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Harvey and the quasi-fiduciary duty to settle

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Courts have struggled to define the nature and scope of a liability insurer's duty to settle — a duty that appears nowhere in the insurance contract but is implicit, based on the judge-made implied covenant of good faith and fair dealing read into every insurance contract.

Courts have uniformly declined to find insurers strictly liable for the adverse consequences of a decision not to settle.

But there is vast disagreement on the specific elements of a claim for bad-faith failure to settle, even when courts purport to apply the same general standard for evaluating an insurer's settlement decisions.

The following questions are relevant:

- Is a formal settlement demand from the claimant a prerequisite to a liability insurer's obligation to engage in settlement negotiations?
- If a duty to attempt to settle may arise in the absence of a settlement demand, when is there a duty to initiate negotiations?
- If an insurer does have a duty to begin negotiations, how can it satisfy that duty?
- Is an offer of policy limits in exchange for a release of the insurer's liability while continuing to provide the insured a complete defense enough?
- If not, what else must the insurer do to facilitate negotiations?

The facts of *Harvey v. Geico General Insurance Co.*, No. SC17-85, 2018 WL 4496566 (Fla. Sept. 20, 2018), implicate all these questions.

In *Harvey,* the Florida Supreme Court required a liability insurer to pay an $8.47 million judgment against its insured even though the insurer tendered its $100,000 policy limits to the claimant within nine days of the underlying accident and the claimant never made a settlement demand.

The insurer's monthlong failure to act on the claimant's request for information about the insured's assets was deemed a bad-faith breach of the insurer's duty to settle, even though the insured was partially responsible for the delay.

FACTUAL BACKGROUND

The facts of the *Harvey* case are likely to make their way into law school exam questions designed to test the nature and scope of a liability insurer's duty to settle.

The bad-faith claim in *Harvey* arose out of a catastrophic automobile collision between a car driven by James Harvey and a car driven by John Potts. Potts died in the accident, leaving behind a wife and three children.

Harvey's automobile insurance policy with Geico had coverage limits of only $100,000.

Within two days of the accident, Geico acknowledged Harvey's liability, warned Harvey of the likelihood of a judgment in excess of policy limits, and advised him of his right to hire his own attorney.

> Florida is one of many jurisdictions around the country where the law on the duty of liability insurers to settle has long suffered from doctrinal confusion.

Six days after the accident, a paralegal from the law firm representing Potts' estate called the Geico adjuster assigned to the claim and requested information about whether Harvey had additional insurance or assets. The adjuster did not communicate the request to Harvey, and, according to the paralegal, denied the request.

Eight days after the accident, Geico sent the estate's attorney a check for the full amount of Harvey's $100,000 policy limit, along with a release of liability.

The estate's attorney sent the adjuster a letter acknowledging receipt of the check as well as Geico's refusal to make Harvey available for a statement about his assets. Geico's adjuster did not respond to the letter.

Twenty-five days after the accident, and 17 days after the paralegal first inquired about Harvey's assets, Geico's adjuster forwarded the estate's attorney's letter to Harvey.

This was the first time Harvey learned of the estate's request for information about his assets.

The next day, Harvey called the adjuster to discuss the estate's attorney's letter. He told the adjuster that he planned to meet

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with his personal attorney to review his financial documents and provide the information requested, but advised the adjuster that his attorney would not be available for another five days.

He specifically asked the adjuster to let the estate's attorney know he was working on collecting the requested information. The adjuster did not do so.

Approximately one month after requesting Harvey's financial information, the estate returned Geico's check and filed a wrongful death suit against Harvey. The wrongful-death action resulted in an $8.47 million judgment against Harvey.

> The *Harvey* decision is emblematic of a modern trend in fiduciary duty law under which the absolute bar on conflicts of interest in fiduciary relationships has given way to a more flexible approach.

In sum, Geico conceded Harvey's liability and tendered its full policy limits within eight days of the accident; the estate never offered to settle for any amount; and although Geico's adjuster failed to facilitate communications between Harvey and the estate regarding Harvey's assets, Harvey was partially complicit in the failure to provide the estate with the information its attorneys needed to determine the settlement value of the case.

