Third District Court of Appeal

State of Florida, July Term, A.D. 2009

Opinion filed October 14, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D08-2538
Lower Tribunal No. 07-5340

State Farm Florida Insurance Company,
Petitioner,

vs.

Seville Place Condominium Association, Inc.,
Respondent.

On Petition for Writ of Certiorari to the Circuit Court for Miami-Dade County, Robert N. Scola, Jr., Judge.

Maltzman Foreman, and Jeffrey B. Maltzman; Butler, Pappas, Weihmuller, Katz, Craig, and John W. Weihmuller (Tampa); Elizabeth K. Russo, for petitioner.

Mintz, Truppman, and Mark J. Mintz; Bilzin Sumberg Baena Price & Axelrod, and Mitchell E. Widom; Ross & Girten, and Laurie Waldman Ross, for respondent.

Before RAMIREZ, SHEPHERD, and SALTER, JJ.

SALTER, J.

State Farm Florida Insurance Company seeks a writ of certiorari quashing circuit court orders that allowed Seville Place Condominium Association, Inc. to proceed with a statutory bad faith claim[1] and a punitive damage claim. State Farm's amended petition and the Association's response require us to evaluate the ripeness of bad faith claims when contractual appraisal provisions have been invoked and coverage has been determined or admitted.

We deny the writ, finding that the trial court correctly found that: (1) the insurer's liability to the Association had already been determined; (2) an appraisal, though aggressively attacked by State Farm, had been completed and confirmed by the court; and, therefore, (3) the conditions precedent for amendment to add a bad faith claim were met. We reject State Farm's argument that the prosecution of such a claim must be abated until the insurer has been permitted to appeal the liability and appraisal decisions and exhaust all appellate remedies relating to those issues.

The Hurricane, the Policy, and the Claim

Seville Place is a residential condominium consisting of forty-five duplexes (for a total of ninety condominium units) in Miami Lakes, Florida. On October 24, 2005, Hurricane Wilma caused substantial windstorm damage at Seville Place, particularly to the forty-five roofs over the units.

[1] § 624.155, Fla. Stat. (2008).

The Association had obtained and paid for a State Farm condominium association insurance policy that was in force at the time of the storm. The policy specifically covered direct physical loss or damage to property caused by a hurricane, and it included a Florida "hurricane deductible endorsement" disclosing a three percent deductible[2] for hurricane-related loss.

In the event of a dispute between the insurer and insured regarding the loss amount, the policy specified that the dispute would be resolved by appraisal:

> If we [State Farm] and you [the Association] disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. Each party will notify the other of the selected appraiser's identity within 20 days after receipt of the written demand for an appraisal. The two appraisers will select an umpire. If the appraisers cannot agree upon an umpire within 15 days, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. . . . If we submit to an appraisal, we will still retain our right to deny the claim.

The Association made a claim under the policy for its hurricane-related loss. In January 2006, State Farm made two payments on the claim to the Association in the total amount of $90,564.62, apparently based on a calculation that the roofs

[2] The endorsement provides that the percentage deductible is applied to the "amount of insurance on each covered building or structure" rather than to the aggregate amount of loss.

could be repaired rather than replaced.[3] The Association's estimate exceeded $4.6 million, based on an assessment that the roofs would have to be replaced. By October 2006 (a year after the hurricane and damage), the Association concluded that further negotiation would be fruitless, and it made a written demand for appraisal under the policy.

The Appraisal and Award

In November 2006, State Farm responded to the Association's repair estimate and the demand for appraisal. State Farm claimed that there was "no clear disagreement" between the parties because State Farm had not yet been allowed access to all the damaged condominium units. State Farm said that it would agree to an appraisal "if we can agree on two conditions." First, State Farm required that any appraisal award "must be a line item document, broken down by building and unit number, including the pricing that establishes the award of that item." Second, State Farm required a sworn "proof of loss" form.

