TWO (OR THREE) TO TANGO: FLORIDA AUTO INSURANCE BAD FAITH FAILURE TO SETTLE POST-*HARVEY*

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Abstract

Insurance companies wield immense power within their relationships with insureds. When settling claims by injured third parties, insurers control decisions that can have significant consequences, including exposing an insured to liability beyond her insurance contract's policy limits. Like many states, Florida protects insureds from abuse of this power through the doctrine of good faith, which holds insurers liable for bad faith failure to settle third-party claims.

In the 2018 decision *Harvey v. GEICO General Insurance Co.*, the Florida Supreme Court broadened Florida's bad faith failure to settle standard. Under *Harvey*, an insurer may be extra-contractually liable if it fails to act with haste and precision in the insured's best interest when investigating and settling a claim, even when its failures amount only to negligence, and even when the insured or claimant contributed to the inability to settle. But the *Harvey* decision incentivizes undesirable conduct by all parties involved. Insureds and third-party claimants may be tempted to hinder settlement in hopes of triggering bad faith (and thus damages beyond policy limits). And *Harvey* motivates insurers to offer premature or outsized settlements—prioritizing haste over precision—in an attempt to avoid bad faith litigation, a practice that results in increased loss costs ultimately passed along to all insureds. To address these incentives, the Florida legislature should amend Florida's bad faith statute to explicitly direct courts to consider the conduct of each party involved when assessing bad faith liability, to clarify that bad faith involves more than mere negligence, and to establish procedures to protect both insurers and insureds in difficult claims circumstances involving multiple injured parties.

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INTRODUCTION

Imagine you are involved in an automobile accident that results in permanent injury to a pedestrian.[1] The pedestrian alleges he has suffered $100,000 in damages for which you are responsible. You are covered by $50,000 in liability insurance,[2] and the pedestrian proposes settlements of $75,000, $50,000, and $35,000 to your insurance company. Nonetheless, your insurance company—despite setting aside $42,500 in reserve for the claim—refuses to offer more than $25,000 to settle. As a

1. This hypothetical is derived from *Campbell v. Government Employees Insurance Co.*, 306 So. 2d 525, 529–30 (Fla. 1974). While the underlying tort claim was subject to Alabama law, the Florida Supreme Court applied Florida law to the subsequent insurer bad faith claim. *See id.* at 528.

2. As of 2020, Florida requires a person wishing to own or operate a motor vehicle to purchase insurance coverage protecting her from liability to third parties in the amounts of $10,000 to any one person who suffers bodily injury, capped at $20,000 for any one accident, along with $10,000 for damage to another's property. FLA. STAT. §§ 324.021(7)(a)–(c), .022(1) (2020).

result, the pedestrian sues you. And wins. The jury's $100,000 verdict exposes you to liability twice the amount of your insurance coverage.

As it turns out, your insurance company—despite indicating that your liability for the accident was doubtful—was advised by counsel of only a 20% to 30% chance of prevailing at trial. Further, your insurance company—despite telling you that they were unable to negotiate a settlement below the pedestrian's $75,000 demand—ignored a letter from the pedestrian's attorney seeking a pre-lawsuit compromise between the claimant's position and your insurance company's $25,000 assessment. Even worse, your insurance company—despite receiving post-verdict offers to satisfy the $100,000 judgment, either for $75,000 total or for your $50,000 policy limits plus the right to pursue the excess from your insurance company in a subsequent suit—withheld information about the latter, within-limits settlement opportunity and instead advised you to appeal the jury verdict rather than accept the pedestrian's renewed $75,000 proposal. In holding out hopes of minimizing or escaping any financial outlay of its own, your insurance company seems to have repeatedly failed to consider your best interests—namely, your interest in not being exposed to liability above the insurance coverage you purchased—when deciding whether to settle with the pedestrian.

What can a person do in this frustrating situation? You and your insurance company—as insured and insurer, respectively—exchanged promises when entering into your insurance policy contract. You promised to pay agreed-upon premiums in exchange for your insurer's promise to pay covered claims[3] and to defend claims or lawsuits by third parties against you.[4] Under such contracts, auto insurers are entrusted with potentially billions of dollars of their insureds' premiums.[5] Much of this money ultimately funds the insurer performing its promises: defending and paying claims on behalf of insureds unfortunate enough to be involved in auto accidents.[6]

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3. *Insurance Handbook*, INS. INFO. INST., https://www.iii.org/publications/insurance-handbook/insurance-basics/auto-insurance-basics [https://perma.cc/R8B7-TEL6]; *see also* FLA. STAT. § 624.02 ("'Insurance' is a contract whereby one undertakes to . . . pay . . . a determinable benefit upon determinable contingencies.").

4. *See, e.g.*, Auto Mut. Indem. Co. v. Shaw, 184 So. 852, 855 (Fla. 1938) (per curiam) ("Auto Mutual Indemnity Company . . . [d]oes [h]ereby [a]gree . . . . [t]o defend . . . any claim or suit against the [insured] . . . to recover damages . . . covered hereby.").

5. The top three private passenger auto insurers in Florida each wrote over three billion dollars in premiums in 2018. *A Firm Foundation: How Insurance Supports the Economy: Florida Firm Foundation*, INS. INFO. INST., https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/state-fact-sheets/florida-firm-foundation [https://perma.cc/H8F8-LUPN].

6. *Compare Current Table*, INS. INFO. INST., https://www.iii.org/table-archive/21241 [https://perma.cc/S928-X94T] (reporting over nineteen billion dollars in private passenger auto

But an insurer often enjoys considerable discretion when carrying out these promises. In fact, an insurer often[7] reserves the right to exercise its exclusive discretion when investigating, settling, and defending against claims.[8] Moreover, an insurance contract often expressly precludes insured action to settle a claim absent the insurer's consent.[9] Such provisions vest in the insurer "complete control" over the investigation, settlement, and defense of claims under the contract,[10] thus tying the insured's hands. She cannot proactively negotiate with an injured party—despite her own potential personal financial liability—because "[t]he insurance contract requires that the insured surrender to the [insurer] . . . control over whether the claim is settled."[11] Rather, "[t]he insured binds h[er]self to cooperate fully with the insurer and to neither negotiate for nor settle the claim against h[er] without the insurer's knowledge and consent."[12] An insured who fails to do so risks breaching the insurance contract and forfeiting coverage.[13]

Indeed, compared to the average insured—just an ordinary person with a car—insurers wield immense power. Not only does the insurer decide how much the insured will pay for her insurance policy, but when the insured needs to rely on that policy because she has caused harm, the

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direct written premiums in Florida in 2017), *with A Firm Foundation: How Insurance Supports the Economy: Incurred Losses by State*, INS. INFO. INST., https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/a-50-state-commitment/incurred-losses-by-state [https://perma.cc/L8ZG-F9S8] (reporting over thirteen billion dollars in private passenger auto incurred losses in Florida in 2017).

7. Each insurance contract is different (and subject to state-specific requirements), but one major exception to plenary insurer discretion is a consent-to-settlement or "hammer" clause, which "requires an insurer to seek an insured's approval prior to settling a claim for a specific amount." *Consent to Settlement Clause*, INT'L RISK MGMT. INST., https://www.irmi.com/term/insurance-definitions/consent-to-settlement-clause [https://perma.cc/S2UU-RBDP]. Hammer clauses are common in professional liability insurance contracts, such as those for doctors and lawyers. *See id.*

8. *See, e.g.*, Nat'l Indem. Co. v. Donald, 229 So. 2d 900, 901 (Fla. Dist. Ct. App. 1969) (Reed, J., dissenting) ("[T]he company shall . . . defend any suit against the insured . . . but the company *may make* such investigation, negotiation and *settlement* of any claim or suit *as it deems expedient*."); Progressive Direct Auto, Florida Auto Policy 3 (July 2017) (on file with author) ("If you pay the premium for Bodily Injury Liability and Property Damage Liability, we will settle or defend, *at our option*, any claim . . . covered by this [contract]." (emphasis added)).

9. *See, e.g.*, *Shaw*, 184 So. at 855 ("The Company shall have the right to settle any claim or suit at its own cost, and the [insured] shall not . . . settle any such claim or suit, except at his own cost, without the written consent of the Company."); Progressive Direct Auto, *supra* note 8, at 23 ("Any judgment or settlement for damages against an owner or operator of an uninsured motor vehicle that arises out of a lawsuit brought without our written consent is not binding on us.").

10. *See, e.g.*, Baxter v. Royal Indem. Co., 285 So. 2d 652, 655 (Fla. Dist. Ct. App. 1973), *cert. discharged*, 317 So. 2d 725 (Fla. 1975).

11. Berges v. Infinity Ins. Co., 896 So. 2d 665, 682 (Fla. 2004).

12. *Baxter*, 285 So. 2d at 655.

13. *See, e.g.*, *id.*

insurer is in control. The insurer decides how to investigate the harm, as well as whether to accept a settlement offer, make such an offer (and for how much), or proceed to litigation. But an insurer's "overarching goal[] of earning profits [can] . . . conflict with the goals of their insureds" of securing an "economic safety net."[14] An insurer's exercise of this discretion can therefore have significant consequences for the insured—particularly in the form of exposure to liability to a third party in excess of her policy limits—if not exercised in a manner that prioritizes protecting her.[15]

This Note explores the implications of this potentially troubling power differential, and the ways Florida law has developed, and should continue to develop, to protect insureds from abuse of that power in the context of an insurer's good faith duty to settle third-party claims. Part I discusses the development of the doctrine of good faith as a constraint on insurer discretion, detailing the development of both the earlier common law and the more recent statutory cause of action for insurer bad faith failure to settle. Part I concludes by examining how the legal standard courts apply in these cases has evolved. Part II analyzes the Florida Supreme Court's most recent insurer bad faith decision, *Harvey v. GEICO General Insurance Co.* (*Harvey Supreme Court*),[16] which departed in noteworthy ways from that court's earlier opinions. Part III addresses both procedural and policy-based arguments against the precedent established in *Harvey*. Part IV examines potential solutions for refining Florida bad faith law and appraises an amendment to Florida's bad faith statute introduced in the Florida Senate during the 2019–2020 legislative session. Finally, this Note concludes by recommending a modified version of the proposed amendment which would explicitly direct courts to consider each party's conduct when assessing an insurer's liability for bad faith, clarify that bad faith involves more than mere negligence, and establish procedures to protect both insurers and insureds in difficult claims circumstances involving multiple injured parties.

I. GOOD FAITH DOCTRINE AS A CONSTRAINT ON INSURER DISCRETION

Initially, breach of an insurance policy was treated like any other breach of contract action, with damages "limited to those contemplated

14. UNITED POLICYHOLDERS ADVOC. & ACTION PROGRAM, 50 STATE SURVEY OF BAD FAITH LAWS AND REMEDIES 2 (2014), https://uphelp.org/sites/default/files/publications/Final%20-%20Bad%20Faith%20Survey.pdf [https://perma.cc/4Q8R-UXM3].

15. As an extreme example, a business model focused on profit from investment instead of underwriting could incentivize an insurer to sit on premiums as a means of generating investment income, rather than making timely claims payouts, thereby exposing an insured to a judgment exceeding her policy limits. Without the doctrine of good faith, an insurer in this situation could simply pay the purchased limits post-judgment, leaving the insured liable for the excess amount.

