(b).
55. FLA. STAT. § 624.155(2)(b).
56. FLA. STAT. § 624.155(2)(b)1.
57. FLA. STAT. § 624.155(2)(b)2.
58. FLA. STAT. § 624.155(2)(b)3.
59. FLA. STAT. § 624.155(2)(b)4.
60. FLA. STAT. § 624.155(2)(b)5.
party bad faith under section 624.155(1)(b)1. The first such decision was *Rowland v. Safeco Insurance Co.* The plaintiffs alleged that Safeco had violated section 624.155(1)(b)1 when it refused to pay a claim for uninsured motorist benefits. Safeco moved to dismiss, alleging plaintiffs failed to state a cause of action. In deciding whether a cause of action existed, the court acknowledged that prior to the enactment of section 624.155 there was no first party bad faith absent any independent tort. However, section 624.155 created such a cause of action for first party bad faith because section 624.155(1)(b)1 enabled any person to sue an insurer. In reaching its conclusion, the court relied on supporting dicta from *Industrial Fire & Casualty Insurance Co. v. Romer.* The *Romer* court stated:

> Although it need not be decided here, it is arguable that with the passage of this legislation, Florida has joined the ranks of those states which impose an implied covenant of good faith and fair dealing in insurance contracts. *See, e.g., Gruenberg v. Aetna Ins. Co., 9 Cal.3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973).* If this is so, then proof of a breach of the covenant would permit recovery in tort in first party, as well as third party, insurance claims.

The *Rowland* court also made reference to legislative history which arguably showed a legislative intent to create a cause of action for first party bad faith. The House Committee On Insurance stated in its 1982 Staff Report that section 624.155

> [S]ubparagraph (f) (1.) requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that a company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies.

This language, it was urged, evinced the legislature's intent to create a

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63. *Id.* at 614.
64. *Id.* at 615 (*emphasis added*).
65. 432 So. 2d 66 (Fla. 4th Dist. Ct. App. 1983).
66. *Id.* at 69 n.5 (Hurley, J., concurring).
67. STAFF REPORT - 1982 INSURANCE CODE SUNSET REVISION (HB 4F; As Amended by HB 10G) at 12 (June 3, 1982).
first party cause of action for bad faith. The court held that even in a first party case, the insured was entitled to the damages provided for in section 624.155(3). What the court failed to address is the equally compelling language which supports the applicability of section 624.155 to first party actions. Specifically, section 624.155(2)(b) provides that "[i]f the person bringing the civil action is a third party claimant, he shall not be required to reference the specific policy language if the insurer has not provided a copy of the policy to the third party claimant pursuant to written request." This language is conspicuously absent from first party decisions relying in whole or in part on the plain language of the statute. The logic is inescapable. Why would the Legislature draft legislation (urged by the insurer not to apply to first party cases) and specifically exclude compliance with section 624.155(2)(b)4 for third party claimants if section 624.155 did not apply to first party claimants as well? Accepting the insurer's argument leads to the illogical conclusion that because section 624.155 applies only to third party cases and section 624.155(2)(b)4 excuses third party claimants from compliance with that subsection, no one need comply with the provisions of section 624.155(2)(b)4. The Legislature intended that section 624.155 apply to first and third party causes of action and excuse only third party claimants from compliance with section 624.155(2)(b)4.

In 1986, the United States District Court for the Middle District of Florida decided United Guaranty Residential Insurance Co. v. Alliance Mortgage Co. The case was before the court on United Guaranty's motion to dismiss Alliance's counterclaim alleging breach of contract and bad faith. Alliance argued that although there existed no common law first party bad faith, the enactment of section 624.155(l)(b)1 did provide such a cause of action. The court recognized the lack of controlling state court decisions, and looked to the Romer and Rowland opinions.