In February 2007, the Association commenced a circuit court action against State Farm for breach of the insurance contract and for declaratory relief regarding coverage and State Farm's waiver of policy defenses. The Association requested

[3] The gross amount of loss computed by State Farm was $324,017. The lesser amount paid reflected a deduction for depreciation and for the applicable deductible. These payments were made within the ninety-day statutory period allowed for "undisputed" residential claim amounts as described in greater detail below.

the court to enforce the appraisal provision without State Farm's required conditions. State Farm then filed its own motion to enforce the appraisal provision, asserting that it had "at all times agreed to and does further hereby agree to proceed with appraisal," but also renewing its request for the special conditions.

The circuit court then ordered the parties to appraisal (without the conditions sought by State Farm) and ultimately appointed a neutral umpire to conduct the appraisal with each party's designated appraiser. Some two years and six months after the hurricane and damage, the contractually-agreed appraisal process was at last underway.

The trial court allowed sixty days for the completion of the appraisal process and directed the appraisers to "informally produce" the basis for amount of the loss. State Farm moved for an additional sixty days in order to inspect "the interior of most units," requiring "the unit owners' cooperation in providing access." The trial court required State Farm to provide an affidavit in support of that motion. The affidavit disclosed that State Farm had not yet inspected the interior of "over 30% of the units" during its three days of on-site appraisal work. Although the motion and affidavit did not otherwise request the court's or the Association's assistance in assuring access to those twenty-seven to thirty units, the court directed the Association to provide State Farm's appraiser with dates for access to, and inspection of, those remaining units.

The trial court granted the extension and set a final appraisal hearing for June 28, 2008. The day before that hearing, however, State Farm filed an emergency motion and affidavit seeking removal of the neutral umpire previously appointed by the court. State Farm later supplemented this motion with a request for an "entirely new panel to conduct a new appraisal," asserting that otherwise it would "require many weeks, months, and possibly even years to sort through the multiple issues related only to this highly problematic and invalid appraisal gone wrong."

The Association's appraiser and the umpire ultimately signed a "final appraisal award" fixing the insured loss at $2,960,405 after hearing or seeing all evidence provided by State Farm and the Association. The award made it clear that it excluded any interest, costs, and attorney's fees that might be determined by the court, and that it should be reduced by amounts previously paid by State Farm and any applicable deductible.

The Trial Court's Rulings on Liability and Confirmation of the Appraisal

Before the appraisal began, the trial court granted the Association's motion for partial summary judgment regarding any policy condition defenses, based on the facts that: (1) State Farm had acknowledged that the loss was covered by making the January 2006 payments; and, (2) thereafter State Farm had denied the balance of the Association's claim. Following the filing of the final appraisal

award, the trial court confirmed the award, denied State Farm's emergency motion for removal of the neutral umpire, and granted the Association's motions to amend the complaint to add the statutory bad faith claim and a demand for punitive damages. The court also reaffirmed that State Farm's affirmative defenses had been subsumed in the confirmation order "and/or such defenses were waived by State Farm." The trial court did not enter a final judgment fixing a total amount of principal and any prejudgment interest in a form ready for execution.[4] State Farm's petition for certiorari followed.

Applicable Florida Law

It is well settled that a statutory first-party bad faith action is premature until two conditions have been satisfied: (1) the insurer raises no defense which would defeat coverage (an issue for the judicial process rather than the appraisal process), or any such defense has been adjudicated adversely to the insurer; and, (2) the actual extent of the insured's loss must have been determined. Vest v. Travelers

[4] State Farm argues that the Association induced the trial court not to enter such a judgment so that State Farm would be unable to appeal the allegedly-erroneous trial court rulings to that point. In State Farm's view, the Association's bad faith claim would not be ripe to begin proceedings on that claim, if ever, until all available appellate remedies had been prosecuted. While we and other appellate courts do our best to determine cases with dispatch, it is difficult to imagine that all such remedies (including motions for rehearing, rehearing en banc, and certiorari) would be exhausted before a new decade begins, or perhaps the fifth anniversary of the hurricane.