16. 259 So. 3d 1 (Fla. 2018).

by the parties at the time they entered into the contract."[17] But as the auto insurance industry transitioned from indemnity policies (under which the insured defends herself against third-party claims) to liability policies (under which the insurer defends her), courts began to acknowledge that more is at stake for insureds than simply the contractually agreed-upon policy limits.[18] The doctrine of good faith thus recognizes that an insurer's duties under the insurance contract are not limited solely to defending the insured and paying damages for which the insured is legally liable.[19] Instead, within the contractual relationship, "the insured looks to the insurer for financial security and protection against calamity."[20] "In exchange for th[e insured's] relinquishment of control over settlement and . . . litigation," then, the insurer takes on a duty to act in good faith when exercising its responsibilities—including investigating accidents, paying the insured's claims, and settling or defending the insured against third-party claims—under the contract.[21]

In the context of the insurer's duty to settle with third parties, the doctrine of good faith "imposes a fiduciary obligation on an insurer to protect its insured from a judgment that exceeds the limits of the insured's policy."[22] Consider an example to illustrate why this fiduciary obligation is necessary. Imagine, as above, that you are involved in an automobile accident in which a pedestrian is permanently injured, resulting in $100,000 in damages for which he asserts you are liable. If you opt to take the pedestrian's claim to trial, your worst-case scenario (ignoring the costs of defending) is being found liable for the full $100,000 in damages; best-case, for nothing. On average,[23] then, litigating the claim exposes

17. State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995) (citing Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 1 (1992)).

18. *See id.* Efficient breach—under which a party may (and perhaps should) breach for the sake of efficient resource allocation as long as she is "ready to pay for any loss of bargain"—makes little sense in a liability-policy world for this very reason. *Cf.* Henderson, *supra* note 17, at 2 (noting that insurers may no longer "indulge" in efficient breach).

19. *See* Ging v. Am. Liberty Ins. Co., 293 F. Supp. 756, 759 (N.D. Fla. 1968), *rev'd on other grounds*, 423 F.2d 115 (5th Cir. 1970).

20. Shannon R. Ginn Constr. Co. v. Reliance Ins. Co., 51 F. Supp. 2d 1347, 1352 (S.D. Fla. 1999).

21. Berges v. Infinity Ins. Co., 896 So. 2d 665, 682–83 (Fla. 2004) ("Indeed, this is what the insured expects when paying premiums."); *see also* United Guar. Residential Ins. Co. of Iowa v. All. Mortg. Co., 644 F. Supp. 339, 341 n.3 (M.D. Fla. 1986) ("[B]ecause the insurer has the right to completely control the defense . . . a duty of good faith arises out of the insurer-insured relationship."); *Ging*, 293 F. Supp. at 759 ("[A] third duty imposed [by the insurance contract] upon the insurer is that of exercising good faith in the conduct of settlement negotiations.").

22. Harvey v. GEICO Gen. Ins. Co. (*Harvey Supreme Court*), 259 So. 3d 1, 3 (Fla. 2018).

23. This example assumes a fifty-percent likelihood you will be found liable.

you to $50,000 in liability, and it would be reasonable for you to accept a settlement offer at or below that amount.

But recall: you have a policy providing $50,000 in liability insurance, and that policy likely assigns to your insurer the exclusive discretion to decide whether to settle a third-party claim against you. If your insurer opts to litigate the claim, its potential payout to the pedestrian is capped at your $50,000 policy limits. Litigating thus exposes your insurer, on average, to only $25,000 in liability, and a reasonable insurer—acting in its own best interests—would decline to settle for a higher amount. This includes any amount between $25,000 and $50,000, all reasonable settlement offers from your perspective. The upshot? Absent a duty to consider your best interests, your insurer could make a decision that exposes you to substantially more liability than if you controlled the settlement negotiations. That is, absent the threat of bad faith liability, your insurer might make unreasonable-to-you decisions that put your money at risk.

This example illuminates how an insurer might act in bad faith by "put[ting] its own interests ahead of its insured['s] in the handling of a claim."[24] An insurer may certainly make an honest decision, based upon its investigation, to decline to settle with a claimant.[25] But a party suing an insurer for bad faith may allege that the insurer refused a reasonable settlement offer (as in the example above), denied a claim for which it knew its insured was liable, or failed to make payments for covered damages within a reasonable time.[26] Under the doctrine of good faith, an insurer who fails to satisfy its duty to exercise good faith may, as a result, be held liable for acting in bad faith. A bad faith judgment can be extremely significant to an insurer because it exposes the insurer, rather than the insured, to the extra-contractual liability—beyond the agreed-upon policy limits—to which its actions exposed the insured.[27]

A. *Development of the Common Law Bad Faith Failure to Settle Cause of Action*

In the seminal 1938 case of *Auto Mutual Indemnity Co. v. Shaw*,[28] the Florida Supreme Court first recognized a common law cause of action for

24. Michael Moline, *Insurance Industry's Michael Carlson: We Hope PIP-Repeal Study 'Will Kill the Bill,'* FLA. POL. (Feb. 6, 2018), https://floridapolitics.com/archives/255514-insurance-industrys-michael-carlson-hope-pip-repeal-study-will-kill-bill [https://perma.cc/3LJD-KEZU].

25. *See* Auto Mut. Indem. Co. v. Shaw, 184 So. 852, 857–58 (Fla. 1938) (per curiam).

26. Moline, *supra* note 24.

27. *Id.*

28. 184 So. 852 (Fla. 1938) (per curiam).

auto insurance bad faith failure to settle with an injured third party.[29] In *Shaw*, an individual injured in an auto accident sued the insurer for satisfaction of an excess judgment the insured could not pay, as well as for bad faith failure to settle the claim without litigation.[30] The court held that, because the insurance contract included an insolvency clause establishing insurer liability for an unsatisfied judgment against the insured,[31] the injured claimant could sue the insurer to recover the excess judgment.[32] The court also discussed a third-party beneficiary theory—under which a contract's promisor has a duty to a creditor beneficiary (here, the third-party claimant) to perform its contractual promises—but did not explicitly hold that such a basis could independently support the cause of action.[33]

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29. *Id.* at 859; *see also* State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995) (citing *Shaw* to support the proposition that actions for insurer bad faith failure to settle a third-party claim were recognized as early as 1938 in Florida). In contrast, Florida has never recognized a common law cause of action for bad faith failure to settle an insured's *first-party* claim. *Cf.* Baxter v. Royal Indem. Co., 285 So. 2d 652, 656 (Fla. Dist. Ct. App. 1973) (noting the special insurer-insured relationship giving rise to the duty of good faith as to third-party coverages is lacking as to first-party coverages), *cert. discharged*, 317 So. 2d 725 (Fla. 1975). The reasons Florida courts have articulated for this distinction vary. In the case of Uninsured Motorist claims, the insurer is essentially settling a claim on behalf of the uninsured motorist, so the insurer and insured are in an adversarial position, "the very antithesis" of the fiduciary relationship ultimately held to undergird the good faith duty to settle third-party claims. *Id.* at 656. And for Collision, Comprehensive, and Personal Injury Protection claims, no good faith duty attaches because the insurer-insured relationship is akin to debtor and creditor; the insured is thus limited to pursuing contract remedies, such as payment with interest, when settlement has been delayed. *See, e.g.*, *id.* at 657; Smith v. Standard Guar. Ins. Co., 435 So. 2d 848, 849 (Fla. Dist. Ct. App. 1983); Indus. Fire & Cas. Ins. Co. v. Romer, 432 So. 2d 66, 70 (Fla. Dist. Ct. App. 1983) (Hurley, J., concurring). *But see* Escambia Treating Co. v. Aetna Cas. & Sur. Co., 421 F. Supp. 1367, 1368 (N.D. Fla. 1976) (holding, in a case of first impression, that an "insurer has liability, sounding in tort . . . when . . . it unreasonably and in bad faith withholds payment to its insured"). Dissenters at both appellate court levels have found this distinction troubling because every insurance contract includes an "implied by law . . . covenant of good faith and fair dealing" applicable to both third-party and first-party coverages under the policy. *See, e.g.*, *Baxter*, 285 So. 2d at 660 (Spector, J., dissenting).

30. *Shaw*, 184 So. at 853.

31. "[I]f, because of [the] insolvency or bankruptcy [of the insured], an execution on a judgment against [the insured] is returned unsatisfied, the judgment creditor shall have a right of action against the [insurer] to recover the amount of said judgment . . . ." *Id.* at 855 (quoting the contractual language). The holding in *Shaw* apparently led many insurers to remove similar provisions from their contracts in order to avoid such liability. Thompson v. Com. Union Ins. Co. of N.Y., 250 So. 2d 259, 261 n.2 (Fla. 1971).

32. *Shaw*, 184 So. at 856.

33. *See id.* (concluding that "the plaintiff to this suit is *within the benefits of the policy sued upon* and has a right to maintain this suit" (emphasis added)).

The court in *Shaw* further held, in a question of first impression,[34] that, because an insurance contract "gives the power of settlement to the insurance company and [takes] the right away from the [insured]," and because neither party has the right to act arbitrarily, an insurer has an ancillary duty to act honestly and in good faith toward its insureds.[35] This duty's source is not the contractual provisions themselves: the duty to act in good faith arises "because of and flowing from" the contract's assignment of the sole right to settle and defend to the insurer,[36] creating a relationship between insurer and insured that later courts would characterize as fiduciary in nature.[37] These principles naturally suggest that an insured may sue her insurer for failure to exercise its duty to settle in good faith.[38] But the court in *Shaw*—by remanding the third-party claimant's bad faith claim for retrial—raised the additional inference that a third party may also properly maintain a claim against an insurer for bad faith failure to settle.[39] However, the court did not address whether that claim hinged on the contract's insolvency provision or was more broadly permissible under a third-party beneficiary theory or good faith doctrine.

Florida's common law bad faith failure to settle cause of action took shape gradually over the decades following *Shaw*. Courts initially held that the insolvency provision in *Shaw* was essential to a third party's right to sue an insurer for damages beyond policy limits,[40] whether for satisfaction of an excess judgment against the insured or in a bad faith action.[41] But an insured found liable for an excess judgment has suffered injury permitting her to sue her insurer for bad faith failure to settle a third

34. *Id.* The court surveyed case law from other jurisdictions for guidance. *See id.* at 856–58 (analyzing positions taken in Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Maryland, 155 N.W. 1081 (Wis. 1916), Hilker v. Western Automobile Insurance Co. of Ft. Scott, 231 N.W. 257 (Wis. 1930), and American Mutual Liability Insurance Co. of Boston v. Cooper, 61 F.2d 446 (5th Cir. 1932)).

35. *Id.* at 857, 859.

36. *Id.* at 859.

37. *See, e.g.*, Baxter v. Royal Indem. Co., 285 So. 2d 652, 655–56 (Fla. Dist. Ct. App. 1973), *cert. discharged*, 317 So. 2d 725 (Fla. 1975).

38. *See id.* at 656 (noting that it is this fiduciary relationship, arising because the insured entrusted the insurer with the settlement and defense of claims against her, which "subjects [an insurer] to excess liability if it acts in bad faith").

39. *See Shaw*, 184 So. at 859.

40. *E.g.*, Canal Ins. Co. v. Sturgis, 114 So. 2d 469, 470 (Fla. Dist. Ct. App. 1959) ("Apparently the Supreme Court considered that the insured's right of action against the insurer . . . for not . . . settling the claim against it, was part of the cause of action accruing to the judgment creditor under the quoted [insolvency] provision . . . ."), *aff'd*, 122 So. 2d 313 (Fla. 1960), *overruled in part by* Thompson v. Com. Union Ins. Co. of N.Y., 250 So. 2d 259 (Fla. 1971).

