

# Bad Faith, Insurer Standing, Professional Liability Insurance Coverage Update

June 15, 2021

## Bad Faith — Eleventh Circuit (Florida Law)

### *Eres v. Progressive Am. Ins. Co.*

--- F.3d ---, 2021 WL 2197391 (11th Cir. June 1, 2021)

The U.S. Court of Appeals for the Eleventh Circuit held that Progressive American Insurance Company (Progressive) did not act in bad faith toward its insured, Eli Villareal Alvarez (Villareal), when it failed to settle a claim with an injured driver, Heather Eres (Eres). The appellate court found that Progressive acted diligently in trying to settle with Eres, and, thus, did not breach its duty of good faith.

Villareal was driving while intoxicated when he crashed into a vehicle driven by Eres, and propelled her vehicle into an oncoming train, killing Eres' son and causing her permanent injuries. Shortly after Progressive learned of the accident, it tendered the full limits of liability to Eres and her son's estate. However, the attorney for Eres informed Progressive that she would not settle until after the criminal proceeding against Villareal concluded. Progressive stayed in touch with Eres while the criminal suit was ongoing. After Villareal's conviction, Eres sent a settlement demand to Progressive, which included a prohibition on any indemnity or hold-harmless agreements that could release Villareal from other claims arising from the accident. In response, Progressive provided policy limits and a draft release, which included a waiver of subrogation claims. Eres considered Progressive's response as a rejection of the settlement demand, and shortly thereafter filed suit against Progressive, alleging bad faith.

The district court granted Progressive's motion for summary judgment, finding that no reasonable juror could determine that Progressive had acted in bad faith. The appellate court agreed with the trial court, reasoning that Progressive's overbroad release that did not follow the terms of the settlement demand was not a breach of its good faith obligation. This was because after Eres objected to the provision that waived subrogation claims, Progressive offered to strike the offending language. Additionally, at the time Progressive drafted the release, a waiver of subrogation claims was not considered a hold harmless clause. The appellate court noted that while a subsequent decision from the district court resolved this issue by ruling that a waiver of subrogation claims is "in the nature of" a hold harmless clause, Progressive did not have the benefit of that decision at the time it drafted the release. Accordingly, the subsequent ruling from the district court could not form the basis of the bad faith claim against Progressive.

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## **Insurer Standing, Legal Malpractice – Florida**

### ***Arch Ins. Co. v. Kubicki Draper, LLP***

--- So. 3d ---, 2021 WL 2232083 (June 3, 2021)

The Florida Supreme Court held that an insurer has standing to maintain a legal malpractice action against counsel hired to represent its insured where the insurer is contractually subrogated to the insured's rights under the insurance policy. Insurer Arch Insurance Company (Arch) brought a legal malpractice action against the law firm Kubicki Draper, LLP (Kubicki), which was retained to represent Arch's insured in a separate action. At the heart of Arch's lawsuit against Kubicki was that the underlying federal litigation filed by the receiver was barred by the applicable statute of limitation, and that Kubicki's failure to timely raise the statute of limitations defense significantly increased the cost of settlement.

Kubicki moved for summary judgment on the grounds that Arch lacked standing to directly pursue an action against it. Arch argued that an insurer has standing to maintain a legal malpractice action against counsel hired to represent the insured where the insurer has a duty to defend. Kubicki countered that Arch does not have standing because Kubicki was in privity with the insured, and there was no privity between Kubicki and Arch.

The Supreme Court agreed with Arch, holding that an insurer has standing to maintain a legal malpractice action against counsel hired to represent its insured where the insurer is contractually subrogated to the insured's rights under the insurance policy. The Supreme Court looked to Arch's right to contractual subrogation, which was expressly provided for in the policy. The subrogation provision under the policy gave Arch the full right to subrogate "all your [insured] rights of recovery therefore against any person, organization, or entity. ..." The Supreme Court found that the subrogation provision was clear, and that Arch's right to subrogate to the right of the insured included claims for malpractice against counsel retained to defend the insured. The Supreme Court held, consistent with the established principles of subrogation, that "because the insured is in privity with the law firm, contractual subrogation allows the insurer to step into the shoes of the insured." For these reasons, the Supreme Court confirmed the denial of Kubicki's motion for summary judgment and remanded the proceedings finding that the insurer had standing to maintain the legal malpractice action.

Prepared by: Michael Hanchett

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## **Professional Liability Insurance – New Jersey**

### ***Cadre v. Proassurance Cas. Co.***

--- A.3d ---, 2021 WL 2344927 (N.J. Super. Ct. App. Div. June 9, 2021)

The Superior Court of New Jersey refused to place with an insurer the responsibility to comply with a court rule requiring a minimum amount of professional liability coverage for attorneys practicing as an LLC. Instead, the court ruled that it was the insured's responsibility to ensure it had enough coverage to comply with the court rule.

Plaintiff Jill Candre (Candre) is an attorney who practices law as a limited liability company (LLC). In her role as an LLC, Candre purchased professional liability insurance from defendant ProAssurance Casualty Company (ProAssurance) as required by New Jersey Court Rule 1:21-1B. In 2015, Candre discovered that one of her paralegals misappropriated client funds. Candre notified ProAssurance of the potential claim. ProAssurance declined the claim, relying on the policy's definition of covered "damages," which specifically excluded "misappropriated client funds." Candre then filed a declaratory judgment action, and subsequent amended complaint, and moved for summary judgment, seeking coverage for claims under the ProAssurance policy resulting from misappropriated client funds. ProAssurance cross-moved for summary judgment, and the lower court granted ProAssurance's motion. Candre appealed.

Candre's main argument was that ProAssurance must have issued her a professional liability policy that complied with Rule 1:21-1B's minimum coverage requirements. She further argued that the policy's definition of "damage" was ambiguous, the policy failed to meet her reasonable expectations, and that ProAssurance negligently misrepresented that the policy complied with Rule 1:21-1B. ProAssurance responded that Rule 1:21-1B only governs attorneys practicing as LLCs, not insurers, and that the rule does not mandate the "scope of coverage" provided by insurers. Candre replied that only the court can regulate the conduct of attorneys, Rule 1:21-1B has statutory authority, and as a result, the ProAssurance Policy must be reformed to provide the coverage required under Rule 1:21-1B.

The Superior Court held that while a professional liability policy that defines damages to exclude coverage for misappropriated funds does not provide coverage as required under Rule 1:21-1B, the rule permits more than one insurance policy to provide the required coverage to the LLC, and it is the attorney, not the insurer, who must procure that insurance and comply with Court Rule 1:21-1B. As the Superior Court put it, "the Rule regulates the conduct of attorneys, not insurers." Moreover, the Superior Court found nothing ambiguous about the ProAssurance policy's coverage limitation, where the policy clearly excludes coverage for "misappropriated client funds." The Superior Court further held that Candre misinterpreted the scope of the trial court's power, that she was unaware of Rule 1:21-1B's requirements, and that ProAssurance made no representations to her regarding whether the policy complied with Rule 1:21-1B. Thus, the Superior Court refused to revive Candre's claim against ProAssurance.



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BAD FAITH, INSURER STANDING, PROFESSIONAL LIABILITY INSURANCE COVERAGE UPDATE Cont.

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