68. Rowland, 634 F. Supp. at 615.
69. Id.
73. Id.
74. Id. at 340.
75. Romer, 432 So. 2d 66.
United argued that section 624.155 did not specifically refer to first party claims, and therefore, only codified third party bad faith law. The court rejected that argument, based upon the language of section 624.155(1) and the holding in Baxter.77 Furthermore, application of section 624.155 to first and third party claims was consistent with the legislative scheme to impose liability on insurers who act "inequitably vis-a-vis their insureds."78 The Legislature chose not to exclude first party coverage from section 624.155(1)(b)(1) and therefore stated, as set forth in the 1982 Staff Report "[t]his section would apply to all insurance policies."79

The first Florida state court decision permitting a first party bad faith cause of action was Opperman v. Nationwide Mutual Fire Insurance Co.80 In Opperman, the court held that section 624.155 created a first party cause of action, and further, that the duty of the insurer to act in good faith in the first party situation was akin to the duty to act in good faith when handling third party claims.81 Subsequent Florida decisions, both state82 and federal,83 followed Romer, Rowland and Opperman.

The courts had now solidified the common law concept of first party bad faith. The Legislature affirmed the existence of a first party cause of action when it passed section 624.155. Despite the settling of the issue of availability of a first party action under section 624.155 by the courts and Legislature, insurers continue to maintain that no such

78. Id. at 341.
79. STAFF REPORT - 1982 INSURANCE CODE SUNSET REVISION (HB 4F; As Amended by HB 10G) (June 3, 1982).
80. 515 So. 2d. 263 (Fla. 5th Dist. Ct. App. 1987), cert. denied, 523 So. 2d. 578 (Fla. 1988).
81. Id. at 266.
cause of action exists.\textsuperscript{84}

B. Damage Assessment in First Party Bad Faith Actions

The issue of what types of damages are proper in a first party bad faith case is not as settled. Florida Statute section 624.155(3) provides, "[u]pon adverse adjudication at trial or upon appeal, the insurer shall be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff."\textsuperscript{86} The legislative history of section 624.155(3) implies that the legislative intent was to permit the recovery of judgments in excess of the policy limits, and that this applies to all insurance policies.\textsuperscript{86} Yet, Florida court decisions conflict as to whether damages in excess of the policy limits are available in first party bad faith cases, and if so, whether they are available as a matter of law\textsuperscript{87} or whether they must be proven.\textsuperscript{88}

In the first party bad faith case, the insured typically demands that the insurer settle his claim for a specific dollar value. The insurer refuses to settle and either party demands arbitration or they litigate the claim.\textsuperscript{89} If the insured receives an arbitration award or jury award

\textsuperscript{84} Brief of Appellant at 25, Continental Ins. Co. v. Jones, No. 89-5911 (11th Cir. 1989).
\textsuperscript{85} FLA. STAT. § 624.155(3) (1989).
\textsuperscript{86} STAFF REPORT - 1982 INSURANCE CODE SUNSET REVISION (HB 4F, as amended by HB 10e)(emphasis added).
\textsuperscript{87} Jones, 716 F. Supp. 1460; Wahl, No. 87-1187-CA(17) (Fla. 19th Cir. Ct. 1987).
\textsuperscript{89} As a procedural caveat, it must be noted here that as of the date of the writing of this note, there exists a conflict as to whether a bad faith claim made pursuant to section 624.155 must be filed contemporaneously with the underlying claim for first party benefits. See, e.g., Schimmel v. Aetna Cas. & Sur. Co., 506 So. 2d 1162 (Fla. 3d Dist. Ct. App. 1987) (filing of bad faith claim subsequent to breach of property insurance contract claim barred by rule against splitting causes of action); Blanchard v. State Farm Mut. Auto Ins. Co., 903 F.2d 1398 (11th Cir. 1990) (in view of Schimmel and other Florida cases indicating a division of reasoning, the Eleventh Circuit certified the following questions to the Florida Supreme Court:
1. DOES AN INSURED'S CLAIM AGAINST AN UNINSURED MOTORIST CARRIER UNDER SECTION 624.155(1)(b)1., FLORIDA STATUTES, FOR ALLEGEDLY FAILING TO SETTLE THE UNINSURED MOTORIST CLAIM IN GOOD FAITH ACCRUE BEFORE THE CONCLUSION OF THE UNDERLYING LITIGATION FOR

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in excess of the policy limits, the damages sought are referred to as the "shortfall",\textsuperscript{90} that is, the difference between the policy limits and the awarded amount.