41. *See id.* at 471–72 (holding that a third-party claimant was limited to recovery of policy limits where the insurance contract provided that a judgment creditor could only "recover under this policy to the extent of the insurance afforded by this policy").

party's claim, even if she cannot or does not satisfy the judgment.[42] On this point, Florida's First District Court of Appeal noted that the unpaid judgment, which accrues interest as time passes, is injury in and of itself under the contract.[43] Further, Florida's Third District Court of Appeal later held that an insured "judgment debtor" may assign her insurer bad faith claim to a third-party "judgment creditor," thereby allowing the third party to sue the insurer directly under a policy lacking the insolvency provision present in *Shaw*.[44]

Eventually, however, the Florida Supreme Court concluded—first in *Shingleton v. Bussey*,[45] and again in *Thompson v. Commercial Union Insurance Co. of New York*[46]—that a third-party judgment creditor may sue an insurer for extra-contractual damages without such an assignment, regardless of the presence or absence of any contractual right to do so.[47] The third party may do so as long as the insured was liable for the claimant's injuries and the insurer had notice of the claim and an opportunity to investigate.[48] In reaching this holding, the court applied the third-party beneficiary theory previously discussed in *Shaw*, finding

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42. Am. Fire & Cas. Co. v. Davis, 146 So. 2d 615, 618–19 (Fla. Dist. Ct. App. 1962).

43. *See id.*

44. McNulty v. Nationwide Mut. Ins. Co., 221 So. 2d 208, 210–11 (Fla. Dist. Ct. App.), *cert. discharged*, 229 So. 2d 585 (Fla. 1969). Such an assignment is not void as champerty, which "is the intermeddling of a stranger in the litigation of another, for profit," because "[a] judgment creditor of an insolvent tortfeasor can hardly be called an intermeddling stranger to litigation necessary to pay his judgment." Nationwide Mut. Ins. Co. v. McNulty, 229 So. 2d 585, 586 (Fla. 1969) (quoting Groce v. Fid. Gen. Ins. Co., 448 P.2d 554, 558 (Or. 1968)).

45. 223 So. 2d 713 (Fla. 1969).

46. 250 So. 2d 259 (Fla. 1971).

47. *See Shingleton*, 223 So. 2d at 715–16; *Thompson*, 250 So. 2d at 260. This is a minority position. Progressive Express Ins. Co. v. Scoma, 975 So. 2d 461, 465 n.4 (Fla. Dist. Ct. App. 2007) (citing Knotts v. Zurich Ins. Co., 197 S.W.3d 512, 525–26 (Ky. 2006) (Cooper, J., dissenting)). *See generally* INS. COVERAGE & BAD FAITH GRP. OF THE PRIMERUS DEF. INST., COMPENDIUM OF PRINCIPLES OF LAW REGARDING BAD FAITH IN THE FIFTY STATES AND D.C. (2010), https://www.primerus.com/files/PRI_InsuranceCoverageAndBadFaithGroup2010BadFaithCompendium_FNL-1.pdf [https://perma.cc/2QNT-A3ED] (cataloging bad faith law in each U.S. jurisdiction). It is also a position the Florida legislature had declined to enact very shortly before the Florida Supreme Court's decision in *Shingleton*. Howard R. Marsee, Note, *Direct Action Against the Liability Insurer: A Legislative Approach for Florida*, 23 U. FLA. L. REV. 304, 305 & n.9 (1971).

48. *Shingleton*, 223 So. 2d at 716. The court in *Shingleton* held that the insured's liability could be established either in a prior action against the insured or in an action in which the insured and insurer are codefendants, even when the insurance contract precludes such joinder (thereby barring an action against the insurer until the claimant has prevailed against the insured), based on public policy goals (in particular, efficiency), liberal state joinder rules, and the third party's constitutional right to a "speedy, realistic, and adequate recovery action." *See id.* at 716–18; Howard R. Marsee, Case Comment, *Civil Procedure: Judicial Creation of Direct Action Against Automobile Liability Insurers*, 22 U. FLA. L. REV. 145, 145 (1969). The Florida legislature later prohibited joinder of the insurer in the underlying tort suit against the insured. FLA. STAT. § 627.4136(1) (2020) (originally codified at FLA. STAT. § 627.7262 (1976)).

that a third party—indeed, the public—is indisputably a "real party in interest" to the auto insurance contract, which the insured buys for the benefit of those she injures while negligently operating her vehicle.[49]

B. *Enactment of the Statutory Bad Faith Cause of Action*

Eventually, the Florida legislature codified these developments to Florida common law which broadly allow an insured or injured third party to sue for extra-contractual damages caused by an insurer's bad faith failure to settle. The Unfair Insurance Trade Practices Act ("Act"),[50] which went into effect on October 1, 1982,[51] provides, in relevant part, that:

> Any person may bring a civil action against an insurer when such person is 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 her or his interests . . . .[52]

The statute describes eligible claimants expansively, and Florida courts have interpreted "any person" to "constitute clear, unambiguous, all-inclusive language"[53] authorizing "all persons . . . damaged by enumerated acts of the insurer" to sue.[54] Still, the Florida Supreme Court has noted that "any person" must be understood in the context of an insurer's duty to settle.[55] The statute thereby mirrors the scope of the common law cause of action, deeming both insureds and third-party

49. *Shingleton*, 223 So. 2d at 715–16; *see Thompson*, 250 So. 2d at 262. On this point, the court noted that its holding is consistent with public policy as expressed in Florida's statutory financial responsibility requirements. *Shingleton*, 223 So. 2d at 716; *see also* FLA. STAT. § 324.011 ("It is the intent of this chapter . . . to promote safety and provide financial security requirements for . . . [automobile] operators whose responsibility it is to recompense others for injury . . . caused by the operation of a motor vehicle."). However, Florida's Fifth District Court of Appeal subsequently held that a third party's right to sue expires when she voluntarily settles with the insured within policy limits, even if she thought she was reserving the right to pursue additional damages in an insurer bad faith action. Kelly v. Williams, 411 So. 2d 902, 903, 905 (Fla. Dist. Ct. App. 1982). The Florida Supreme Court later concluded likewise, noting that the third party's claim is derivative of the insured's claim for damages due to exposure to an excess judgment. Fid. & Cas. Co. of N.Y. v. Cope, 462 So. 2d 459, 459–61 (Fla. 1985) ("[A]bsent a prior assignment . . . once an injured party has released the tortfeasor from all liability . . . no such action may be maintained.").

50. 1982 Fla. Laws 1291 (codified as amended at FLA. STAT. § 624.155 (2020)).

51. Indus. Fire & Cas. Ins. Co. v. Romer, 432 So. 2d 66, 69 n.5 (Fla. Dist. Ct. App. 1983) (Hurley, J., concurring).

52. § 624.155(1)(b)(1).

53. Conquest v. Auto-Owners Ins. Co., 637 So. 2d 40, 42 (Fla. Dist. Ct. App. 1994), *aff'd*, 658 So. 2d 928 (Fla. 1995).

54. Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928, 929 (Fla. 1995).

55. State Farm Fire & Cas. Co. v. Zebrowski, 706 So. 2d 275, 277 (Fla. 1997).

claimants to be proper plaintiffs if impacted by an insurer's failure to attempt to settle the third party's claim in good faith.[56] As a result, the insured or third party may now choose between bringing a common law cause of action or a statutory claim.[57]

A party suing an insurer under the Act must satisfy two prerequisites. First, the insured must have been damaged, so a bad faith claim is not ripe unless the following are established: (1) the insured's liability to a third party for the underlying injury, and (2) the extent of the third party's damages.[58] Practically speaking, this means an injured third party must have first obtained an excess judgment against the insured, since an excess judgment demonstrates that the insurer may have breached its duty of good faith to the insured.[59] The Act thus effectively codified the Florida Supreme Court's holding in *Fidelity & Casualty Co. of New York v. Cope*[60] that such claims are rooted in "the bad faith action of the insurer which caused its insured to suffer a judgment for damages above his

56. *See* State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 63 (Fla. 1995). Unlike under the common law, *see id.* at 58–59; *supra* note 29, an insured now also has a statutory cause of action for her insurer's bad faith failure to pay her first-party claim, *see Laforet*, 658 So. 2d at 59; Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263, 264 (Fla. Dist. Ct. App. 1987). The court in *Opperman* relied on two federal district court opinions to hold that the statute's plain language, coupled with the presumption that lawmakers legislate with an awareness of the common law, justified concluding that the legislature intended to extend Florida bad faith doctrine to cover failure to pay first-party claims. *Id.* at 265–66 (first citing United Guar. Residential Ins. Co. of Iowa v. All. Mortg. Co., 644 F. Supp. 339 (M.D. Fla. 1986); and then citing Rowland v. Safeco Ins. Co. of Am., 634 F. Supp. 613 (M.D. Fla. 1986)); *see United Guar. Residential Ins. Co. of Iowa*, 644 F. Supp. at 341 (noting the statute's overarching purpose to "impose civil liability on insurers who act inequitably vis-a-vis their insureds, not simply to restate or clarify the common law"). The Florida Supreme Court affirmed this interpretation in 1991, explicitly characterizing the Act as "Florida's civil remedy statute for first-party insurer bad faith." Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So. 2d 1289, 1290 (Fla. 1991). With this enactment, Florida arguably has recognized an implied covenant of good faith and fair dealing when the insurer pays its insured's claims under the contract. *See Opperman*, 515 So. 2d at 267; *Romer*, 432 So. 2d at 69 n.5 (Hurley, J., concurring).

57. *Laforet*, 658 So. 2d at 63. The Act's 1990 amendment specifically clarified that the statute did not eliminate the common law remedy, although a plaintiff cannot recover under both causes of action. 1990 Fla. Laws 385 (codified as amended at FLA. STAT. § 624.155(8) (2020)).

58. *Blanchard*, 575 So. 2d at 1291. But the plaintiff need not plead a specific *amount* of damages or that the damages exceed the insured's policy limits. Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617, 618 (Fla. 1994).

59. *See Zebrowski*, 706 So. 2d at 277 ("[I]n the absence of an excess judgment, a third-party plaintiff cannot demonstrate that the insurer breached a duty toward its insured."). This prerequisite became statutorily required in 1977 with the enactment of the nonjoinder of insurers statute. *See supra* note 48. This requirement is also explicitly incorporated into some insurers' policy contracts. *See, e.g.*, Progressive Direct Auto, *supra* note 8, at 43 ("We may not be sued for payment under Part I—Liability to Others until the obligation of an insured person under Part I to pay is finally determined either by judgment after trial against that person or by written agreement of the insured person, the claimant, and us.").

60. 462 So. 2d 459 (Fla. 1985).

policy limits."[61] Absent an excess judgment requirement, an insurer would find itself "in the dilemma of having a good-faith obligation to a third-party claimant as well as to its insured when the best interest of one would not necessarily be in the best interest of the other."[62]

Second, the Act requires that any party bringing a bad faith claim against an insurer files a Civil Remedy Notice giving the Florida Department of Insurance and the insurer sixty days' notice of the alleged bad faith violation.[63] The insurer then has the opportunity to respond or cure the alleged violation during this sixty-day safe harbor period,[64] which "promotes quick resolution of insurance claims."[65] Nonetheless, the safe harbor period is not a cure-all for allegations of bad faith failure to settle a third-party claim. An insurer is not off the hook if it tenders policy limits in response to a Civil Remedy Notice while an underlying third-party tort action against the insured is ongoing, because doing so at that late juncture "does not eliminate . . . the insured's exposure to an excess verdict."[66] Nor can an insurer cure alleged bad faith by paying policy limits after an excess judgment has been rendered against the insured.[67] Rather, once a third-party claimant has sued the insured tortfeasor, the insurer may no longer avoid exposure to a bad faith action by the insured or third party by tendering policy limits.[68]

C. *The Pre-Harvey Bad Faith Failure to Settle Legal Standard*

Like the cause of action for extra-contractual liability, the legal standard for determining what conduct exposes an insurer to such liability has evolved over time. From the beginning, however, case law has provided inconsistent answers to two key questions: whether the relevant standard is negligence or bad faith, and whether courts should exclusively

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61. *Id.* at 461.