Ins. Co., 753 So. 2d 1270, 1275-76 (Fla. 2000); N. Pointe Ins. Co. v. Tomas, 999 So. 2d 728, 729 (Fla. 3d DCA 2008).

In this case, State Farm waived most or all defenses to coverage by acknowledging and paying a loss amount to the Association following receipt of the claim. In addition, the trial court later granted the Association's motion for partial summary judgment regarding any such defenses.

As regards the amount of the loss, the appraisers rendered a final appraisal award and this was confirmed by the court. The only judicial labor remaining as to the original claim is ministerial: the subtraction of the three percent deductible and prior payments, and the computation of prejudgment interest, if allowed. The reservation of jurisdiction to consider a motion for attorney's fees and costs allows that issue to be determined at the conclusion of the entire case.

Nevertheless, State Farm argues that before a bad faith claim may proceed, the Association must obtain a final judgment on its original claim, requiring a trial on certain affirmative defenses State Farm asserts are still pending, and that State Farm must then be allowed to exhaust all appellate remedies regarding that judgment. We find no support for these arguments. To the contrary, we find that no affirmative defenses remain pending, and that the procedural trenches and hurdles proposed by State Farm would contravene the express objectives of the bad

faith statute and the Florida Insurance Code: the fair and prompt investigation and adjustment of claims by insurers.[5]

Regarding State Farm's argument that the Association must obtain a final judgment before it may proceed with its bad faith and punitive damages claim, we find no authority for such a proposition. To the contrary, the Supreme Court of Florida has determined that an arbitration award determining liability and extent of loss is a sufficient basis for the commencement of a bad faith claim. Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216 (Fla. 2006). And the binding nature of the appraisal award here is a provision bargained for by State Farm in its form of policy, as in Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 362 F.3d 1317 (11th Cir. 2004).

For its argument that a bad faith claim is premature until the insurer exhausts all appellate remedies as to liability and loss amount, State Farm cites Michigan Millers Mutual Insurance Co. v. Bourke, 581 So. 2d 1368 (Fla. 2d DCA 1991). Michigan Millers says no such thing, however. That case merely applies the holding of Blanchard v. State Farm Mutual Automobile Insurance Co., 575 So. 2d

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[5] Section 626.9541(1)(i)4., Florida Statutes (2006), "Unfair claim settlement practices," establishes a ninety-day standard, measured from receipt of claim to payment of undisputed amounts, for a "residential property insurance claim." Section 627.4025(1), Florida Statutes confirms that "residential" coverage includes condominium association policies of the kind at issue here. The legislature obviously recognized the particular exigency of claim resolution when Floridians' homes, condominium units, and apartments are damaged.

1289 (Fla. 1991), that a "bad faith claim does not exist until liability and the extent of damages are determined." Michigan Millers, 581 So. 2d at 1369. Neither Michigan Millers nor any decision by this Court or the Florida Supreme Court has held that liability and the extent of damages must also be "finally final," surviving any appellate remedies sought by an insurer, before the insured's bad faith claim is ripe.[6]

Our conclusion that the Association's bad faith claim is ripe for prosecution in the second amended complaint also finds support among our Florida federal courts. See Tropical Paradise Resorts, LLC v. Clarendon Am. Ins. Co., No. 08-60254-CIV, 2008 WL 3889577 (S.D. Fla. Aug. 20, 2008); Muckenfuss v. Hanover Ins. Co., No. 5:05-cv-261-Oc-10GRJ, 2007 WL 1174098 (M.D. Fla. Apr. 18, 2007). Though such decisions are not binding precedent here, these opinions are well reasoned and persuasive.