The first Florida decision to implicitly address the issue of excess damages was \textit{Opperman v. Nationwide Mutual Life Insurance Co.}\textsuperscript{91} In \textit{Opperman}, the insureds received an arbitration award in excess of their uninsured motorist limits and sued the insurer for bad faith refusal to settle.\textsuperscript{92} In arriving at the holding that a first party action existed under the statute, the court examined the legislative history\textsuperscript{93} and other decisions in Federal courts,\textsuperscript{94} and found that the statute clearly provided a first party cause of action for bad faith.\textsuperscript{95} Implicit in the court's opinion is that the remedy for first party bad faith is the same as for third party bad faith, that is, the excess award.\textsuperscript{96}

A Florida circuit court case broke ground by holding that the shortfall was the proper amount of damages in first party bad faith cases. In \textit{Wahl v. Insurance Co. of North America},\textsuperscript{97} the insured was rendered comatose as the result of an automobile accident.\textsuperscript{98} Although the insurer recognized the value of the policy to be in excess of the policy limits, it made no offer to settle.\textsuperscript{99} The matter was arbitrated, resulting in an excess award.\textsuperscript{100} The judge heard arguments and held that the shortfall was recoverable as a matter of law upon proof of bad

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\textbf{THE CONTRACTUAL UNINSURED MOTORIST INSURANCE BENEFITS?}

2. IF SO, IS JOINDER OF THE CLAIM UNDER SECTION 624.155(1)(b)1. IN THE UNDERLYING LITIGATION FOR CONTRACTUAL UNINSURED MOTORIST BENEFITS PERMISSIBLE?

3. IF SO, IS JOINDER OF THE SECTION 624.155(1)(B)1. CLAIM WITH THE CONTRACTUAL CLAIM MANDATORY?

\textit{Blanchard}, 903 F.2d at 1400.


91. 515 So. 2d 263 (Fla. 5th Dist. Ct. App. 1987) \textit{rev. denied}, 523 So. 2d 578 (Fla. 1988).

92. \textit{Id.} at 264.

93. \textit{Id.} at 265.

94. \textit{Id.}

95. \textit{Id.}

96. Brief of Appellant, \textit{supra} note 90, at 29.

97. No. 87-1187-CA(17) (Fla. 19th Cir. Ct. 1987); Brief of Appellant at 29, \textit{McLeod}, 15 Fla. L. Weekly 2785.

98. \textit{Id.}


100. \textit{Id.}
faith. At least one other Florida circuit court has held similarly, as has one federal district court.

Another federal district court has held that although the shortfall may be a proper element of damages, it is not available as a matter of law, but must be proven in accordance with traditional tort and contract law. A Florida circuit court has refused to instruct the jury that the shortfall is, as a matter of law, the appropriate measure of damages.

III. First Party Bad Faith Damages as Applied in Jones v. Continental

Jones v. Continental Insurance Co. was one of the first decisions, applying Florida law, which permitted insureds to recover amounts in excess of their uninsured motorist coverage limits for bad faith refusal to settle an uninsured motorist claim. Continental insured Thomas and Mary Ann Jones under an uninsured motorist policy. This policy was in effect on January 29, 1984, when the Jones' daughter Karen was killed when the car in which she was a passenger was struck by a drunk driver. The uninsured/underinsured limits of coverage were $300,000. Because the policy covered two of the Jones' automobiles, Florida law permitted stacking of limits based upon the number of vehicles. Therefore, there was a total of $600,000 in uninsured motorist benefits available.

101. Id. at 30-31.
102. Order on Motion for Summary Judgment at 4, Fidelity & Cas. Co. of New York v. Taylor, No. 84-18844-CA (02) (Fla. 11th Cir. Ct. 1984).
103. 716 F. Supp. at 1460.
105. Brief of Appellant, supra note 90, at 20.
106. 716 F. Supp. 1456.
107. See supra note 24 and accompanying text.
108. FLA. STAT. §§ 624.155(1),(3).
109. FLA. STAT. § 624.155(1)(b)1.
111. Brief of Appellees at 1, Continental Ins. Co. v. Jones, No. 89-5911 (11th Cir. 1989).
112. FLA. STAT. § 627.727(3)(b).
113. Brief of Appellant, supra note 84, at 2.
114. FLA. STAT. § 627.4132.
The Plaintiffs made a written demand on Continental for the entire $600,000 limit. Their attorney sent a five page letter to Continental detailing: (1) Karen’s lack of fault because she was a passenger; (2) the limited insurance available from the tort feasors; and (3) the emotional loss sustained by Mr. and Mrs. Jones.” Their counsel received a reply denying the demand for the $600,000 limits and advising them to get ready to arbitrate. Continental, on its own evaluation of the claim, established a $600,000 reserve. The Plaintiffs demanded arbitration and their depositions were taken. A scrapbook highlighting important points in Karen Jones’ life was provided to Continental. “Thus, by the middle of May, Continental knew that Karen was a model daughter—she was a college level tennis player, a respected piano player, an excellent student, and she had just transferred colleges just to be close to her parents.” Even Continental’s counsel’s evaluation of the case detailed the risks of litigating the claim:

In a letter dated May 7, 1984 Continental’s own counsel evaluated the case as follows: ‘[B]oth parents made very good witnesses. The girl is a model daughter in all respects. The scrapbooks and photo albums present a detailed emotional picture of their daughter’s life, and the accident is one of aggravated liability.’

Still, there was no offer of settlement. Continental failed to make an offer until the eve of arbitration, when Continental offered $250,000 per parent for a total of $500,000. The Plaintiffs rejected this offer and the matter proceeded to arbitration.

During the arbitration, Continental defended the claim by alleging that Karen was negligent for not wearing a seat belt. The arbitrators rendered a $1,000,000 award, $500,000 per parent. Continental petitioned to limit the amount of the arbitration award to the $600,000

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116. Id.
117. Brief of Appellees, supra note 111, at 1-2.
118. Id. at 2.
119. Id.
120. Brief of Appellees, supra note 111, at 2.
121. Id.
122. Id.
123. Id. at 3.
124. Id.
125. Id.
126. Id.
policy limit, and the Plaintiffs challenged the petition to modify claiming that the award was not defective.\textsuperscript{127} The trial court entered judgment against Continental for the policy limits.\textsuperscript{128}

The Plaintiffs filed a bad faith action in state court against Continental seeking damages for Continental's alleged bad faith refusal to settle their claim for the death of their daughter.\textsuperscript{129} While the action was pending on Continental's motion to dismiss,\textsuperscript{130} Continental removed the action to federal district court.\textsuperscript{131} Continental claimed that section 624.155 did not recognize an action for bad faith involving a claim for first-party benefits such as uninsured motorist coverage.\textsuperscript{132} The Plaintiffs argued to the contrary, that the bad faith statute applied equally to first and third party claims alike.\textsuperscript{133} The judge agreed with the Plaintiffs,\textsuperscript{134} and in his Opinion and Order on Continental's Motion to Dismiss held that section 624.155(1)(b)\textsuperscript{1}, which made it illegal for an insurer not to attempt in good faith to settle claims, applied to first party actions as well.\textsuperscript{135}

The case proceeded to trial on the bad faith claim and at the close of evidence, the Plaintiffs moved for a directed verdict\textsuperscript{136} asserting that as a matter of law, if Continental was found to have violated section 624.155(1)(b)\textsuperscript{1}, they were entitled to the excess arbitration award of $366,750.\textsuperscript{137} The court ruled that this was a proper element of damages to be submitted to the jury.\textsuperscript{138} A verdict form comprised of special interrogatories was submitted to the jury.\textsuperscript{139}

\textsuperscript{127} Jones, 716 F. Supp. at 1457.

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Continental moved to dismiss the first party bad faith claim, maintaining that section 624.155 did not recognize a first party cause of action for bad faith, a position that Continental has steadfastly maintained, even in the instant appeal. Brief of Appellant, \textit{supra} note 84, at 4.


\textsuperscript{132} \textit{See supra} note 120 and accompanying text.

\textsuperscript{133} Brief of Appellant, \textit{supra} note 84, at 4.

\textsuperscript{134} 716 F. Supp at 1457.

\textsuperscript{135} Brief of Appellant, \textit{supra} note 84 at 4.

\textsuperscript{136} \textit{Fed. R. Civ. Pro.} 50(a).

\textsuperscript{137} Jones, 716 F. Supp. at 1457-58.

\textsuperscript{138} Id. at 1458.