62. *Zebrowski*, 706 So. 2d at 277.

63. FLA. STAT. § 624.155(3)(a) (2020).

64. § 624.155(3)(c).

65. Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617, 619 (Fla. 1994). In the first-party context, no bad faith action lies where the insurer pays within the safe harbor period, since "what had to be 'cured' is the non-payment of the contractual amount due the insured. . . . The statutory cause of action . . . never comes into existence until expiration of the sixty-day window without the payment of the damages owed under the contract." Talat Enters., Inc. v. Aetna Cas. & Sur. Co., 753 So. 2d 1278, 1282–84 (Fla. 2000). But the insurer need not pay extra-contractual damages to cure alleged first-party bad faith; otherwise, there would be no incentive to pay to prevent a bad faith action. *Id.* at 1282 ("Surely an insurer need not immediately pay 100% of the damages claimed to flow from bad faith conduct in order to avoid the chance that the insured will succeed on a bad faith cause of action."). However, when an insurer completely fails to respond within the sixty-day period, that failure "create[s] a presumption of bad faith sufficient to shift the burden to the insurer to show why it did not respond." *Imhof*, 643 So. 2d at 619.

66. Macola v. Gov't Emps. Ins. Co., 953 So. 2d 451, 458 (Fla. 2006).

67. *See* Hollar v. Int'l Bankers Ins. Co., 572 So. 2d 937, 938 (Fla. Dist. Ct. App. 1990).

68. *Macola*, 953 So. 2d at 458.

consider the conduct of the insurer (and not that of the insured or third-party claimant), in making its evaluation.

1. Which Triggers Insurer Extra-Contractual Liability: Negligence or Bad Faith?

As to the first key question, in *Shaw*—Florida's seminal insurance bad faith case—the Florida Supreme Court looked, on first impression, to other jurisdictions for guidance when determining the appropriate legal standard.[69] Ultimately, the court rejected the negligence standard embraced by the Wisconsin Supreme Court,[70] which requires an insurer to act with "ordinary care" when investigating claims and alerting the insured to the potential for liability beyond her policy limits.[71] Instead, the court opted for the "prevailing rule" requiring a showing of bad faith to trigger extra-contractual liability:

> It appears that the insurance company . . . should be held to that degree of care and diligence which a man of ordinary care and prudence should exercise in the management of his own business. The prevailing rule seems to be, however, that the insurer must act in good faith toward the [insured].[72]

The *Shaw* court's phrasing suggests bad faith is something more than "mistakes and miscues"[73] during claims handling. And certainly, some cases have required intentional misconduct: deliberate, unethical actions intended to deceive the insured or third-party claimant. In *Campbell v. Government Employees Insurance Co.*,[74] for instance, the Florida Supreme Court pointed to three specific instances of misconduct—misrepresenting the gravity of a claim (both as to the severity of injury and the likelihood of an adverse judgment), concealing a claimant's post-judgment settlement offer, and falsely advising the insured about legal options—that established "a continued course of dishonest dealing" rising to the level of bad faith.[75]

However, other courts have applied a broader standard such that even inadvertent misconduct can result in excess liability, including when an

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69. Auto Mut. Indem. Co. v. Shaw, 184 So. 852, 856–59 (Fla. 1938) (per curiam).

70. *See id.* at 858–59 (discussing Hilker v. Western Automobile Insurance Co. of Ft. Scott, 231 N.W. 257 (Wis. 1930)).

71. *See id.* at 858.

72. *Id.* at 859 (citations omitted).

73. *See* Berges v. Infinity Ins. Co., 896 So. 2d 665, 687 (Fla. 2004) (Cantero, J., dissenting) ("To establish a breach of this duty, claimants must demonstrate more than mere negligence; they must prove the insurer acted in bad faith . . . by 'wrongfully refusing to settle . . . .' Clearly mistakes and miscues do not meet this standard." (quoting Dunn v. Nat'l Sec. Fire & Cas. Co., 631 So. 2d 1103, 1106 (Fla. Dist. Ct. App. 1994)).

74. 306 So. 2d 525 (Fla. 1974).

75. *Id.* at 530, 532.

insurer simply drops the ball while handling claims. For example, the First District Court affirmed a finding of bad faith where an insurer—allegedly due to understaffing—neglected to thoroughly investigate a claim and thus missed overtures indicating the claimant wished to settle quickly.[76] Other decisions have similarly backpedaled from the *Shaw* court's apparent rejection of negligence as the proper measuring stick. Indeed, the Florida Supreme Court itself—while affirming that the "standard[] for determining liability in an excess judgment case is bad faith rather than negligence"—has held that reasonable diligence and ordinary care are themselves material factors when evaluating bad faith,[77] and other Florida courts have reiterated this holding.[78]

2. Whose Conduct Matters when Evaluating Bad Faith?

As to the second key question—whose conduct is relevant to the question of bad faith—the *Shaw* court held that, to avoid bad faith liability, "it must . . . appear that [*the insurer*] acted in good faith and dealt fairly with the insured" when exercising its rights and responsibilities under the insurance contract.[79] Textually, the *Shaw* standard thus appears to focus entirely on the conduct of the insurer. Yet the court reversed the bad faith verdict in light of a letter from the insured to the insurer in which the insured consented to litigating the claim while acknowledging the possibility of an excess judgment.[80] Nonetheless, for several decades to follow, courts applied *Shaw* by focusing exclusively on the insurer's conduct.[81]

Over time, however, the case law seemingly moved toward a totality-of-the-circumstances approach—considering both the conduct of the insurer and that of the insured or third-party claimant[82]—when evaluating

76. Travelers Indem. Co. v. Butchikas, 313 So. 2d 101, 102–03 (Fla. Dist. Ct. App. 1975), *aff'd*, 343 So. 2d 816 (Fla. 1976).

77. *Campbell*, 306 So. 2d at 530–31.

78. *See, e.g.*, *Berges*, 896 So. 2d at 668–69 ("Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith.") (quoting Bos. Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980)); DeLaune v. Liberty Mut. Ins. Co., 314 So. 2d 601, 603 (Fla. Dist. Ct. App. 1975) (affirming evidence of negligence is probative as to the question of bad faith).

79. Auto Mut. Indem. Co. v. Shaw, 184 So. 852, 859 (Fla. 1938) (per curiam).

80. *Id.*

81. *See, e.g.*, Am. Fire & Cas. Co. v. Davis, 146 So. 2d 615, 617–18 (Fla. Dist. Ct. App. 1962).

82. In fact, some appellate districts, for a time, held that a claimant's offer to settle within policy limits, either proactively or in counter to the insurer's settlement offer, was essential to a later finding of insurer bad faith failure to settle. Beck v. Kelly, 323 So. 2d 667, 668 (Fla. Dist. Ct. App. 1975) (per curiam) (first citing Am. Fid. Fire Ins. Co. v. Johnson, 177 So. 2d 679 (Fla. Dist. Ct. App. 1965); and then citing Seward v. State Farm Mut. Auto. Ins. Co., 392 F.2d 723 (5th Cir. 1968)), *abrogated by* Gen. Accident Fire & Life Assurance Corp. v. Am. Cas. Co. of Reading,

whether an insurer acted in bad faith. In *Boston Old Colony Insurance Co. v. Gutierrez*,[83] the insured and claimant each accused the other of crossing the center line and causing a collision.[84] Although the insured was cited for the accident, he encouraged his insurer not to settle out of concern that settlement would be construed as an admission of fault and thus jeopardize his counterclaim.[85] After a jury awarded the claimant an excess judgment of over $1.3 million against the insured, the claimant successfully sued the insurer for bad faith failure to settle.[86] The intermediate appellate court affirmed, but the Florida Supreme Court reversed, finding insufficient evidence of bad faith.[87] Instead, the court held the insured's conduct dispositive, pointing out that "the insurer was ready to settle, expressed its willingness to settle, and only because of the explicit request of its own insured did not settle."[88]

The *Boston Old Colony* decision, and others that followed,[89] thus affirmed both a totality-of-the-circumstances approach and, within that approach, the relevance of the insured's conduct to a determination of bad faith. Further, in 1982, the Florida legislature arguably codified this approach in Florida's bad faith statute, which authorizes suit against an insurer for "[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 her or his interests."[90] And in 1995, the Florida Supreme Court stated unequivocally that the same standard—as pronounced in the bad faith statute and including a consideration of all the circumstances—applies to both statutory and common law bad faith failure to settle claims.[91]

The clear—and commonsense—implication of the statutory language is that the insurer is not in sole control of whether settlement is effectuated. The conduct of other parties—specifically, the insured and

390 So. 2d 761 (Fla. Dist. Ct. App. 1980). But the Third District Court later receded from its holding in *Beck*, *see Gen. Accident Fire & Life Assurance Corp.*, 390 So. 2d at 765–66, and the Florida Supreme Court has cited the decision in *General Accident* in support of the principle that a formal settlement offer by a claimant is not necessary to a finding of bad faith, *see Berges*, 896 So. 2d at 680.

83. 386 So. 2d 783 (Fla. 1980) (per curiam).

84. *Id.* at 784.

85. *Id.*

86. *Id.* at 784–85.

87. *Id.* at 785.

88. *Id.* at 786. But the court declined to find dispositive a hold harmless agreement the insured had signed, noting that an insurer cannot "insulate itself" from liability for acting solely in its own interests in this way. *Id.*

89. *See, e.g.*, Cotton States Mut. Ins. Co. v. Trevethan, 390 So. 2d 724, 727 (Fla. Dist. Ct. App. 1980) (distinguishing *Boston Old Colony* because "[t]he insured here was not prosecuting a counterclaim and did not stand in the way of a settlement").

90. FLA. STAT. § 624.155(1)(b)(1) (2020) (emphasis added).

91. State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62–63 (Fla. 1995).

third-party claimant—also matter, and there are situations in which the insurer could not reasonably settle. Yet case law has consistently focused primarily on circumstances relevant to determining whether an *insurer* has acted in good faith. For example, in *Boston Old Colony*, the Florida Supreme Court—while noting that bad faith is a factual question for the jury—articulated seven obligations of an insurer acting in good faith:

> [T]o advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same . . . [and] 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.[92]

Other cases have identified additional, insurer-focused circumstances, such as the insurer's following (or failing to follow) counsel's advice to settle;[93] unreasonably enforcing its contractual right to arbitrate;[94] refusal to disclose policy limits or affirmatively and promptly initiate settlement negotiations where liability is clear and injuries severe;[95] whether a denial of coverage is supported by diligent and thorough investigation;[96] the weight of legal authority as to a coverage issue;[97] the insurer's attempts to reach a prompt resolution of a coverage dispute so as to limit potential prejudice to the insured;[98] complete failure to respond to a Civil Remedy Notice within the sixty-day safe harbor window;[99] and even violation of the insurer's own internal claims-handling procedures or an expert witness's testimony that the insurer had acted in bad faith.[100]

At the same time, courts have largely taken a narrow approach to weighing insured or claimant conduct against a finding of bad faith. In

92. *Bos. Old Colony*, 386 So. 2d at 785 (emphasis added).

93. *Trevethan*, 390 So. 2d at 728.

94. Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263, 267 (Fla. Dist. Ct. App. 1987).

95. Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. Dist. Ct. App. 1991) (per curiam); *see also* Bannon v. GEICO Gen. Ins. Co., 743 F. App'x 311, 313 (11th Cir. 2018) (per curiam) (affirming bad faith where a settlement offer came twenty days after a claim was filed, seventeen days after liability was clear, and twelve days after the insurer knew an offer of policy limits was justified).