Certiorari

"The writ of certiorari is reserved for those situations where the order results in a material injury which cannot be corrected on appeal and departs from the

[6] One reported opinion suggests in a footnote that Michigan Millers requires that the determinations of liability and damages must "include the appellate process," but we find no such holding in Michigan Millers or any other case. United Auto. Ins. Co. v. Tienna, 780 So.2d 1010, 1011-12, n.4 (Fla. 4th DCA 2001). As already noted, such a requirement is contrary to the underlying purpose of both the bad faith statute and appraisal provisions (to assure that claims are expedited, not delayed).

essential requirements of the law." Sardinas v. Lagares, 805 So. 2d 1024, 1025 (Fla. 3d DCA 2001). In this case, these requirements have not been met. The trial court correctly determined that the conditions precedent for a statutory bad faith claim—liability and extent of damages—were satisfied. State Farm will be able to obtain later plenary appellate review of all pertinent trial court rulings, including any judgment or verdict relating to statutory bad faith.

Conclusion

State Farm originally estimated the Association's covered loss at $324,017. This is less than eleven percent of the amount determined by the appraisal process. State Farm will have an opportunity to explain this fact, to explain the extraordinary length of time it has taken to resolve the Association's claim, and to defend State Farm's aggressive legal tactics (including the unfounded imposition of conditions on the contractually-stipulated appraisal provision and the last-minute attempt to remove the neutral umpire). For now, however, we find no basis in this record to quash the orders below as requested by State Farm.

Petition denied.

RAMIREZ, C.J., concurs.

SHEPHERD, J., dissenting.

Today's decision is in direct conflict with two recent decisions of this Court, see N. Pointe Ins. Co. v. Tomas, 999 So. 2d 728 (Fla. 3d DCA 2008) (N. Pointe Ins. Co. I); XL Specialty Ins. Co. v. Skystream, Inc., 988 So. 2d 96 (Fla. 3d DCA 2008), and is contrary to carefully-developed, long-standing precedents that have emanated from our high court for almost the last two decades. See Vest v. Travelers Ins. Co., 753 So. 2d 1270 (Fla. 2000); Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617 (Fla. 1994), receded from on other grounds by State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 63 (Fla. 1995); Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So. 2d 1289 (Fla. 1991).

The North Pointe Insurance Co. case, identical to the one before us, is an appraisal case. However, in sharp contrast to our case—where State Farm opposes the payment of the appraisal award, continues to contest the conditions under which it was ordered to appraisal, and vigorously disputes the trial court's ruling that all of State Farm's defenses have been "either waived [or] subsumed within [the] Court's Order granting Plaintiff's Motion to Confirm Appraisal"—this Court, just ten months ago, **granted** certiorari and quashed an order authorizing first-party insureds to prosecute a bad faith claim against their insurer, North Pointe Insurance Company, before judgment, where the company had **conceded** all defenses to

coverage and actually **paid** the amount of the appraisal award to its insured, leaving only a determination of the amount of pre-judgment interest and entry of judgment. N. Pointe Ins. Co. I, 999 So. 2d at 729 (remanding "for abatement of the bad faith claim pending disposition of the breach of contract action"). Just days ago, we affirmed the trial court's final order confirming the appraisal award and awarding pre-judgment interest, N. Pointe Ins. Co. v. Tomas, No. 3D08-2245, 2009 WL 2601700, at *1 (Fla. 3d DCA Aug. 26, 2009) (N. Pointe Ins. Co. II), thus fulfilling the condition of our abatement and freeing the Tomas to proceed with their bad faith action. N. Pointe Ins. Co. I, 999 So. 2d at 729. We should follow our own precedent. See Tyson v. Mattair, 8 Fla. 107, at *8 (1858) ("*[S]tare decisis*[] is a first principle in the administration of justice—it is one of the most sacred in law.").