THE BAD-FAITH LAWSUIT

The gravamen of Harvey's bad-faith failure-to-settle suit against Geico was that Potts' estate would have settled for Harvey's $100,000 policy limit if its attorneys had known that his only other liquid asset was a business account worth approximately $85,000.

At trial, the estate's attorney testified that he would not have filed suit and instead would have recommended that the estate accept the policy limits settlement offer.

Potts' widow testified that she would have followed the attorney's advice and accepted the policy limits.

In addition, an insurance bad-faith expert testified that any claim involving a high likelihood of liability and damages in excess of policy limits requires a "sense of urgency," which Geico's adjuster failed to show in communicating with the estate and Geico about the estate's need for additional financial information.

The expert explained that because Geico was handling the claim, Harvey could not contact the estate's attorney directly. Instead, Harvey had to use Geico's adjuster as "a go-between given his duty to cooperate with his insurer."

Following the jury's verdict, the parties contested the sufficiency of the evidence to support a cause of action for bad-faith failure to settle.

Florida's 4th District Court of Appeal agreed with Geico that the evidence was not sufficient to support a bad-faith verdict, but the Florida Supreme Court reversed in a 4-3 decision.

HARVEY'S PLACE IN THE EVOLUTION OF FLORIDA BAD-FAITH LAW

Florida is one of many jurisdictions around the country where the law on the duty of liability insurers to settle has long suffered from doctrinal confusion.

Some courts have defined the duty narrowly, stressing that "an insurer does not have to act perfectly, prudently, or even reasonably ... [but] must 'refrain from acting solely on the basis of [its] own interests in settlement.'"[1]

Courts adhering to this narrow view state unequivocally that a liability insurer's duties commence only when the claimant has initiated settlement discussions by making a formal settlement demand.

Other decisions have imposed liability without requiring a settlement demand only if the insurer is guilty of some impropriety in handling the claim. Such improprieties include refusal to tell the claimant what the policy limit is and failure to keep the insured informed of developments regarding settlement.[2]

Still other decisions have characterized a liability insurer's duty as fiduciary in nature, holding that "[w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations."[3]

The Florida Supreme Court explored the limits of the cause of action for bad-faith failure to settle in *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980).

The *Boston Old Colony* court described the insurer's duty of good faith in general terms as "a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business." It then laid out certain specific obligations an insurer is required to fulfill in the context of injuries caused by its insured to a third party:

> This good-faith duty obligates the insurer to 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. The insurer must 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.[4]

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The court concluded that the evidence demonstrated that the insurance company "fulfilled all these obligations."[5] In so doing, it placed particular emphasis on the insured's own actions in preventing settlement.

The court ultimately determined that the insurer's failure to settle was "because of the explicit request of its own insured."[6] It also noted the relevance of the third party's own actions, namely the third party's "refus[al] to settle when the insurer subsequently offered to settle prior to trial."[7]

THE APPEALS COURT'S DECISION

The intermediate appellate court in *Harvey* found that Geico had fulfilled all its obligations under *Boston Old Colony* and therefore was entitled to a directed verdict. Relying on the 11th U.S. Circuit Court of Appeals' opinion in *Novoa*, the 4th District acknowledged that "Geico could have acted more efficiently in handling the insured's claim."[8]

The 4th District concluded, however, that the evidence "merely show[ed] that Geico could have perhaps 'improved its claims process,' not that it acted in bad faith."[9] The 4th District stated further that, "even if Geico's actions were negligent, negligence alone is insufficient to prove bad faith."

FLORIDA SUPREME COURT CLARIFIES INSURER'S DUTY

The Florida Supreme Court revisited its decision in *Boston Old Colony* and reexamined the nature of a liability insurer's duty to settle in Florida.

In *Berges v. Infinity Insurance Co.*, 896 So. 2d 665 (Fla. 2004), the court had described the insurer's duties to its insured as "a fiduciary obligation to protect its insured from a judgment exceeding policy limits" without imposing any duties beyond those specified in *Boston Old Colony*.

In addition, several intermediate appellate court decisions had suggested that a liability insurer's fiduciary obligations include a duty to initiate settlement negotiations without waiting for a settlement demand.[10]

But the supreme court had not adopted the result or reasoning of either case, and in *Powell* the insurer had interfered with the claimant's ability to make a settlement demand by refusing to disclose policy limits. The discussion of the insurer's duty to initiate settlement negotiations in *Powell* is therefore dicta.