96. Robinson v. State Farm Fire & Cas. Co., 583 So. 2d 1063, 1068 (Fla. Dist. Ct. App. 1991).

97. *Id.*

98. *Id.*

99. Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617, 619 (Fla. 1994) ("[W]e find it difficult to articulate a possible reason not to respond within sixty days.").

100. *Bannon*, 743 F. App'x at 314.

DeLaune v. Liberty Mutual Insurance Co.,[101] Florida's Fourth District Court of Appeal affirmed a finding of no bad faith where the claimant sued less than one month after the accident, tendered a settlement offer less than three weeks later which was open for only ten days, and then refused to extend the deadline.[102] The unreasonably brief timeline between the accident, the lawsuit, and the settlement deadline "made it virtually impossible [for the insurer] to make an intelligent acceptance," even though the insurer knew liability was "highly probable" and the alleged injuries were severe.[103] In fact, the court suggested the "whole charade might have been a 'set up'" to manufacture bad faith, evidenced particularly by the claimant's unwillingness to settle one business day after the original, arbitrarily short deadline.[104]

However, *DeLaune* appears to be an outlier in the sense that the court evaluated the claimant's conduct broadly as hampering the insurer's efforts to settle in good faith. That is, it seems that only extremely clear evidence of non-insurer conduct impacting settlement may suffice to offset allegations of insurer bad faith, such as the insured's written acknowledgement of the risk of litigating in *Shaw*,[105] or the insured's express entreaty that the insurer not settle in *Boston Old Colony*.[106] Indeed, the Third District Court has held that the insurer bears the burden of showing "there was no realistic possibility of settlement within policy limits."[107]

Further, in *Berges v. Infinity Insurance Co.*,[108] the Florida Supreme Court expressly stated that "the focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its [fiduciary] obligations to the insured," who has surrendered to the insurer control over settling the claim.[109] Yet the court asserted that bad faith law serves to "protect insureds . . . who have fulfilled their contractual obligations by *cooperating fully* with the insurer in the resolution of claims."[110] The court also claimed to be affirming the totality-of-the-

101. 314 So. 2d 601 (Fla. Dist. Ct. App. 1975).

102. *Id.* at 602–03. The Fifth District Court reached a similar conclusion in *Clauss v. Fortune Insurance Co.*, holding that "[a] one-month period to verify the claim was not excessive, and certainly does not rise to the level of bad faith, particularly when Fortune tendered the policy limits one day after the notice of the bad-faith failure to settle was sent by Clauss," thus falling within the sixty-day statutory safe harbor period. 523 So. 2d 1177, 1178–79 (Fla. Dist. Ct. App. 1988).

103. *DeLaune*, 314 So. 2d at 602–03.

104. *Id.* at 603.

105. *See supra* text accompanying note 80.

106. *See supra* text accompanying notes 85–88.

107. Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. Dist. Ct. App. 1991).

108. 896 So. 2d 665 (Fla. 2004).

109. *Id.* at 677 (citing Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980) (per curiam)).

110. *Id.* at 682 (emphasis added).

circumstances approach articulated in *Laforet*.[111] So while suggesting that all surrounding circumstances are relevant to a finding of bad faith, including the insured's requisite cooperation—a requirement that sensibly must also apply to a claimant, since settlement is impossible without claimant cooperation—the *Berges* court nonetheless suggested a court should limit its consideration to the conduct of the insurer. And the *Berges* court further held that "the question of bad faith . . . extends to [*the insurer's*] entire conduct in the handling of the claim," including ways in which the insurer "dropped the ball."[112] Notwithstanding these contradictory assertions, this decision thus appears to revert the Florida bad faith standard to a place where only the insurer's conduct—be it intentional or simply negligent—is probative.

II. THE *HARVEY* DECISION

The Florida Supreme Court's decision in *Harvey v. GEICO General Insurance Co.* removes insured conduct even further from the totality-of-the-circumstances calculus, explicitly holding that an insured's action (or inaction) that contributes to an excess judgment does not absolve an insurer of liability for bad faith failure to settle.[113]

A. *Factual and Procedural Background*

James Harvey was involved in an automobile accident as a result of which a motorcyclist died.[114] Within three days, Harvey's insurer, GEICO, had concluded that Harvey was at fault for the collision, notified him that the motorcyclist's claim could exceed the policy limits, and advised him of the option to hire his own attorney in the matter.[115] By the ninth day, GEICO had proactively tendered the $100,000 policy limits to the motorcyclist's estate.[116]

In the meantime, on day six, the law firm representing the motorcyclist's estate had contacted GEICO to ask for a formal statement from Harvey as to the extent of his assets and whether he had any other insurance that might cover losses in excess of Harvey's GEICO policy limits.[117] It is unclear whether GEICO immediately rebuffed this request:

111. *Id.* at 680; *see also* Barry v. GEICO Gen. Ins. Co., 938 So. 2d 613, 618 (Fla. Dist. Ct. App. 2006) (noting that *Berges* requires evaluating the totality of the circumstances—including conduct of the third-party claimant and her attorney—to determine whether settlement was realistically possible).

112. *Berges*, 896 So. 2d at 672, 682 (emphasis added).

113. Harvey v. GEICO Gen. Ins. Co. (*Harvey Supreme Court*), 259 So. 3d 1, 11 (Fla. 2018).

114. *Id.* at 4.

115. *Id.*

116. *Id.*

117. *Id.* Harvey's vehicle was registered in the name of his business; thus, the motorcyclist's estate wished to know whether Harvey was driving for business purposes at the time of the accident. *Id.*

a paralegal from the law firm testified to that effect,[118] while GEICO's adjuster indicated she would not have refused such an inquiry.[119] However, it is undisputed that GEICO did not communicate this request to Harvey until more than two weeks had passed.[120] At that point, GEICO communicated the estate's request to Harvey, both orally and in writing, and sent Harvey a sample affidavit he could use to provide the information.[121] But GEICO's claims adjuster never informed the motorcyclist's estate that Harvey intended to comply once his attorney was available several days hence, even though Harvey had asked her to do so out of concern that the estate might think he was dragging his feet, and even though her supervisor had instructed her accordingly.[122]

The law firm had neither specified a deadline nor indicated to GEICO that the estate would not settle absent the requested information.[123] Yet nearly two more weeks passed during which Harvey took no further action to provide the statement, even though he had already met with his attorney to document his assets.[124] And so—nearly a month after its initial request—the motorcyclist's estate returned GEICO's settlement check and filed suit against Harvey.[125] After the motorcyclist's estate obtained an $8.47 million wrongful death judgment against him, Harvey then sued GEICO for bad faith.[126] At trial, the court credited several key pieces of evidence in Harvey's favor. First, Harvey presented evidence that the motorcyclist's estate would have accepted the policy limits had Harvey provided the estate with the requested statement.[127] In particular, the estate's attorney testified that he would have recommended settlement if he knew Harvey had few assets and no other accessible insurance, and the motorcyclist's widow testified that she would have heeded that advice.[128] Additionally, Harvey called an expert witness, who asserted that GEICO should have acted with "a sense of urgency" when handling a claim of this severity, especially since Harvey—who was under a duty to cooperate with GEICO and use its claims adjuster as a go-between—could not work directly with the estate to reach a settlement.[129] Finally, Harvey presented documentation of a historical pattern of

118. *Id.*

119. GEICO Gen. Ins. Co. v. Harvey (*Harvey District Court*), 208 So. 3d 810, 812 (Fla. Dist. Ct. App. 2017), *rev'd*, 259 So. 3d 1 (Fla. 2018).

120. *Harvey Supreme Court*, 259 So. 3d at 4.

121. *Harvey District Court*, 208 So. 3d at 813.

122. *Harvey Supreme Court*, 259 So. 3d at 4–5.

123. *Harvey District Court*, 208 So. 3d at 812–13.

124. *Id.*

125. *Harvey Supreme Court*, 259 So. 3d at 5.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

communication failures by GEICO's claims adjuster, including documented acknowledgement on GEICO's part that the adjuster's weaknesses could expose the insurer to extra-contractual obligations.[130] For these reasons, the trial court denied GEICO's motions for directed verdict and judgment notwithstanding the verdict, instead entering judgment on the jury verdict in Harvey's favor.[131]

On appeal, the Fourth District Court reversed, finding the evidence insufficient as a matter of law to support the jury's decision because "no competent, substantial evidence" suggested that GEICO had acted in its own interests alone.[132] The court noted that GEICO had already unconditionally tendered its policy limits by day nine, commenting that "it [is] hard to imagine how [the insurer] acted in bad faith when it offered to pay everything it possibly could under the policy."[133] And once GEICO notified Harvey of the estate's request for Harvey's financial statement—albeit seventeen days after receiving it—"the *insured* subsequently failed to provide a statement to the estate despite having the opportunity to do so before suit was filed."[134] Moreover, the court discredited Harvey's self-serving "after-the-fact" claim that he would have provided the statement if GEICO had more promptly communicated the request to him:

> Before the estate ever filed suit, the insured knew the estate wanted a statement, knew what the estate wanted in that statement, and had the materials to produce a statement. Further, the insured never provided a statement to the estate despite having the assistance of legal counsel for [at least eight] days before suit was eventually filed. Therefore, the insured failed to show that he would have provided the requested statement but for GEICO's purported "bad faith."[135]

Hence, the court determined that GEICO's conduct, albeit subpar and inefficient, did not cause the excess judgment against Harvey.[136] On this point, the court relied on a federal case to hold that "where the *insured's own actions or inactions* result, at least in part, in an excess judgment, the

130. *Id.*

131. *Id.* at 5–6.

132. GEICO Gen. Ins. Co. v. Harvey (*Harvey District Court*), 208 So. 3d 810, 815 (Fla. Dist. Ct. App. 2017), *rev'd*, 259 So. 3d 1 (Fla. 2018).

133. *Id.* at 812, 816 (second alteration in original) (quoting Novoa v. GEICO Indem. Co., 542 F. App'x 794, 796 (11th Cir. 2013) (per curiam)).

134. *Id.* at 812 (emphasis added).

135. *Id.* at 813, 816 ("Nothing in the record shows why the insured could not have given his statement between the time his personal attorney became available and the date the suit was filed.").

136. *Id.* at 816.

insurer cannot be liable for bad faith."[137] The court also analyzed each insurer good faith obligation articulated by the Florida Supreme Court in *Boston Old Colony*, concluding that GEICO had "fulfilled every obligation that an insurer owes the insured as announced in" that case.[138] The court thus concluded that holding GEICO responsible for extra-contractual damages was improper, and the trial court should have directed a verdict in GEICO's favor.[139]

B. *The Florida Supreme Court's Opinion*

The Florida Supreme Court, in a 4–3 decision, disagreed and quashed the intermediate appellate court's reversal.[140] The court asserted conflict jurisdiction based on the Fourth District Court's "misapplication" of Florida bad faith precedent as articulated in *Boston Old Colony* and *Berges*.[141] On review, the court remanded the case for reinstatement of the trial court's judgment because of that misapplication as well as improper reliance "on nonbinding federal cases that cannot be reconciled with [the court's own] clear precedent."[142]

As to the misapplication of Florida precedent, the court chastised the lower court for treating the obligations set forth in *Boston Old Colony* as a "mere checklist," and rejected its focus on whether GEICO acted solely in its own interests as the relevant measurement.[143] Instead, the court held that an insurer must not only fulfill the *Boston Old Colony* duties but do so while acting with due regard for the *insured's* best interests, namely by operating "with the same haste and precision" as the insured would in seeking to avoid an excess judgment.[144] And because good faith involves diligence and care, negligence is relevant to assessing whether an insurer has acted in bad faith.[145] Where—as here—liability is so clear and injuries are so severe as to make the claim a "ticking financial time bomb," the insurer has an affirmative duty to initiate settlement negotiations.[146] Nor do an insurer's obligations end with tendering policy

137. *Id.* (citing Barnard v. GEICO Gen. Ins. Co., 448 F. App'x 940, 944 (11th Cir. 2011) (per curiam)).

