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SPECIAL INSURANCE COVERAGE/BAD FAITH UPDATE

Dear Ladies and Gentlemen:

A very significant "bad faith" decision was handed down by Florida's Third District Court of Appeal on March 30, 2011. Because of the decision in this case, we are suggesting some practical pointers and recommendations in order for you to avoid the issues similar to those that arose in the *United Automobile Insurance Company v. The Estate of Levine* case.

EXECUTIVE SUMMARY

In *United Automobile Insurance Company v. The Estate of Levine*, the Third District held that in a bad faith case, the trial court did not abuse its discretion when it did not allow evidence of an insurer's prompt handling, in a multiple claims scenario, of two claims against an insured, with respect to a third distinct claim against the insured, and that a prima facie case of bad faith was shown when, although an insurer initially offered to settle a single claim against the insured, the insurer required the claimant to execute an overly broad release, hold harmless agreement, and medical/health affidavit.

SPECIAL UPDATE

United Automobile Insurance Company v. The Estate of Levine, Case No.: 3D09-3234 (Fla. 3d DCA 2011).

FACTS AND PROCEDURAL HISTORY

United Automobile Insurance Company ("UAIC") insured Mr. Jose Hernandez under a liability policy, with Bodily Injury coverage limits of $10,000.00 per person, and $20,000.00 per accident, and Property Damage coverage limits of $20,000.00 (the "Subject Policy"). In December, 2011, the insured drove his flatbed truck into an automobile driven by Mr. Steven D. Levine (the "Subject Accident"). Mr. Levine and his passenger, Ms. Lourdes Maldonado, were killed. The insured, and his passenger, Mr. Ruben Soto, were seriously injured. Mr. Levine's spouse, Mrs. Tracy Howard, was appointed Personal Representative of the Estate of Mr. Levine (hereinafter "Levine").

Immediately after the Subject Accident, UAIC began an investigation of the possible claims arising therefrom. UAIC assigned a non-attorney adjuster to the case, who determined there were four potential claims against UAIC's insured under the

Subject Policy: two wrongful death claims, one by Levine and the other by the Estate of Maldonado, a bodily injury claim by Mr. Soto, and a property damage claim on behalf of the owner of the automobile driven by Mr. Levine.

On February 4, 2002, Levine, through its counsel, notified the insured of its claim against him. The insured retained independent counsel. On February 6, 2002, the insured's counsel notified UAIC of the claim. Just one day after being notified of the claims arising out of the Subject Accident, on February 7, UAIC tendered a $10,000.00 check, representing the full amount of the Subject Policy's bodily injury coverage limits, to counsel for Levine.[1]

Along with the tendered check, UAIC transmitted to Levine a letter which requested the following: (1) the execution of a release, which was enclosed, and released **all claims** Levine may have had as a result of the Subject Accident (the "Release"); (2) disclosure of all liens and medial and/or health insurance subrogation claims against the proffered settlement; (3) written confirmation that all liens disclosed in (2) would be satisfied out of the proceeds of the settlement; (4) the execution of a Hold Harmless and Indemnification Agreement (the "Hold Harmless Agreement"), which was also enclosed; and (5) a copy of Letters of Administration appointing the Personal Representative of Levine. The letter was unclear as to whether the execution and return of the above-mentioned documents was a condition to the tendered check.[2] The Release and Hold Harmless Agreement were both sweeping in their breadth and scope.[3]

Thereafter, UAIC settled the personal injury claim brought by Mr. Soto and the wrongful death claim brought by the Estate of Maldonado, but not the wrongful death claim brought by Levine. Levine instituted an action against UAIC's insured, and obtained an excess verdict of over $5.2 million dollars.

Levine then filed a bad faith action against UAIC. UAIC sought to introduce evidence of its settlement of the claims of Mr. Soto and the Estate of Maldonado. Levine filed a Motion in Limine, seeking to exclude this evidence, arguing that such evidence was irrelevant and unfairly prejudicial as the bad faith action against UAIC was with respect to Levine's claim against UAIC's insured only. The trial court granted Levine's Motion in Limine.

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[1] The facts do not indicate whether or not UAIC attempted to schedule a global settlement conference; however, it seems to imply that UAIC made no such attempt.

[2] However, Judge Wells adamantly maintains, in her dissenting opinion, that acceptance of the tendered check was *not* conditioned on the execution of the Release.