The case before us is similarly indistinguishable from XL Specialty Insurance Co., which also issued from our Court last year. This case arises out of an aircraft accident in which all eight passengers aboard the aircraft were killed. XL insured and undertook the defense of all defendants in the ensuing wrongful death action, except for Omnicom and Virgin. XL Specialty Ins. Co., 988 So. 2d at 97. Omnicom and Virgin subsequently settled their claims with the estates. Id. Meanwhile, XL sought declaratory relief to determine its obligations under its insurance policy to Omnicom and Virgin. Id. Omnicom and Virgin filed

counterclaims against XL for damages based upon XL's failure to defend. Id. The parties then filed cross-motions for summary judgment. Id. The trial court granted summary judgment in favor of Omnicom and Virgin, finding the XL policy provided coverage to all defendants sued by the estates, and that XL had a duty to defend Omnicom and Virgin. Id. Over Omnicom and Virgin's objections, the trial court reserved jurisdiction to address the counterclaims for damages, pending this Court's resolution of the coverage issue. Id.; see Fla. R. App. P. 9.110(m). We affirmed the summary judgment finding coverage to exist. XL Specialty Ins. Co., 988 So. 2d at 97.

Thereafter, the matter returned to the trial court. Id. Virgin and Omnicom moved for leave to add a bad faith claim against XL, despite the fact that the trial court, in the interim, had not adjudicated Omnicom and Virgin's counterclaims against XL. Id. at 98. XL's motion to dismiss or abate the bad faith claim as premature was denied. Id. On XL's petition for writ of certiorari, we quashed the trial court order, stating, "As the counterclaims have not gone to judgment, there has been no determination of damages within the meaning of Imhof and Blanchard." Id.[7] We explained:

[7] Puzzlingly, the majority states "we can find no authority for [the] proposition" that "the Association must obtain a final judgment before it may proceed with its good faith and punitive damages claim." See supra p. 9. Ignoring direct authority from this District, the majority cites Dadeland Depot, Inc. v. St. Paul Fire & Marine Insurance Co., 945 So. 2d 1216 (Fla. 2006)—a case in which the Florida

> **Under the logic of Imhof and Blanchard, it is prejudicial to allow the injection of issues of bad faith into a coverage case, and to allow expanded bad faith discovery, before the underlying claim for damages under the insurance policy has been determined.** For that reason, Imhof and Blanchard bar the assertion of a bad faith claim until such time as liability and damages under the insurance policy have been determined. The logic of the rule is equally applicable to claims of first-party and third-party bad faith. Because of the prejudice entailed, certiorari is available to challenge a premature bad faith claim or premature bad faith discovery.

Supreme Court held that an arbitration award can satisfy the liability and damages conditions precedent required before initiation of a bad faith claim—to support its conclusion that a final judgment is not a condition precedent to prosecution of a bad faith claim. Of course, unlike a judgment, an arbitration award is for all practical purposes final upon its entry. See § 682.13, Fla. Stat. (2008) (reciting limited grounds to vacate arbitration award). The majority also cites Three Palms Pointe, Inc. v. State Farm Fire & Casualty Co., 362 F.3d 1317 (11th Cir. 2004), which holds that once a matter has been submitted to appraisal, the insurer can only dispute the claim as a whole and not anything less. This case has been expressly disapproved by one of our sister courts, see Liberty Am. Ins. Co. v. Kennedy, 890 So. 2d 539, 541 (Fla. 2d DCA 2005) (Canady, J.), and at least impliedly disapproved by another. See Fisher v. Certain Interested Underwriters at Lloyds Subscribing to Contract #242/99, 930 So. 2d 756, 759 (Fla. 4th DCA 2006). As such, it is no longer binding authority on the United States District Courts in the Circuit, see McMahan v. Toto, 311 F.3d 1077, 1080 (11th Cir. 2002) ("[The courts of the United States] are bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently."), and is not followed by them. See Sands on the Ocean Condo. Ass'n v. QBE Ins. Corp., No. 05-14362-CIV, 2009 WL 790120, at *1 (S.D. Fla. Mar. 24, 2009) ("Given the holding in Kennedy, [] the Court finds that [the insurer] is entitled to challenge coverage as to a portion of the appraisal award."). See also Jablonski v. St. Paul Fire & Marine Ins. Co., No. 2:07-CV-00386, 2009 WL 2252094, at *8 n.4 (M.D. Fla. July 24, 2009). Although federal cases sometimes are cited as persuasive authority in state proceedings, see State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976), Three Palms Pointe is instructive of nothing here.