138. *Id.* at 815.

139. *Id.* at 816.

140. Harvey v. GEICO Gen. Ins. Co. (*Harvey Supreme Court*), 259 So. 3d 1, 12 (Fla. 2018).

141. *Id.* at 3; *see also* FLA. CONST. art. V, § 3(b)(3) ("The supreme court . . . [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision . . . of the supreme court on the same question of law.").

142. *Harvey Supreme Court*, 259 So. 3d at 3–4.

143. *Id.* at 7–8.

144. *Id.* at 7.

145. *Id.* (citing Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980) (per curiam)).

146. *Id.* (quoting Goheagan v. Am. Vehicle Ins. Co., 107 So. 3d 433, 439 (Fla. Dist. Ct. App. 2012)).

limits: an insurer's good faith duties extend until the claim is resolved or settlement is reached.[147] Any delay by the insurer during that process—even if, under the circumstances, it is unclear whether the claimant would eventually settle—may be construed by the factfinder as bad faith.[148]

And as to the lower court's improper reliance on federal cases, the court adamantly rejected the idea that an insured's misconduct can absolve an insurer of its own bad faith.[149] The court described this notion as "fundamentally inconsistent with" its position in *Berges* that the focus in a bad faith inquiry is on the insurer's conduct and not that of any other party.[150] Further:

> While this Court has stated that "there must be a causal connection between the damages claimed and the insurer's bad faith," this Court has never held or even suggested that an insured's actions can let the insurer off the hook when the evidence clearly establishes that the insurer acted in bad faith.[151]

The court dismissed such an excuse—which would effectively create a contributory negligence defense—as contradictory to Florida's long-standing bad faith law.[152] As a result, under Florida law, an insurer is liable for the harm its bad faith conduct causes, regardless of whether the insured's conduct also contributed, wholly or partially, to that harm.[153]

Applying these principles to Harvey's case, the court concluded that the evidence adequately supported the jury's finding of bad faith.[154] In particular, the court noted that GEICO utterly failed to treat the motorcyclist's claim—and its potential financial exposure to Harvey—as the "ticking financial time bomb" it was.[155] Indeed, GEICO's claims adjuster "completely dropped the ball" repeatedly and was "a considerable impediment" to reaching a settlement.[156] GEICO's crucial failure: not informing the motorcyclist's estate that Harvey intended to

147. *Id.* at 10.

148. *Id.* at 7 (citing *Goheagan*, 107 So. 3d at 439).

149. *Id.* at 11.

150. *Id.*

151. *Id.* (citation omitted) (quoting Perera v. U.S. Fid. & Guar. Co., 35 So. 3d 893, 902 (Fla. 2010)).

152. *Id.* at 12.

153. *See id.* at 11.

154. *Id.* at 10–11.

155. *Id.* at 8–9 (quoting Goheagan v. Am. Vehicle Ins. Co., 107 So. 3d 433, 439 (Fla. Dist. Ct. App. 2012)) ("There can be no doubt that had GEICO been faced with paying the entire multimillion-dollar judgment returned by the jury in this case, an amount that was completely foreseeable given the clear liability and catastrophic damages, it would have done everything possible to comply with the estate's reasonable demands.").

156. *Id.*

provide the requested financial statement.[157] In the court's view, this failure ultimately caused the excess judgment, because the court credited the statements of the widow and the estate's attorney that—had they received that information—they would not have filed the wrongful death action at all.[158] And because Harvey had surrendered control to GEICO, and thus could not contact the estate's attorney directly, his failure to provide the requested information was simply irrelevant.[159]

III. PROBLEMS WITH *HARVEY*

The Florida Supreme Court's decision in *Harvey v. GEICO General Insurance Co.* is problematic in a number of ways.

A. *Conflict with Precedent*

The dissenters in *Harvey* rejected the very basis for jurisdiction, challenging the majority's contention that the Fourth District Court's decision expressly and directly conflicted with prior Florida Supreme Court decisions on the same question of law.[160] Rather, the dissenters argued that the perceived conflict was "grounded in the majority's misreading of our case law" and asserted that the *Harvey* decision itself was in such conflict.[161] By refusing to consider the insured's conduct, the *Harvey* decision is inconsistent with *Boston Old Colony*, in which the Florida Supreme Court "specifically noted the relevance of the insured's own actions," as well as those of the third-party claimant, to its holding that the insurer—who was ready and willing to settle—did not act in bad faith.[162] It further conflicts with *Berges*—in which the Florida Supreme Court explicitly articulated its intent to remain consistent with *Boston Old Colony*—insofar as the *Berges* court's focus on the insurer's conduct must be read in harmony with the probative value placed on the insured's and third-party claimant's actions in *Boston Old Colony*.[163] The dissenters thus argued that the *Harvey* court misinterpreted *Berges* as holding that "the *sole* focus in any action for bad faith failure to settle must be on the insurer's actions—to the exclusion of all else."[164] Instead, the dissenters concluded that the intermediate appellate court properly

157. *Id.* at 9 ("The significance of [GEICO's] failure to inform the estate that Harvey intended to provide a statement cannot be overstated . . . .").

158. *Id.*

159. *See id.* at 10.

160. *Id.* at 12 (Canady, C.J., dissenting); *id.* at 21 (Polston, J., dissenting).

161. *Id.* at 12–13 (Canady, C.J., dissenting).

162. *See id.* at 14–15. In that case, the claimant refused the insurer's offer to settle prior to trial. *Id.* at 14.

163. *Id.* at 15.

164. *Id.*

factored Harvey's conduct into its bad faith analysis, and conflict jurisdiction was improper.[165]

The *Harvey* decision also conflicts with *Boston Old Colony*, according to the dissenters, because *Harvey*'s holding divorces the prior case's "general language" about ordinary care and prudence from its "specifically enumerated obligations," thus "effectively adopt[ing] a negligence standard for bad faith actions" where *Shaw* had established that "bad faith involves 'a heavier burden upon the insured' than does negligence."[166] Thus, the dissenters agreed with the intermediate appellate court in deeming the evidence of GEICO's negligent claims handling insufficient to support the verdict.[167] Specifically, the dissenters agreed with the lower court's holding that Harvey—who had assets in excess of $1 million, was already discussing his financial situation with an attorney the day the accident occurred, had already provided financial information to his attorney three weeks before suit was filed, and "controlled the only relevant decision that needed to be made" yet failed to ever provide the requested information to GEICO or the motorcyclist's estate—caused the excess judgment, not GEICO.[168]

B. *Broader Policy-Based Concerns*

More broadly, the *Harvey* decision is problematic in terms of the conduct—of all players involved—that it incentivizes. On the one hand, the standard for an insurer's conduct has become more stringent: from only intentional acts calculated to disregard an insured's best interests triggering bad faith liability[169] to negligence being probative of bad faith,[170] to the need for an insurer to exercise ordinary care with "haste and precision,"[171] such that even inadvertent process errors are now fodder for a bad faith verdict. On the other hand, the import of an insureds or claimant's conduct has become less (or perhaps not at all) relevant when appraising the totality of the circumstances. It is unclear how to square the statutory language—which implies that an insurer does not enjoy total control over whether settlement occurs[172]—and the *Berges* court's assertion that bad faith law protects an insured who has cooperated fully in the claims handling process[173] with that same court's

165. *See id.* at 19–20 ("Neither *Boston Old Colony* nor *Berges* require (or permit) ignoring the actions of Harvey and the estate.").

166. *Id.* at 19 (quoting Auto Mut. Indem. Co. v. Shaw, 184 So. 852, 858 (Fla. 1938) (per curiam)).

167. *Id.* at 12, 15.

168. *See id.* at 13.

169. *See supra* notes 73–75 and accompanying text.

170. *See supra* notes 76–78 and accompanying text.

171. *See supra* text accompanying notes 144–148.

172. *See supra* text accompanying notes 90–91.

173. *See supra* text accompanying note 110.

directive that courts should focus on the insurer's conduct,[174] let alone with the *Harvey* court's broad holding that "an insurer can[not] escape liability merely because the insured's actions could have contributed to the excess judgment."[175]

Indeed, the *Harvey* decision is the latest step along the road of distorting the doctrine of bad faith into an incentive—at least in a subset of (very expensive) cases—for insureds and claimants to avoid policy limits by manufacturing bad faith. Bad faith originated as a legitimate means of protecting insureds and claimants—who face the costs of often considerable harm suffered as a result of an automobile accident—from powerful insurers who might unreasonably withhold policy benefits. But *Harvey* and its lead-up cases merely trade one perverse incentive—that of an insurer sitting on premiums—for another: that of an insured or claimant attempting to trigger bad faith. Where the case law demonstrates little attention will be paid to an insured's or claimant's conduct, a potential plaintiff has little motivation to cooperate, negotiate, or accept a settlement, even when an insurer has offered every dollar of coverage an insured has purchased.[176] This is particularly true of a third-party claimant plaintiff, whose recalcitrance does not come with the risk of breach of the insurance contract for non-cooperation.

Further, even for an insured, risk of breach for non-cooperation may now be an idle threat. This is because an insurer's good faith performance of its duties under the policy is itself an element of an insurer's non-cooperation defense.[177] The *Harvey* decision, then, creates a double standard. An insured who substantially prejudices her insurer's defense of a third-party claim by breaching her good faith duty to cooperate may still enjoy the contractual—and potentially extra-contractual—benefits of her insurance policy, if a court finds her insurer too has breached its good faith obligations, thereby precluding a non-cooperation defense. But an insurer found liable for bad faith failure to settle a third-party claim enjoys no such shelter, even if the insured's lack of cooperation substantially contributed to or caused the inability to settle. Indeed, an insurer bears full responsibility for the consequences of its—and its

174. *See supra* text accompanying notes 108–109.

175. Harvey v. GEICO Gen. Ins. Co. (*Harvey Supreme Court*), 259 So. 3d 1, 11 (Fla. 2018); *see also supra* text accompanying notes 149–153 (discussing this aspect of the *Harvey* decision).

176. *Cf.* Bos. Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 786 (Fla. 1980) (Alderman, J., concurring) ("[I]t is to the injured party's benefit if the insurer breaches its duty to its insured . . . . [I]f the insurer settles, the plaintiff will receive no more than the policy limits, but if it does not, the plaintiff may end up with both the policy limits and an excess judgment.").

177. Ramos v. Nw. Mut. Ins. Co., 336 So. 2d 71, 75 (Fla. 1976). In Florida, an insured's non-cooperation may rise to the level of breach if an insurer can show four things: (1) the insured's non-cooperation was material; (2) the non-cooperation "substantially prejudiced" the insurer; (3) the insurer "exercised diligence and good faith" in trying to secure the insured's cooperation; and (4) the insurer "complied in good faith with the terms of the policy." *Id.*

insured's—combined bad faith conduct. In short, *Harvey* renders the non-cooperation defense illusory in such cases.