\textsuperscript{139} The special interrogatories submitted and the jury's responses (in \textit{italics}) are set forth in their entirety as follows:

1. Do you find from a preponderance of the evidence that Continental
The jury returned a special verdict against Continental, finding that it did not attempt to settle the Jones’ claim in good faith. However, the jury found “zero” damages. The Plaintiffs filed motions for judgment notwithstanding the verdict and for new trial. The judgment notwithstanding the verdict motion concerned the determination of damages and requested judgment be entered for $366,750.00. The motion for new trial alleged that the damages assessed, or rather, not assessed, were grossly inadequate and contrary to the manifest weight of the evidence.

After stating the proper standard for deciding a motion for judg-
ment notwithstanding the verdict, the court succinctly presented the issue of what the proper measure of damages should be in a first party bad faith insurance action under section 624.155. This was the same issue raised by Continental in its motion for partial summary judgment and the Plaintiffs in their post trial motions. The court noted that in third party bad faith actions, it was unassailable that damages may properly include amounts in excess of the stated policy limits.

The court went on to note that first party bad faith actions were, until 1982, distinguished from the third party action; there was no fiduciary relationship in first party claims and as a result, no cognizable common law action for bad faith. In 1982, the Florida Legislature enacted the “Bad Faith Statute,” and thereafter, both state and federal courts have extended a bad faith cause of action to first party claims.

The court looked first to the language of the statute and then to the legislative history, and deduced that the full contours of the statute should be determined by Florida insurance law including third party doctrine. The court analyzed other Florida courts’ construc-
tions of section 624.155 as applicable to first party bad faith claims and those courts going further, holding that an excess award may be recoverable in a first party action. The court used this analysis to form the basis for granting Jones' motion for judgment not withstanding the verdict.

The court determined that the Plaintiffs were entitled, as a matter of law, to the $366,750 excess damages as well as prejudgment interest. Continental has appealed both of the court's rulings that: (1) there exists a first party bad faith cause of action; and (2) that the proper measure of damages in a first party bad faith case is the difference between the policy limits and arbitration award.

IV. In Defense of the Bad Faith Statute

Once an uninsured motorist carrier is determined to have acted in bad faith by failing to settle a claim "when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests," the issue then becomes one of a determination of damages. Specifically with regard to the first-party bad faith action, the question is whether the damages assessed against the insurer and in favor of the insured may exceed the policy limits. The legislative history of section

159. Id. The court analyzed: Wahl, No. 87-1187-CA(17); Fidelity, No. 84-18844-CA(02); Opperman, 515 So. 2d 263 (Fla. 5th Dist. Ct. App. 1987); United Guar., 644 F. Supp. 339 (M.D. Fla 1986).

160. The court ordered, \textit{inter alia}:

ORDERED AND ADJUDGED that Plaintiff's Motion for Judgment Notwithstanding the Verdict be, and the same is, hereby GRANTED; the damage verdict entered by the jury in this cause on April 20, 1989 is hereby SET ASIDE and JUDGMENT is hereby entered in favor of the Plaintiff and against Defendant in the amount of $366,750.00 with prejudgment interest on this liquidated sum at a rate specified by law (12\% per annum) commencing from the date of the state court judgment (October 31, 1984). Plaintiff is also awarded a judgment for COSTS OF THIS ACTION TO BE TAXED BY THE CLERK OF THIS COURT upon the filing of an appropriate bill of cost form.

\textit{Jones}, 716 F. Supp. at 1460.

161. Id.

162. Id.

163. \textit{See Jones}, 920 F.2d 847.

164. FLA. STAT. § 624.155(1)(b)1.

165. FLA. STAT. § 624.155(3).

166. \textit{See supra} note 18 and accompanying text.
624.155, current Florida decisions, sound social policy concerns, and reference to decisions in other states present a compelling rationale that damages in excess of the policy limits should be permitted in a first party bad faith action under section 624.155(1)(b)1.