Id. (emphasis added). Similarly, in the case before us, no judgment has been entered. In fact, as the condominium association admits in its response, it specifically "asked the court to defer the entry of final judgment, and to authorize filing a second amended complaint adding [the] statutory bad faith claim." Acceding to the Association's request, the trial court clearly has departed from the essential requirements of law. XL Specialty Ins. Co., 988 So. 2d at 98; see also Phoenix Ins. Co. v. Trans World Forwarding, Inc., No. 3D09-1344 (Fla. 3d DCA Sept. 23, 2009) (quashing order directing insurer to produce discovery relating to bad faith before judgment) (Salter, J., joining); Citizens Prop. Ins. Co. v. Bertot, 34 Fla. L. Weekly D1109, D1110 (Fla. DCA June 3, 2009) (Salter, J.) (perspicaciously citing XL Specialty Ins. Co. as an example of where this court has "often granted certiorari when a trial court has declined to dismiss or abate a premature statutory bad faith claim").

The question of when a bad faith claim accrues is not a rare issue. Other jurisdictions that have addressed the issue have held that an insured's claim for its bad faith refusal to settle accrues when the judgment against the offending carrier becomes final and non-appealable.[8] As the authorities discussed above illustrate,

[8] See Taylor v. State Farm Mut. Auto. Ins. Co., 913 P.2d 1092, 1096 n.5 (Ariz. 1996) (citing Romano v. Am. Cas. Co., 834 F.2d 968, 969-70 (11th Cir. 1987); Torrez v. State Farm Mut. Auto. Ins. Co., 705 F.2d 1192, 1202 (10th Cir.1982); Larraburu Bros., Inc. v. Royal Indem. Co., 604 F.2d 1208, 1215 (9th Cir. 1979); Am. Mut. Liab. Ins. Co. v. Cooper, 61 F.2d 446, 448 (5th Cir. 1932), cert. denied,

that is the law of this district. See also State Farm Mut. Auto. Ins. Co. v. O'Hearn, 975 So. 2d 633, 635 (Fla. 2d DCA 2008) ("There is an abundance of case law that holds that a first-party bad faith claim does not accrue until there has been a **final** determination of both liability and damages in an underlying coverage claim.") (emphasis added) (citing Vest, 753 So. 2d at 1276; Imhof, 643 So. 2d at 619;