[3] For example, the Hold Harmless Agreement was to indemnify and hold harmless UAIC, "its heirs, assessors [sic] and assigns" from and against an assortment of other claims or liens, including "any and all other Insurer's claims or subrogated liens." Further, the Release included a recital that the Release was to bind "any heirs, executors, administrators, successors and assigned [sic]" as against UAIC, "their agents, servants, successors, heirs, executors, administrators and all other persons, firms corporations, association [sic] or partnerships of and from any and all claims, actions, causes of action, demands, rights damages [sic], costs, loss of service, expenses and compensation whatsoever" including any "known and unknown foreseen and/or unforeseen" injuries and damage resulting or to result from "the accident, casually [sic] or event" identified by date and location.

Thereafter, UAIC moved for a directed verdict, on the grounds that it had initially tendered a $10,000 check to Levine. The trial court denied UAIC's motion. Final judgment was rendered in favor of Levine. UAIC appealed the final judgment against it, along with the trial court's rulings on Levine's Motion in Limine, and UAIC's Motion for a Directed Verdict.

APPELLATE COURT DECISION

On appeal, UAIC argued that the trial court abused its discretion in excluding evidence regarding its prompt action in settling two of the four separate policy-related claims arising from the Subject Accident because it was part of the "totality of the circumstances" associated with the claims handling of all the claims arising from the Subject Accident. Further, UAIC argued that Levine failed to prove a prima facie case of insurer bad faith under section 624.155 of the Florida Statutes, and precedential case law, because it tendered a $10,000.00 check to Levine immediately when it was initially advised of Levine's claim.

Before beginning with its analysis, the Third District Court of Appeal noted one unique feature of the instant case distinguishing it from many other insurance bad faith cases; namely, that no expert witness testified on behalf of UAIC regarding claims-handling policies generally, while Levine had two expert witnesses that testified regarding same.

The Third District began its analysis by noting that section 624.155(1)(b)(1) of the Florida Statutes affords "any person" including an insured, a civil remedy against an insurer for "[n]ot attempting in good faith to settle claims when, under all circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests . . . ." UAIC argued that "claims" and "under all circumstances" referred to all four claims against its insured, and all the circumstances pertaining to all four of those claims. Specifically, UAIC contended that it was entitled to show the jury that UAIC settled the claims of Mr. Soto and the Estate of Maldonado quickly, and by tendering more than the aggregate policy limits. UAIC argued that the prompt resolution of the Estate of Maldonado's claim, which the court noted occurred because UAIC did not require the Estate of Maldonado to sign a release as a pre-condition for negotiating a settlement check, tended to prove good faith regarding the handling of *all* claims against the insured.

The Third District noted the trial court recognized that because one independent claimant negotiated separate settlement terms with UAIC[4] did not tend to prove whether UAIC acted properly regarding the claim of *another* independent claimant. To hold otherwise, the court stated, would distract the jury. The jury should be focusing on UAIC's efforts, or lack thereof, in settling *Levine's claim* against UAIC's insured, and not on UAIC's efforts in settling the *other* claims against its insured. In a bad faith case, the court noted, the focus is on the insurer's reasonable assessment of "a" claim against

[4] For example, as noted above, one claimant was not required to execute a release.

its insured. In this case, the court noted, the bad faith claim was based on *Levine's* claim against UAIC's insured.

Accordingly, the Third District held the trial court, by disallowing evidence of UAIC's handling of the claims of Mr. Soto and the Estate of Maldonado, fairly balanced the purported relevance and probative value of those settlements against their prejudicial impact upon UAIC's handling of the claim of Levine, and thus, that the trial court did not abuse its discretion in refusing to admit such evidence.

As noted above, UAIC argued that Levine failed to prove a prima facie case of bad faith. Specifically, UAIC argued a prima facie failed to be proven because it tendered a check to Levine, for the per person bodily injury policy limits of the Subject Policy one day after the insured's counsel notified UAIC of Levine's claim. However, the Third District noted that UAIC's initial enthusiasm to tender its policy limits to Levine pales when the tender is looked at along with the "one-size-fits-all" Release, the Hold Harmless Agreement, and the medical and health lien affidavit UAIC required Levine to execute in exchange for the tendered check. Further, the Third District noted, UAIC failed to follow up with Levine in a meaningful way after the tender of the $10,000.00 check, given the nature of the facts of the case. As such, the Third District held, Levine proved a prima facie case of bad faith.[5]

Accordingly, the Third District affirmed the trial court's judgment.