Florida's bad faith statute is a remedial statute, intended to provide a remedy for first party bad faith where none existed before.167 The purpose of the statute is to provide redress for insureds and to impose damages upon insurers as a result of their bad faith. Remedial statutes, like section 624.155 are required to be liberally construed in favor of those parties for whose benefit the statute was enacted. Because section 624.155 provides a first party cause of action, the remedy, excess damages, is likewise applicable.168 Prior to the enactment of section 624.155, first party insurers could intentionally refuse to pay first party benefits with impunity.169

Florida Statute section 624.155(3) makes the insurer "liable for damages . . . ."170 Since the term "damages is undefined, and is susceptible to varied definitions,"171 each with its own unique implications," resort to the legislative history of section 624.155 is necessary to determine the intent of the Legislature with respect to the definition of "damages" as used within section 624.155(3).172

167. A remedial statute "is designed to correct existing law, redress existing grievance, or introduce regulations conducive to the public good; it may also be defined as a statute giving a party a mode of remedy for a wrong where he had none, or a different one, before." Adams v. Wright, 403 So. 2d 391, 394 (Fla. 1981). Prior to the enactment of section 624.155, there was no common law cause of action for first party bad faith. See supra note 36 and accompanying text.


171. Judge Friedman specifically held that, "[i]n reviewing F.S. section 624.155, the Court is of the opinion that the Statute is not clear or unambiguous." Fidelity & Cas. Co. of New York v. Taylor, No. 84-18844-CA(02) (Fla. 11th Cir. Ct. 1984), Order on Motion for Summary Judgment, at 3 (emphasis added).

172. According to the court in Foley:
If the language employed by the Legislature in the law itself is clear . . . the Legislative intent is to be found therein . . . Of course, if the phraseology of the act is ambiguous or is susceptible of more than one interpretation, it is the court's duty to glean the legislative intent from a consideration of the act as a whole, 'the evil to be corrected, the language of the act
Although the Legislative history of section 624.155 is brief, it specifically addresses the issue of excess damages:

"Subparagraph (f) (1.) requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that a company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies." 173

This history combined with the plain language of section 624.155, cannot possibly convey more clearly the intent of the drafters that Florida's Bad Faith Statute applies to first party actions. 174 The language is as plain as it could possibly be. 175

Therefore, since the drafters of the statute intended, and court decisions held, 176 that the Legislature intended to make section 624.155 applicable to the first party actions as well as third party actions, it is logical that the Legislature intended to apply the same remedy. 177 As further evidence of the Legislature's intent that excess damages be recoverable in first party actions, section 624.155 was amended on June 1, 1990. 178

Amending section 624.155 F.S.: clarifying Legislative intent with respect to the issues of . . . the definition of damages; . . . (7) . . . The damages recoverable pursuant to this section shall include those damages which are reasonably foreseeable as a result of a

. . . the history of its enactment, and the state of the law already in existence bearing on the subject . . . .

Foley v. State, 50 So. 2d 179, 184 (Fla. 1951).

173. STAFF REPORT - 1982 INSURANCE CODE SUNSET REVISION, at 12 (HB 4F; as amended by HB 10e June 3, 1982).


175. Id.


177. Brief of Appellees, supra note 111, at 16; Telephone interview with Eric Tilton, Esquire, Editor-In-Chief of the 1982 version of section 624.155 and member of the drafting committee for the 1990 amendments effective October 1, 1990 (October 1, 1990). Mr. Tilton expressed the opinion that the language could not have been made any clearer to apply the bad faith statute to first and third party claims alike.

specified violation of this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits.\textsuperscript{179}

Thus, the Legislature again pronounced that excess damages are available in actions under section 624.155 and because section 624.155 applies to first and third party claims, so does the availability of excess damages.\textsuperscript{180}

The insurer is not without protection under the statute. The insurer is given sixty days, from the time the insured gives notice to the Department of Insurance and the insurer of the alleged violation, to conduct its investigation, evaluate the case and respond to offers of settlement.\textsuperscript{181} If the damages are paid or the alleged violation corrected within this sixty day period, no action for bad faith is permitted.\textsuperscript{182} This period is important to any action for bad faith. The conduct of the insurer throughout the entire period up to trial or arbitration is the gauge of bad faith.