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289 U.S. 736 (1933); Boyd Bros. Transp. Co. v. Fireman's Fund Ins. Cos., 540 F. Supp. 579, 582 (M.D. Ala. 1982), aff'd, 729 F.2d 1407 (11th Cir. 1984); Lexington Ins. Co. v. Royal Ins. Co., 886 F. Supp. 837 (N.D. Fla. 1995); Vanderloop v. Progressive Cas. Ins. Co., 769 F. Supp. 1172, 1175 (D. Colo. 1991); Wessing v. Am. Indem. Co., 127 F. Supp. 775, 781 (W.D. Mo. 1955); Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co., 484 F. Supp. 1375, 1389 (D. Del. 1980); Hartford Accident & Indem. Co. v. Cosby, 173 So. 2d 585, 589-90 (Ala. 1965); Nationwide Ins. Co. v. Super. Ct., 128 Cal. App. 3d 711 (Cal. Ct. App. 1982); Woolett v. Am. Employers Ins. Co., 77 Cal. App. 3d 619 (Cal. Ct. App. 1978); Linkenhoger v. Am. Fid. & Cas. Co., 260 S.W.2d 884, 887 (Tex. 1953), overruled in part on other grounds, Street v. Honorable Second Ct. App., 756 S.W.2d 299 (Tex. 1988); Campbell v. State Farm Mut. Auto. Ins. Co., 840 P.2d 130, 140 n.20 (Utah App. 1992), cert. denied, 853 P.2d 897 (Utah 1992); Bush v. Safeco Ins. Co., 596 P.2d 1357, 1358 (Wash. Ct. App. 1979); Jenkins v. J.C. Penney Cas. Ins. Co., 280 S.E.2d 252, 259 (W. Va. 1981), overruled in part on other grounds, State ex rel. State Farm Fire & Cas. Coverage v. Madden, 451 S.E.2d 721 (1984); Page v. QBE Ins. Corp., No. 09-20593-CIV, 2009 WL 1025716 (S.D. Fla. Apr. 15, 2009) (dismissing bad faith complaint because insurer had not exhausted appellate remedies); accord Leitstein v. QBE Ins. Corp., 609 F. Supp. 1311 (S.D. Fla. 2009); see also William M. Shernoff, et al., Insurance Bad Faith Litigation § 20.07[4][A] (1984); John C. McCarthy, Punitive Damages In Bad Faith Cases § 5.13 (5th ed. 1990). See also 5 J.D. Lee, Barry A. Lindahl, Modern Tort Law: Liability and Litigation § 47:29 (2d ed. 2009) ("In third-party bad faith actions based on tort, a number of courts have held that an insured's claim for its insurers' bad faith refusal to settle accrues when the excess judgment in the underlying case becomes final or non-apppealable.").

Blanchard, 575 So. 2d at 1291); 31B Fla. Jur. 2d Ins. § 3652 ("[A] statutory bad-faith claim against an insurer is premature where the first-party coverage dispute has not been **finally** resolved.") (emphasis added). Although the majority is correct that the Second District Court of Appeal in Michigan Millers Mutual Insurance Co. v. Bourke, 581 So. 2d 1368 (Fla. 2d DCA 1991), did not expressly state that "liability and the extent of damages must be 'finally final'" before an insured's bad faith claim is ripe, see supra p. 10, I am well-persuaded, based upon all of these authorities, that the Fourth District Court of Appeal in United Automobile Insurance Co. v. Tienna, 780 So. 2d 1010 (Fla. 4th DCA 2001), correctly extrapolates Michigan Millers to so conclude.

Lastly, the majority argues the "finally final" rule disadvantages insureds. See supra p. 7 n.4. I say just the opposite. Insurance exists for the purpose, first and foremost, of protecting the individual against personal loss or from mishaps accidentally inflicted by the insured on another. Bad faith claims are independent claims, sounding in tort. Blanchard, 575 So. 2d at 129; Laforet, 658 So. 2d at 58-59. The first goal of any insurance claim should be to get money or protection to the insured as quickly as possible. On occasion, litigation is necessary to achieve the goal. Because of the plenary nature of appellate review in such a case, it is logical to await final disposition of the appeal of the case before it may form the basis of another claim. Such a rule avoids duplicative and unnecessary litigation.

See Fortson v. St. Paul Fire & Marine Ins. Co., 751 F.2d 1157, 1161 (11th Cir. 1985) ("Nothing in the statutory language of section 624.155 suggests that the Florida legislature intended such an anomalous possibility.").[9] It also inhibits potential mischief and possible ethical conflict by counsel who might choose to "roll the dice" for a greater reward at the expense of present client needs.

We should grant the petition in this case.

[9] That the Florida Legislature would not intend to permit an action of this kind to be brought prior to resolution of the underlying claim is exemplified by its reaction to a recent decision of our supreme court, which held that a liability insurance carrier could be joined as a defendant in a third-party cause of action covered by the policy. See Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969). The Florida Legislature quickly countermanded this decision by statute. See § 627.7261, Fla. Stat. (1971). The court has found the statute constitutional. VanBibber v. Hartford Accident & Indem. Ins. Co., 439 So. 2d 880, 882 (Fla. 1983) ("The statute is quite clear that no cause of action against an insurance company shall accrue until a judgment against an insured is obtained.").