CHOICE OF LAW IN INSURANCE BAD FAITH CASES

by Daniel Greene

By the time this edition of the *Journal* hits your desk, we will be in peak snowbird season. The winter months can increase Florida's driving population by up to 5 percent, and many — if not most — of those additional drivers maintain auto policies issued outside the state of Florida.

Well, what happens when one of those out-of-state drivers injures your client and you hit them for an excess judgment? Which state's law will apply in the ensuing insurance bad faith case — Florida or the state where the policy was issued?

The Florida Supreme Court helped answer that question almost 50 years ago in the case of *GEICO v. Grounds*,[1] and the story is a bit of a wild ride.

In *Grounds*, a drunk driver caused an accident injuring a naval cadet training to be a helicopter pilot. Although the accident occurred in Florida, the GEICO policy insuring the tortfeasor's vehicle was issued and delivered in Mississippi.

The injured cadet's lawyer wrote to GEICO offering to resolve the case for the policy limits, but GEICO failed to respond. The cadet proceeded to file an auto negligence suit in Florida, which eventually resulted in a judgment against GEICO's insured in excess of the policy limits.

The insured then brought a bad faith action against GEICO under Florida law seeking to recover the amount of the judgment exceeding the policy limits.

On motions to dismiss and for directed verdict, GEICO argued the insured's claim failed as a matter of law because the bad faith action arose from the policy contract, the policy was issued in Mississippi, and Mississippi law did not allow for excess judgment recoveries. The trial court rejected this "lex loci contractus" argument and determined Florida insurance bad faith law applied. Following a jury verdict in favor of the insured, GEICO appealed.

The First District affirmed the trial court's choice of law determination. Specifically, the court stated:

Although the courts have labeled a claim for 'bad faith' in refusing to settle as a contract action . . . to a great extent the action sounds in tort arising out of a contractual relationship. Since an excess judgment action, though bearing certain aspects of a suit upon a contract is, strictly speaking, not one, we find that the law of Florida is the correct law to be applied in this situation.[2]

The story of *Grounds* did not end there, though. On petition for writ of certiorari, the Florida Supreme Court *quashed* the portion of the First District opinion which had held an insurance bad faith action was not "ex contractu." The Court held:

[T]he cause of action for an 'excess,' where one arises from bad faith, is bottomed on the contract, and [] the nature of an action thereon is ex contractu rather than in tort. The fact that the proofs offered to establish an insurer's bad faith in this connection may include or consist of showing an act of negligence will not take the cause of action out of the contract category.[3]

Bad news, right? Fortunately, the Court did not stop there: "Finding that this is an action ex contractu rather than tort will not alter the decision of the District Court insofar as it determines that Florida law should apply as opposed to Mississippi law." The Court concluded that although a bad faith action arises from a contractual relationship, it is based on an insurer's *performance* (or lack thereof) of its good faith obligations under the contract and "matters concerning performance are determined by the law of the place of performance under traditional conflict of laws principles."

Applied to the facts in *Grounds*, the Court held "the place of performance was Florida, where the cause of action against [the insured] was maintained and was defended by [GEICO]."[4]

Grounds has now been the law for nearly 50 years. Nevertheless, time and again we see out of state insurance companies handling Florida accident claims in a manner that can only be explained by ignorance of the fact that their claims handling will eventually be judged under Florida bad faith law. Opportunity abounds.

So, what about first-party UM bad faith under §§ 624.155 and 627.727(10)? That's a whole different discussion. But long story short, unfortunately (or fortunately depending on your facts), Florida's unique first-party bad faith remedy is likely only available for policies issued in the state of Florida.[5] While that may not be great for your snowbird client who only maintains her New York UM policy, it's good news for your Florida-resident client injured while driving through Georgia. Florida law is likely to apply to third-party bad faith actions arising from Florida accidents regardless of where the tortfeasor's policy was issued.

DANIEL GREENE
is an associate at Swope, Rodante P. A. in Tampa. Originally from Cooper City, Florida, he attended Bowdoin College in Maine where he was a two-sport athlete (golf and baseball) and graduated with a Bachelor of Arts in government and legal studies in 2014. He returned to Florida to earn his Juris Doctor, and in 2017 graduated magna cum laude from the University of Florida Levin College of Law. During law school, Greene was forum editor of the Florida Law Review and recipient of the Gertrude Brick Outstanding Board Member Award. In 2016, while still in law school, he joined the FJA. Today, his practice focuses on insurance bad faith and catastrophic injury claims.

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1 332 So. 2d 13 (Fla. 1976).

2 *Gov't Employees Ins. Co. v. Grounds*, 311 So. 2d 164, 168 (Fla. 1st DCA 1975) (quoting in part *Thompson v. Commercial Union Ins. Co. of New York*, 267 So. 2d 18, 19 (Fla. 1st DCA 1972)).

3 *Grounds*, 332 So. 2d 13, 14 (Fla. 1976).

4 In determining the place of performance for an insurer's good faith obligations, courts applying *Grounds* have considered where the claimant was injured, where the claimant filed a lawsuit, where the insured tortfeasor was defended, and where settlement negotiations (if any) occurred. *See MI Windows & Doors, LLC. v. Liberty Mut. Fire Ins. Co.*, 88 F. Supp. 3d 1326, 1331 (M.D. Fla. 2015) (collecting cases applying *Grounds*).

5 *See Higgins v. W. Bend Mut. Ins. Co.*, 85 So. 3d 1156 (Fla. 5th DCA 2012) (applying lex loci contractus in choice of law analysis for first-party bad faith claim).