In Jones,\textsuperscript{183} despite the overwhelming evidence of no fault on the part of Karen Jones,\textsuperscript{184} the limited insurance available from the tort feasor,\textsuperscript{185} the potential for excess damages, and the insurer's attorney's evaluation of the case,\textsuperscript{186} Continental never responded to settlement demands, even with a one dollar offer, until the eve of arbitration.\textsuperscript{187} Similarly, in Wahl v. Insurance Co. of North America (INA),\textsuperscript{188} the insured was comatose for two weeks with resultant brain damage.\textsuperscript{189} Despite INA's evaluation of the value of the case as being in excess of the policy limits, it made no offer during pre-suit negotiations or during

\begin{thebibliography}{199}
\bibitem{179} Id. (emphasis added).
\bibitem{180} Because the drafters intended section 624.155 to apply to both first and third party causes of action, it is obvious that the new damages provision applies as well. The drafters could not have made it any clearer. Telephone interview with Eric Tilton, Esquire, Editor-In-Chief of the 1982 version of section 624.155 and member of the drafting committee for the 1990 amendments effective October 1, 1990 (October 1, 1990).
\bibitem{181} FLA. STAT. § 624.155(2)(a) (1989).
\bibitem{182} FLA. STAT. § 624.155(2)(d) (1989).
\bibitem{183} 716 F. Supp. 1456 (S.D. Fla. 1989).
\bibitem{184} 650 F. Supp. at 939; Brief of Appellees, supra note 111, at 1.
\bibitem{185} Brief of Appellees, supra note 111 at 1-2.
\bibitem{186} See supra, note 122 and accompanying text.
\bibitem{187} See supra note 123 and accompanying text.
\bibitem{188} No. 87-1187 CA(17) (Fla. 19th Cir. Ct. 1987).
\bibitem{189} Brief of Appellant, supra note 90, at 29.
\end{thebibliography}
the 60 day period. INA did offer $69,000 on the eve of arbitration. The arbitrators awarded a total of $787,468.20. After trial, the judge held that the “shortfall” was recoverable as a matter of law.

Other jurisdictions permitting recovery for first party bad faith have defined the obligation on the part of the insurer as follows:

[A]t the very least, ... the insurer will diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim ... These performances are the essence of what the insured has bargained and paid for, and the insurer has the obligation to perform them. When an insurer has breached this duty, it is liable for damages suffered in consequence of that breach.

In Bucholtz v. Safeco Insurance Co., the insured sued the insurer for an excess judgment allegedly due to Safeco's bad faith in failing to settle the case. The court affirmed the summary judgment in favor of the carrier because Safeco did handle the claim reasonably. Judge Tursi, in dissent, described the duty of good faith as including "the requirement that the insurer investigate the factual predicates of the claim of liability and not unreasonably persist in defenses that are without foundation in either fact or law." In Jones, the defendant presented no evidence to support its only defense which was that Karen Jones was negligent in failing to wear her seat belt.

Not every transgression by an insurer or complaint by an insured will suffice to sustain a cause of action for bad faith. Admittedly, an insurer is not in business to lose money. The insurer wants to minimize

190. Id. at 30.
191. Brief of Appellant, supra note 90, at 31.
194. Id. at 592.
195. Id. at 593; cf. Martin v. Horace Mann Ins. Co., No. 87-CV-19335 (Denver County, Colorado) ($255,000 verdict against insurer who acted in bad faith in refusing to pay $50,000 uninsured motorist claim).
196. Id. at 594. (Tursi, J., dissenting).
197. 716 F. Supp. 1456.
198. Brief of Appellees, supra note 111, at 3.
payment while the insured wants to maximize his recovery. However, when an insurer embarks on a course of conduct as in Jones, Wahl or McLeod where liability is clear and an award of damages in excess of the policy is foreseeable, it should not complain when an excess verdict is rendered.

Insurers maintain that any damages awarded were due to the acts of the uninsured driver and not the insurer. Therefore, the insurer should not be liable for the excess verdict. However, this reasoning ignores the fact that the insured purchases uninsured motorist coverage for this specific eventuality. Had the insurer dealt with its insured in good faith, there would be no bad faith suit and no excess verdict. But for the unreasonable acts of the insurer, there would be no excess judgment. Curiously the second district's recent opinion in McLeod seems to dismiss this question of causation. According to the McLeod court, the best an insured can hope for, following lengthy litigation of a bad faith claim, is interest on unpaid benefits (up to the policy limits), attorney fees, and costs. This holding sends a clear message to any insurer who is faced with a legitimate serious damage claim and a large policy: feel free to withhold payment on the policy and litigate. Liability is limited, roll the dice. This was not the legislature's intent when it drafted section 624.155.

