Eleventh Circuit Finds No Bad Faith Where Insurer Failed to Provide "Mirror-Image" Response to Claimant's Demand

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In Florida, an insurer is required to work diligently on the insured's behalf to avoid an excess judgment, with the "same haste and precision as if it were in the insured's shoes". *Harvey v. GEICO General Insurance Company*, 259 So. 3d 1 (Fla. 2018). A failure to do so leaves an insurer open to first-party and third-party bad faith claims.

In *Eres v. Progressive American Insurance Company*, No. 20-11006, 2021 U.S. App. LEXIS 16277 (11th Cir. 2021), the U.S. Court of Appeals for the Eleventh Circuit was called to determine whether an insurer who failed to provide a "mirror-image response" to a claimant's demand acted in bad faith toward its insured by failing to settle a claim within policy limits. Applying Florida's "totality of the circumstances" test, the Eleventh Circuit concluded that the claimant failed to demonstrate bad faith, affirming the Middle District of Florida's grant of summary judgment in favor of the insurer.

As with any failure to settle case, the facts are important. Nonetheless, we apologize for the length. In May of 2007, Progressive's insured, Eli Villareal Alvarez, crashed into Heather Eres's vehicle, causing it to collide with an oncoming train. Eres sustained permanent injuries and her son was killed. Villareal subsequently pled guilty to DUI manslaughter.

Progressive was informed of the crash four days after it occurred. The next day, Progressive offered its full bodily injury policy limits of $10,000 to both Eres and her son's estate. Eres's attorney informed Progressive that Eres was not prepared to accept the payments until Villareal's criminal proceedings concluded and the representative of her son's estate was chosen. Progressive diligently followed up throughout the criminal proceedings, advising that it was "ready to distribute the checks at [Eres's counsel's] direction."

Nearly two years later, Progressive received correspondence from Peter Macaluso, Eres's new attorney, which contained a settlement offer conditioned on "strict compliance" with a number of requests. These requests included: (1) that Progressive provide insurance-coverage information as required by Florida law and an affidavit from Villareal indicating that he had no other insurance coverage; (2) issuance of a reimbursement in the amount of $650 for Eres's son's personal effects lost in the crash; and (3) a release which released only Villareal and which did not contain hold-harmless or indemnity provisions. The settlement offer was also subject to a strict deadline.

Two days after receiving Macaluso's correspondence, Progressive's claim examiner engaged outside counsel, Katherine Shadwick, to represent Villareal and to assist in preparing a response to the settlement offer. Prior to the deadline, Shadwick provided Macaluso with all of the requested payments, information and documentation, including a release which released only Villareal. Significantly, the release reserved Eres's right to pursue and recover future health and medical expenses from other parties; however, that reservation contained a carve-out for "party(ies) released who is/are given a full and final release of all claims, *including but not limited to, past, present or future claims for subrogation* arising out of the above-referenced accident."

Shadwick informed Macaluso that she believed Villareal and Progressive had satisfied the conditions of the settlement offer and requested that Macaluso immediately advise her if he disagreed. A few days later, Macaluso responded, stating that he viewed the release, which he claimed contained a hold-harmless or indemnity agreement, as a rejection of the settlement offer. Shadwick disagreed with Macaluso's characterization of the language but agreed to strike the offending language from the release. Eres

subsequently sued Villareal in state court, and at trial, was awarded a judgment of more than $10 million. The judgment was affirmed on appeal. During the appeal, the Second District Court of Appeal's court rejected the argument that Progressive, on behalf of Villareal, had met all of the terms of the settlement offer, instead concluding that while the "proposed releases do not use the terms 'hold harmless' or 'indemnification,'" the language which released claims for subrogation was "in the nature of a hold harmless or indemnification agreement."

Eres then filed a third-party bad-faith action against Progressive, arguing that Progressive acted in bad faith by failing to settle Eres's claim within Villareal's policy limits. The Eleventh Circuit disagreed, stating that Progressive had acted "[q]uite the opposite, in fact." The court noted that Eres's particular focus on the release language ran counter to Florida's "totality of the circumstances" test, which required that the court consider Progressive's actions both before and after Shadwick sent the release. The court concluded that, examining the totality of the circumstances, Progressive's actions did not rise to the level of bad faith, as it had: (1) timely offered policy limits to Eres and her son's estate; (2) indicated during the criminal proceedings that it was prepared to settle at Eres's discretion; (3) promptly satisfied the time-limited demands requests contained in the settlement offer; and (4) offered to strike the subrogation language from the release.

The Eleventh Circuit additionally held that the release was not overbroad simply because it "wasn't a mirror-image response to [Eres's] demand". The court reasoned that the release did not include express hold-harmless or indemnification language, and that neither Eres's nor the court had found any Florida case decided before the proposed release was sent, which settled the question regarding whether a waiver-of-subrogation clause could constitute a hold-harmless or indemnification provision. The court declined to accept the Second District Court of Appeal's finding that the subrogation clause was "in the nature of" a hold harmless or indemnification agreement as evidence of bad faith, noting that "a reasonably prudent person in Progressive's shoes wouldn't necessarily have known circa April 2009 that a waiver-of-subrogation clause was tantamount to a hold-harmless or indemnity provision."

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