As a result, insureds and third-party claimants have considerable motivation to construct roadblocks to settlement in an attempt to reach into an insurer's deep pockets and "convert a policy purchased by the insured . . . [with] low limits . . . into unlimited insurance coverage."[178] Take, for example, the insured in *State Farm Mutual Automobile Insurance Co. v. Curran*,[179] who—despite a contractual obligation to attend medical examinations—unreasonably insisted that the insurer waive its contractual right to multiple exams and erected a "moving target [of] evolving demands" in exchange for ostensible cooperation,[180] with the "rather transparent motive . . . of putting the . . . [insurer] in a position where it could not offer up the policy limits prior to suit, unless it did so without having a medical consultation that it had confidence in."[181] Such gamesmanship can also take the form of withholding information about the nature or severity of a loss, ducking an insurer's attempts to initiate settlement until perceivably too much time has passed since the insurer's most recent attempt, or "setting artificial deadlines for claims payments and . . . [withdrawing] settlement offers when the artificial deadline is not met."[182]

This incentive to gamesmanship can particularly create lose-lose situations in cases of multiple injured parties whose damages clearly exceed available limits. An insurer is in a bind, for *Harvey* articulates expectations—haste and precision—that can be contradictory. Should an insurer err on the side of haste and pay filed claims—and exhaust policy limits—promptly, first-come, first-served style?[183] Should it err on the

178. *See* Berges v. Infinity Ins. Co., 896 So. 2d 665, 685 (Fla. 2004) (Wells, J., dissenting) ("[T]here 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."). *But see* Rutledge R. Liles, *Insurance Bad Faith: The "Setup" Myth*, FLA. BAR J., June 2003, at 18, 22 (arguing insurers set themselves up for bad faith allegations by failing to engage in "[d]efensive claims handling" that presumes any claim can lead to bad faith exposure).

179. 83 So. 3d 793 (Fla. Dist. Ct. App. 2011) (en banc), *aff'd*, 135 So. 3d 1071 (Fla. 2014).

180. *Id.* at 801–02.

181. *See id.* at 808 (Monaco, J., concurring) ("This was about as thinly disguised a bad faith trap as is imaginable."); *see also id.* at 807–08 (Orfinger, C.J., concurring) (describing insured's demands as a "poorly disguised setup for a bad faith claim" and the "sort of game playing . . . appropriate for a casino, not a courtroom").

182. *See Berges*, 896 So. 2d at 685 (Wells, J., dissenting). Indeed, "[p]ermitting an injured plaintiff's chosen timetable for settlement to govern the bad-faith inquiry would promote the customary manufacturing of bad-faith claims." *Id.* at 694 (Cantero, J., dissenting) (alteration in original) (quoting Pavia v. State Farm Mut. Auto. Ins. Co., 626 N.E.2d 24, 28–29 (N.Y. 1993)).

183. Evidently not. *See, e.g.*, Lee v. Sec. Nat'l Ins. Co., 943 So. 2d 887, 888 (Fla. Dist. Ct. App. 2006) (holding tender of policy limits to two claimants did not bar a bad faith claim by a subsequent claimant injured in the same accident).

side of precision and thoroughly investigate harm to each potential claimant before tendering any settlement offers? A claimant in such a situation has a strong motivation to withhold information on the extent of losses in the hopes of generating bad faith and thus obtaining damages beyond the policy limits.

Further, for insurers, the *Harvey* decision—which sets expectations under which arguably whatever an insurer does can be characterized as inappropriate or insufficient—creates two perverse incentives. The first is to settle for extra-contractual amounts where bad faith litigation is threatened or likely, even in the face of genuine reservations about liability or the extent of damages.[184] Such settlements can mean paying dollars, or more, on the pennies of contractually agreed-upon policy limits. The second perverse incentive for an insurer is to offer higher payouts than indicated, earlier in the investigation process, to settle claims—even those lacking warning signs of bad faith litigation—within policy limits simply to avoid the specter of bad faith.[185] But these incentives toward premature or outsized settlements—prioritizing the "haste" component of the *Harvey* directive—can contravene the insurer's contractual right and good faith obligation to thoroughly investigate claims, thus jeopardizing *Harvey*'s "precision" component.[186]

And these insurer incentives hurt everyone. While a robust bad faith jurisprudence might seem to penalize only the wrong-doing insurer (and not the ill-treated insureds), this is not true of those "excess" costs an insurer takes on prophylactically. Florida law prohibits the costs of extra-contractual liability resulting from a bad faith judgment, or a settlement to resolve a bad faith action, from being passed along to insureds in an insurer's pricing.[187] Instead, these expenses must come out of an insurer's profits. But no such barrier applies to costs an insurer proactively incurs to avoid bad faith litigation in the first place: those costs do affect the prices insureds pay. So when—to avoid the risk of an extra-contractual

184. *See* WILLIAM G. HAMM ET AL., BERKELEY RSCH. GRP., THE IMPACT OF BAD FAITH LAWSUITS ON CONSUMERS IN FLORIDA AND NATIONWIDE, at ES-2 (2010).

185. *See id.*

186. *See Berges*, 896 So. 2d at 694 (Cantero, J., dissenting) (citing *Pavia*, 626 N.E.2d at 28–29).

187. FLA. STAT. § 627.0651(12) (2020) ("[A] judgment entered [in] a . . . bad faith action . . . shall not be included in the insurer's rate base, and shall not be used to justify a rate or rate change. . . . [Nor shall] a settlement entered as a result of a statutory or common-law bad faith action identified as such . . . ."); *see also* HAMM ET AL., *supra* note 184, at 19 n.34, 23 ("While [s]ection 627.0651 . . . bars insurance companies from including awards and settlements resulting from . . . bad faith actions in their rate base, this prohibition does not apply to settlements offered to reduce the risk of such actions."). Further, the costs insurers are statutorily barred from incorporating into their pricing can nonetheless indirectly impact the prices consumers pay, either (1) by depleting an insurer's reserves, leading the state insurance commissioner to require the insurer to increase premiums for replenishment; or (2) by causing an insurer to exit the market, leading to a less competitive insurance market overall. *Id.* at 23.

obligation—an insurer pays more than it genuinely thinks justified for any claim with potential to be a bad faith situation, the insurer's loss costs increase.[188] Those increased loss costs feed into the insurer's pricing model, ultimately raising premiums for everyone in the future.[189]

IV. WHERE DO WE GO FROM HERE?

At root, the problem with the *Harvey* decision—despite tipping its hat to the idea that bad faith law exists "to protect insureds . . . who have fulfilled their contractual obligations by cooperating fully with the insurer in the resolution of claims"[190]—is its failure to recognize that it takes two (or three) to tango, so to speak. While an insurer plays a central role in the handling of third-party claims, the good faith conduct of insureds and claimants is relevant—indeed, vital—to effectuating settlement. A sensible bad faith doctrine must take this reality into account.

Such a doctrine should unquestionably hold an insurer accountable for deliberate conduct that seeks to withhold the benefit of the bargain—the agreed-upon coverage amounts and legal representation—from the insured or those she harms. But a sensible bad faith doctrine should also protect an insurer from unfounded—or unshared—liability for bad faith where evidence clearly shows the insurer, under all the circumstances, *could not* have settled[191] because the claimant never intended to accept a settlement offer, or because the insured obstructed settlement. Dissenting justices in prior bad faith cases have urged the Florida Supreme Court to "set forth 'logical, objective' rules for bad faith"[192] and "to reserve bad faith damages, which is limitless, court-created insurance, to egregious circumstances of delay and bad faith acts."[193] Along these lines, Justice Charles Wells, writing in dissent in *Berges*, argued for "express guidelines" that set expectations for all parties, such as timelines and conditions for payments, appointment of guardians, and penalties for

188. Moline, *supra* note 24 ("The Insurance Research Council did a study of the costs of claims settlements designed to avoid bad-faith suits. They came up with a number of about $80 per insured vehicle per year. That's like $800 million in additional insurance costs.").

189. *Cf. Berges*, 896 So. 2d at 686 (Wells, J., dissenting) ("When an insured purchases . . . $20,000 of insurance but the insurer pays $2.5 million in claims, someone has to fill up the pool. Initially, this amount may come out of an insurer's profits, but eventually the someones are the other insureds, whose premiums are increased."); *see also* HAMM ET AL., *supra* note 184, at ES-2 to -5 (concluding that the availability of a bad faith failure to settle cause of action in Florida has driven a 30% increase in insurance premiums, before factoring in the costs of increased attorney involvement in claims settlement, and also more heavily burdens the court system).

190. Harvey v. GEICO Gen. Ins. Co. (*Harvey Supreme Court*), 259 So. 3d 1, 6 (Fla. 2018) (quoting *Berges*, 896 So. 2d at 682).

191. *Contra* FLA. STAT. § 624.155(1)(b)(1).

192. *Harvey Supreme Court*, 259 So. 3d at 13 (Canady, C.J., dissenting) (quoting *Berges*, 896 So. 2d at 686 (Wells, J., dissenting)).

193. *Berges*, 896 So. 2d at 686 (Wells, J., dissenting).

failure to meet such requirements.[194] But, as Justice Wells acknowledged in 2004, the direction in which case law has proceeded suggests any such change in bad faith law must come from the legislature.[195]

Legislation introduced in the Florida Senate during the 2019–2020 session sought to do just that. In November 2019, State Senator Jeff Brandes introduced Senate Bill 924, which would modify Florida's bad faith standard in several significant ways that ring of a direct rejection of *Harvey*.[196] Brandes's bill would correct the apparent slide toward a functionally negligence-based standard for bad faith, instead placing the burden on the insured or claimant to "prove that the insurer acted in reckless disregard for the rights of [the] insured . . . caus[ing] damage to the insured or claimant."[197] This provision would codify the distinction the *Shaw* court appears to have envisioned: that bad faith is a more stringent standard than negligence.[198] This position—requiring more than simple negligence to support a finding of bad faith—is consistent with the bad faith standard in many other states.[199] While a reckless disregard standard may not have deterred a court from finding that GEICO acted in bad faith under the facts in *Harvey*—particularly given the insurer's failure to monitor a struggling claims adjuster more closely[200]—such a provision would appropriately protect future insurers from exposure to bad faith liability based solely on mere negligence.

Brandes's bill would also explicitly codify a commonsense idea the *Harvey* court rejected: that "[t]he actions or inactions of the insured or claimant are relevant in an action for bad faith. It is an affirmative defense to a claim for bad faith that the insured's or claimant's own conduct, in

194. *Id.*

195. *Id.* at 686–87.

196. S. 924, 2020 Leg., 122d Sess. (Fla. 2020). Senate Bill 924 died in committee in March 2020. *Id.*

197. *Id.*

198. *See supra* notes 69–73 and accompanying text. The bill would also more adequately reflect the fact that "[g]ood faith is a subjective standard that involves a test of what the actor knew and thought," rather than a comparison of conduct to an objective normative standard of, say, due care. Henderson, *supra* note 17, at 36 ("[G]ood faith is more consistent with a test that inquires whether the harm to the insured has been caused intentionally or recklessly, whereas a test of fair dealing is more consistent with the use of a standard such as that for negligence.").

199. *See, e.g.*, State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 303–04 (Ala. 1999); Aetna Cas. & Sur. Co. v. Broadway Arms Corp., 664 S.W.2d 463, 465 (Ark. 1984); s*ee also* INS. COVERAGE & BAD FAITH GRP. OF THE PRIMERUS DEF. INST., *supra* note 47, at 5, 10, 15–16, 20, 40, 70–71, 74, 82, 108–09, 114, 127, 140, 163, 184, 198–99 (surveying bad faith law in every jurisdiction, and noting that a showing of simple negligence may be insufficient in Alabama, Alaska, Arizona, Arkansas, Connecticut, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New Mexico, Oklahoma, and Pennsylvania).

200. *See supra* notes 130, 155–158 and accompanying text.

whole or in part, caused an excess judgment."[201] This provision would align Florida bad faith jurisprudence with the existing statutory recognition that, under certain circumstances, an insurer could not reasonably have effectuated settlement.[202] But the provision, as worded, is somewhat ambiguous as to whether it creates the contributory negligence defense the *Harvey* court unequivocally vetoed[203] or a more moderate comparative negligence standard.[204] The latter would strike an equitable balance, allowing a court to assign liability for harm actually caused by an insurer's bad faith while still minimizing the incentive for insureds and claimants to obstruct claims investigation and settlement with hopes of triggering extra-contractual damages. It would also align Florida with a position embraced in certain circumstances by numerous other states.[205] Under the facts in *Harvey*, then, while a court might—as

201. Fla. S. 924. House Bill 895, which was also introduced in the Florida legislature during the 2019–2020 term and which likewise failed to emerge from committee in March 2020, would have implemented this affirmative defense in a slightly different manner, explicitly codifying an insured's or claimant's "duty to act in good faith" throughout the claims investigation and settlement process. H. 895, 2020 Leg., 122d Sess. (Fla. 2020).