199. Weese, 879 F.2d at 118.
200. 716 F.2d 1456.
201. No. 87-1187-CA(17) (Fla. 19th Cir. Ct. 1987).
204. See, e.g., Brief of Appellant, supra note 84, at 22; Brief of Appellees, supra note 111, at 13; McLeod, 15 Fla. L. Weekly 2785.
205. "Reasonably foreseeable," as used in the 1990 amendment, means exactly what it says. It is reasonably foreseeable that if an insurer, first or third party, is found liable for a violation of Section 624.155, that insurer will be liable for damages, and these damages may exceed the policy limits. The drafters did not differentiate between first and third party bad faith because the statute applies equally to both. Telephone interview with Eric Tilton, Esquire, Editor-In-Chief of the 1982 version of section 624.155 and member of the drafting committee for the 1990 amendments effective October 1, 1990 (October 1, 1990).
206. McLeod, 15 Fla. L. Weekly 2785, 2786. Contra Opperman, 515 So. 2d at 267 (citing 15A COUCH ON INSURANCE 2d § 58.1 (1983)) ("The function of the bad faith claim is to provide the insured with an extra-contractual remedy.")
As a matter of policy, excess judgments in first party bad faith actions should be recoverable as a matter of law. The remedial purpose of section 624.155 cannot be satisfied without the imposition of damages, including excess judgments. To do otherwise would take the teeth out of the statute. If excess judgments are not permitted, there is little or no reason to require insurers to act in good faith when handling a first party claim.

It was the actions of insurers which prompted the Legislature to enact section 624.155. Insurers were reaping the benefits of premiums from uninsured motorist coverage, and refusing to pay valid claims. After all, what did they have to lose? An insurer could intentionally refuse to pay a valid claim and place the insured in a position where his medical bills would not be paid. This conduct may also take its toll on the insured’s emotional well being. The insurer could take a chance on arbitration or a jury. If the award was lower than the policy limits, the insurer wins. If the award was in excess of the policy limits, the insurer would pay no more than the policy. Prior to the enactment of section 624.155 it was a win-win situation for insurers.

Insurance companies do not prosper by paying claims - this is a fact. As a response to the abuses of insureds by insurers, the Florida Legislature enacted section 624.155 to provide a remedy for insureds.

207. “To hold other than that the remedy is an award of the excess would emasculate the remedial purpose of the statute regarding first party claims.” Brief of Amicus Curiae, Academy of Florida Trial Lawyers at 6, McLeod, No. 89-2586 (Fla. 2d Dist. Ct. App.).

208. In an excerpt from the trial in Wahl, counsel for INA aptly described the state of first party bad faith law prior to the enactment of section 624.155:

Before this statute [section 624.155] was passed, an insurance company could say to a plaintiff ‘Hey, I’m not going to pay you, I am — I don’t — I think your case is worth ten bucks less than you say it is and I’m still going to make you arbitrate.’ They could go ahead, get hit for a $250,000 award, write him a check for two hundred and say ‘That’s all she wrote, I don’t owe you another nickel.’ There was no basis for anything. They couldn’t get any costs back, except arbitration costs, couldn’t get emotional distress, anything incurred for having to litigate something that should have been settled.

The Legislature came along and said ‘Well, we’re going to amend that. Now you’re going to have a statutory claim for any damages that are caused by that bad faith.’

The Legislature and the courts have applied section 624.155 to first party claims as well as third party claims. There is no differentiation in the statute concerning damages that can be awarded in first party claims as opposed to third party claims. The recent amendments to section 624.155 support the position that damages should be measured by the excess award over the policy limits in first party claims as well at third party claims. The federal and Florida trial courts have held that these damages are recoverable as a matter of law. The rationale for these holdings is compelling. The Florida Supreme Court will have an opportunity to squarely address and put to rest the question of what the measure of recovery in a first party bad faith action should be.\footnote{Marc S. Buschman}

\footnote{See supra note 14 and accompanying text for the exact language of the certified question.}