The Florida Supreme Court's opinion in *Harvey* elevates the dicta in *Powell* to the definitive law of the state. The court explained that the duty described in *Boston Old Colony* is not a "mere checklist" but a duty to do "everything possible" to protect its insured's interests.

"The critical inquiry," the court observed, "is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment."

In determining whether the insurer did so, courts and juries must look to the "totality of the circumstances" surrounding the claim.

The court expressly repudiated the language in *Novoa* on which the appellate court relied.

While acknowledging that a bad-faith action is not a negligence action, the court reiterated its position in *Boston Old Colony* that "[b]ecause 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."[11]

The court stressed that a liability insurer's fiduciary duty in settlement requires more than promptly supplying the claimant with requested information within the insurer's control, such as information about policy limits.

The insurer also must take affirmative action to ensure its policyholder understands that failure to supply information the policyholder controls may impede settlement discussions.

Moreover, citing *Powell* and *Goheagan,* the court explained that where liability is clear, and injuries so serious that a judgment in excess of policy limits is likely, the insurer cannot sit back and wait for the injured claimant to make a settlement demand.

Rather, the insurer "has an affirmative duty to initiate settlement." But, as *Harvey* illustrates, an insurer cannot satisfy its duty to settle merely by promptly tendering its policy limits.

In so ruling, the supreme court significantly limited the circumstances under which an insurer may blame its insured for a failure to effectuate settlement.

The court flatly rejected the appellate court's view that *Boston Old Colony* stands for the proposition that an insurer cannot be liable for bad faith "where the insured's own actions or inactions result, in least in part, in an excess judgment."[12]

In contrast to *Boston Old Colony,* where the insured obstinately objected to any settlement until his counterclaim had been resolved, nothing in the record suggested that Harvey objected to providing the estate information about his finances.

To the contrary, Harvey started collecting the information shortly after the accident and instructed Geico's adjuster to ask the estate for more time. The significance of the adjuster's failure to do so, the court observed, "cannot be overstated."

The estate's attorney testified that he would have refrained from filing a wrongful-death suit had he known Harvey planned to give a statement of his financial assets. Thus, if the adjuster had followed through, the excess judgment could have been avoided.

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COMMENT

In the settlement context, a liability insurer's duty to act as if it has no policy limits is roughly analogous to a fiduciary's duty to manage the assets and affairs of its principal as if they were its own.

But the analogy is far from perfect. Liability insurers, unlike trustees or attorneys, have "skin in the game" — the limits of liability in their insurance policies.

The existence of a cap on the insurer's contractual liability, together with policy provisions giving the insurer control over the defense and settlement of claims, give rise to a conflict of interest whenever there is a possibility of liability in excess of the policy limits.

The *Harvey* decision is emblematic of a modern trend in fiduciary duty law under which the absolute bar on conflicts of interest in fiduciary relationships has given way to a more flexible approach.

This is why some courts refer to the relationship between a liability insurer and its insured as *quasi*-fiduciary.

NOTES

[1] *Novoa v. Geico Indemnity Co.*, 542 F. App'x 794 (11th Cir. 2013).

[2] *See, e.g.*, *Davis v. Nationwide Mut. Fire Ins. Co.*, 370 So. 2d 1162 (Fla. 1st Dist. Ct. App. 1979).

[3] *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d Dist. Ct. App. 1991).

[4] 386 So.2d at 785 (citation omitted).

[5] *Id.*

[6] *Id.* at 786.

[7] *Id.*

[8] *Harvey*, 208 So. 3d at 816.

[9] *Id.* (quoting *Novoa*, 542 F. App'x at 796).

[10] *Powell v. Prudential Prop. & Cas. Ins. Co.*, *supra; Goheagan v. Am. Vehicle Ins. Co.*, 107 So. 3d 433, 439 (Fla. 4th Dist. Ct. App. 2012).

[11] 386 So. 2d at 785 (emphasis added by the *Harvey* court).

[12] 208 So. 3d at 816.

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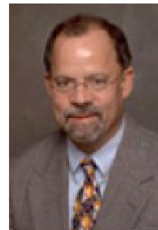

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