PRACTICAL POINTERS AND RECOMMENDATIONS

In situations where an insurance carrier is faced with multiple claims arising out of an accident, strong evidence of a liability against the insured and the value of claims significantly exceeding the aggregate policy limits, we strongly recommend that an insurance carrier take the following steps:

1. Retain outside counsel **for the insurance carrier** to coordinate all efforts in arranging for and holding a global settlement conference, this would include initial contact with each of the claimants, their immediate family and/or legal counsel to advise them of the policy limits, scheduling of a global settlement conference, **and stating clearly that the carrier is, and will continue, offering to the claimants collectively the full policy limits in order to secure a release from all of the claimants and perspective claimants against the insured arising out of subject accident.**
2. Schedule a global settlement conference.
3. Request each of the claimants or potential claimants to notify the carrier if a claim is being brought and request documentation to support claims for injury and damages.[6]

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[5] Counsel for Levine simply did not respond to the tender of the policy limits for months after the check, Release, Hold Harmless Agreement, and medical and health affidavit were sent.

[6] As set forth in the case of *Boston Old Colony v. Gutierrez*, 386 So. 2d 783 (Fla. 1980) and *Farinas v. Florida Farm Bureau*, 850 So. 2d 555 (Fla. 4th DCA 2003) a carrier has an obligation not only to attempt

4. In all communications with the claimants or their counsel prior to the global settlement conference, the carrier should explain and reiterate that the company wishes to utilize the full extent of the policy limits to secure release of all claims against the insured related to and arising out of the subject accident.

Although not specifically addressed in the *United Automobile Insurance Company v. The Estate of Levine* case, it is our opinion that had a global settlement conference been coordinated to facilitate the settlement of all individual claims against UAIC's insured, evidence of all of the claimants collectively would have been admissible in the *Levine* bad faith action. This is particularly the case when correspondence is carefully drafted to the claimants or potential claimants and their counsel inquiring as to:

A. Whether a claim is being presented;
B. The nature and description of the injuries sustained;
C. Documentation supporting claim for injury including medical summaries and /or medical specials;
D. Documentation regarding lost earning or earning capacity.

Requests of this nature need to be balanced against practicalities such as circumstances surrounding the accident involving Levine, Maldonado, Soto and UAIC's insureds. For example, unless the personal injuries of Mr. Soto were of an extraordinary nature such as spinal cord injury, significant brain damage, tremendous disfigurement, such as multiple loss of limbs or significant burns, it is highly unlikely that the personal injury claims of Mr. Soto would in any way compare to the wrongful death claims of the Estate of Maldonado and the Estate of Levine. Certainly if a global settlement failed because of the non-response of counsel representing one of the estates, then such failure to respond with utilization of the policy limits to extinguish the other claims could be utilized to defend a carrier against a bad faith claim by the estate of the decedent whose attorneys had not responded to or cooperated with the scheduling of a global settlement conference. Where counsel is unresponsive, repeated written correspondence should be directed to that counsel noting the prior requests, and acknowledging that counsel has not responded to same.[7]

Further, when settling claims, such as those presented in *United Automobile Insurance Company v. The Estate of Levine*, insurers should not use overly expansive releases, or releases which attempt to release "all claims"; but rather, insurers should use plain vanilla releases. For example, an insurer should not require a claimant to settle "all claims." An insurer should only require a claimant to release only claims against the insurer and the insured, with respect to the subject accident, and with reference to a

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global settlement of all claims in circumstances where there are multiple claimants and the value of the claims vastly exceeds the policy limits, but also to investigate the accident and injuries arising therefrom, to assess their relative value both for settling any individual claim. Furthermore, form correspondence needs to be sent to the insured including an explanation of what the insurance carrier is doing, copies of letters to all claimants, and a letter advising of excess exposure.

[7] Copies of all correspondence should be also be sent to the insured.

specific policy of insurance, referenced by policy number. A release should also affirm the claimant's right to pursue other first-party and third-party claims he or she may have.

Moreover, insurers should never require a claimant to execute an indemnity and hold harmless agreement, **unless** the claimant, or his or her counsel, **specifically** agree to execute such an agreement. Similarly, an insurer should not require a claimant to execute a medical and/or health affidavit, again, unless the claimant, or his or her counsel, specifically agree to execute same.

As a final recommendation, where an insurance carrier faces a bad faith suit, the carrier makes a grave mistake if it is trying to defend the suit without utilizing an expert on insurance claims handling. An insurance carrier would also make a grave mistake without utilizing an expert who is an attorney with personal injury and bad faith experience and can review the claims file and point out specific actions by the carrier that are consistent with Florida's standard of good claims handling. In our opinion, an attempt to defend against an insurance bad faith suit without the use of the above-mentioned experts is tantamount to the exercise of futility because it does not provide a context to the jury to evaluate whether the insurance carrier's actions were in compliance with Florida's good faith standards.

We hope you find the above updates helpful. Should you have any questions with respect to the foregoing, please feel free to contact us at our Miami office.

Very truly yours,

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