202. *See* FLA. STAT. § 624.155(1)(b)(1) (2020).

203. *See supra* text accompanying notes 149–153.

204. In a 1973 (non-insurance) case, the Florida Supreme Court replaced the state's prior contributory negligence standard with a pure comparative approach, noting that such an approach is "the most equitable result." Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); *see also* Michael S. Smith, *The Comparative Fault Defense in Insurance Bad Faith Litigation: A Florida Perspective*, FLA. BAR J., Mar. 1991, at 59, 61 (acknowledging this change in the law). However, the same court later held that the comparative negligence defense applies only to a negligence action between uninsured parties. Stuyvesant Ins. Co. v. Bournazian, 342 So. 2d 471, 474 (Fla. 1977) ("Nothing in *Hoffman*, the insurance laws, or the public policy of this state justifies . . . a requirement that a partially-negligent but fully-insured person should absorb a portion of the cost of his negligence.").

205. For example, in some states, a claimant has an affirmative duty to extend a settlement offer before an insurer can be found liable for bad faith failure to settle. *See, e.g.*, GA. CODE ANN. § 33-4-7(c) (2020) ("A claimant shall be entitled to recover . . . if the claimant . . . has delivered to the insurer a demand letter . . . offering to settle for an amount certain . . . ."); Wittig v. Allianz, A.G., 145 P.3d 738, 751 (Haw. Ct. App. 2006); Haddick *ex rel.* Griffith v. Valor Ins., 763 N.E.2d 299, 305 (Ill. 2001); Davis v. Home Indem. Co., 659 S.W.2d 185, 189 (Ky. 1983). Other states consider the bad faith acts of an insured or claimant more broadly. *See, e.g.*, Almy v. Com. Union Ins. Co., No. CIV.A. 95-2174, 1997 WL 60862, at *8 (Mass. Super. Ct. Feb. 13, 1997) (citing the appellate court's warning that courts "be vigilant to ensure that plaintiffs not engage in 'reverse bad faith'" conduct to conclude that an insurer did not act in bad faith when negotiating with a plaintiff whose "bargaining posture was unreasonable at every stage until the last" (quoting Parker v. D'Avolio, 664 N.E.2d 858, 864 n.9 (Mass. App. Ct. 1996))); First Bank of Turley v. Fid. & Deposit Ins. Co. of Md., 928 P.2d 298, 308 (Okla. 1996) (noting that while "[a] tort-like comparison of the parties' *degree of bad faith* does not avail . . . the insured's inadequate notice avails to the insurer as a defense" relevant to the portion of damages for which the insurer is liable); Me. Bonding & Cas. Co. v. Centennial Ins. Co., 693 P.2d 1296, 1299 (Or. 1985) (en banc) ("[A]n insurer cannot be held liable for failure to settle within the policy limits when no reasonable

described above—find bad faith on GEICO's part, the insurer might nonetheless justifiably be spared from bearing full responsibility for an excess judgment its insured also contributed to causing.

Further, Brandes's bill would establish procedures to guide an insurer facing a loss with multiple injured parties whose aggregate damages exceed policy limits.[206] Rather than forcing an insurer to make the lose-lose choice between acting with haste or precision in investigating and settling such claims,[207] the bill would allow the insurer to file an interpleader action under which the trier of fact would determine the prorated share of the policy limits to which each injured party is entitled.[208] The bill thus protects both insurers, insureds, and claimants in situations in which the insurer's good faith obligations are especially unclear and potentially contradictory.

Finally, the bill would also codify—nearly word for word—the insurer good faith obligations the Florida Supreme Court enumerated in *Boston Old Colony*,[209] along with an obligation to defend an insured in any legal action "alleg[ing] facts that fairly and potentially bring the suit within policy coverage."[210] While the *Harvey* court chided the Fourth District Court for treating the *Boston Old Colony* obligations as a "mere checklist,"[211] Brandes's bill would treat the fulfillment of such obligations as dispositive of insurer good faith when, "within [forty-five] days after . . . written notice of loss, the insurer stood ready and willing to settle for policy limits."[212] In this way, the bill is similar to proposals[213] to extend the statutory sixty-day safe harbor rule to third-party bad faith claims.

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opportunity to settle exists."). The Court of Appeals of Oregon has gone so far as to hold, in a medical malpractice insurance case, that "[a]n insured's breach of the policy's cooperation clause, if proved, would provide a complete bar to recovery" in a bad faith suit. Stumpf v. Cont'l Cas. Co., 794 P.2d 1228, 1233 (Or. Ct. App. 1990). Utah's proportional liability statute may also limit an insurer's exposure if a court finds it did not solely cause an excess judgment. *See* UTAH CODE ANN. § 78B-5-820(1) (LexisNexis 2020).

206. Fla. S. 924.

207. *See supra* text accompanying note 183.

208. Fla. S. 924. House Bill 895 included a nearly identical interpleader provision. H. 895, 2020 Leg., 122d Reg. Sess. (Fla. 2020).

209. *Compare* Fla. S. 924 ("An insurer must advise an insured of settlement opportunities, advise an insured as to the probable outcome of the litigation, warn an insured of the possibility of an excess judgment, [and] advise an insured of steps to avoid an excess judgment . . . ."), *with* Bos. Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980) (per curiam) (holding that an insurer has a duty "[t]o advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same").

210. Fla. S. 924.

211. *See supra* text accompanying notes 143–148.

212. Fla. S. 924.

213. *See* Moline, *supra* note 24.

Under those proposals, an insurer could—if case law interpreting the existing statutory rule[214] is applied to third-party claims—cure alleged bad faith by paying policy limits to the third-party claimant within sixty days. Such an extension would provide an escape valve for an insurer accused of bad faith, shielding it from extra-contractual liability, but it has downsides. In addition to enabling precisely the behavior bad faith law originally developed to combat—an insurer delaying payment on valid claims for no good reason other than because it can (and will benefit financially from doing so[215])—an insurer who settles with a third-party claimant could also fail to protect the insured from liability beyond the disbursed policy limits by failing to condition that settlement on the claimant's release of its insured.[216] Further, it is unclear whether an insurer who does so would retain a duty to defend its insured from such liability.[217]

An insurer in this situation arguably has not cured its alleged bad faith within the meaning of the statute—because the insured would remain exposed to liability to the third party[218]—but the scenario illustrates a problem that is potentially broader under Brandes's bill: that an insurer might qualify for protection under the bad faith statute while still prejudicing its insured in future litigation with a third-party claimant. Significantly, the bill only requires that an insurer be "ready and willing" to tender policy limits, not that it actually effectuate settlement with a claimant. The bill's language appears to link the forty-five-day window to an insurer's earlier fulfillment of the enumerated good faith obligations, but what of bad faith conduct not specifically enumerated? Moreover, absent actual settlement, the insurer continues to be bound by a good faith duty to defend its insured. As written, how would a court treat bad faith conduct subsequent to an insurer's apparent readiness and willingness to settle?

Thus, it would remain to be seen whether Brandes's bill would adequately protect an insured from prejudice to her litigation with a third-

214. *See supra* notes 63–68 and accompanying text.

215. *See supra* note 15. This risk could certainly be mitigated by enacting a narrower safe harbor period, but the enduring problem with identifying an appropriate static period is the diversity of claims an insurer must handle. In some cases, liability and damages are clear within days; in other cases, such investigation might take weeks or months.

216. Additionally, a proposed rule that would extend the statutory safe harbor, standing alone, fails to address another important problem with current bad faith law in Florida: that insureds and claimants have considerable ability to stand in the way of an insurer investigating claims and making intelligent decisions about whether and what to offer for settlement. This particular shortcoming in current bad faith law is adequately addressed by State Senator Jeff Brandes's bill.

217. *See, e.g.*, Progressive Direct Auto, *supra* note 8, at 3 ("Our duty to . . . defend ends after we have paid the applicable limit of liability for the accident that is the basis of the lawsuit.").

218. *See supra* text accompanying note 66.

party claimant as a result of her insurer's bad faith conduct. For example, a court might find that an insurer who advised the insured of the possibility of an excess judgment and communicated the claimant's request for a financial statement—but who failed to later press the insured to follow through on the request, as occurred in *Harvey*—has failed to satisfy the proposed statutory requirement to "advise an insured of steps to avoid an excess judgment."[219] But it might not, and in *Harvey* the Fourth District Court did not, instead finding that the insured was aware of the request and bore responsibility for not responding in a timely manner.[220] The same result would seem inappropriate if the insurer alerted the insured to the financial statement request but actively withheld a claimant's explicit indication that she would sue without receipt of the information by a specified deadline, yet it is not absolutely clear that the latter hypothetical would yield a different outcome.

With this admittedly exaggerated example, the risk of a bright-line rule pairing the *Boston Old Colony* obligations with a forty-five-day escape valve becomes apparent: namely, there will be cases in which an insurer satisfies the checklist, is ready and willing to settle by day forty-five, and yet has neither acted in its insured's best interest nor eliminated her potential exposure to excess liability. Perhaps a bad outcome in this small minority of cases is a worthwhile trade-off for the clarity a bright-line rule provides to insurers—and to insureds and third-party claimants—in the remaining vast majority. But a stronger proposal would retain the first three portions of Brandes's bill, which establish guideposts for a trier of fact's evaluation of bad faith—in particular, the applicability of a heightened bad faith standard rather than mere negligence, the relevance of the conduct of all parties involved when assessing causation, and specific procedures to handle problematic multiple-claimants scenarios—while declining to conclusively absolve an insurer while it retains control over the insured's defense, thus maintaining a court's discretion to evaluate the totality of the circumstances.[221]

CONCLUSION

Passage of State Senator Brandes's bill would represent great strides toward righting the ship of Florida's doctrine of bad faith failure to settle. Most importantly, it recognizes that negligence and bad faith are not one and the same, and it codifies the reality that it takes two (or three) to

219. S. 924, 2020 Leg., 122d Sess. (Fla. 2020).

220. *See supra* notes 132–139 and accompanying text.

221. Other commentators have suggested codifying a similar checklist of good faith duties for insureds and claimants. *See, e.g.*, Gwynne A. Young & Johanna W. Clark, *The Good Faith, Bad Faith, and Ugly Set-up of Insurance Claims Settlement*, FLA. BAR J., Feb. 2011, at 9, 14. Like an insurer checklist, an insured or claimant checklist is suboptimal because it would hamper a court's ability to exercise discretion when assessing all the circumstances of a particular case.

tango, as the insurer, insured, and claimant—as well as each party's counsel—may, any or all, be an impediment to reaching a reasonable settlement. With these provisions enacted, Florida's bad faith statute would expressly and appropriately direct courts to consider the conduct of all parties—indeed, the true totality of the circumstances—when assessing an insurer's liability for bad faith, such that where evidence shows the insured or claimant caused an excess judgment, no insurer bad faith liability would lie. The bill would better serve the insured's interests, however, if modified to eliminate the possibility of absolving an insurer of bad faith before it has fully discharged its duty to defend the insured. Such a compromise would both protect an insurer from misplaced liability for an excess judgment it did not—or did not fully—cause, while at the same time ensuring that an insured can be confident that her insurer is acting with her best interests in mind throughout the entire claims resolution process.