

Split 11th Circ. Revives Bad-Faith Dispute On \$12M Judgment

By **Ganesh Setty**

Law360 (June 28, 2022, 7:08 PM EDT) -- A Florida federal court erred in a motorcycle crash victim's bad-faith suit seeking to collect a \$12.6 million judgment from the at-fault driver's insurer when it failed to instruct the jury that an insurer not only has a duty to settle claims for its insured, but also to properly advise them, the Eleventh Circuit ruled Tuesday.



The Eleventh Circuit ruled 2-1 that a Florida federal court failed to instruct a jury properly and remanded the suit over a crash victim's bad-faith insurance dispute involving a \$12.6 million judgment back for a new trial. (AP Photo/Mike Stewart)

Remanding Dustin C. Brink's suit alleging bad faith against Direct General Insurance Co. back for a new trial, a 2-1 panel said Brink correctly stated Florida insurance law in his proposed jury instruction highlighting that second duty to advise.

Based on the district court's instruction that solely described an insurer's duty to settle, the jury had returned a verdict in March 2021 siding with Direct General, which insured the at-fault driver in the 2008 crash that severely injured Brink. That verdict, until Brink's successful appeal Tuesday, had marked the end of a long-running insurance dispute marked by numerous communication breakdowns following the accident.

In a partial dissent finding that the district court did not err, Judge R. Lanier Anderson III noted that the

"overwhelming evidence" indicates that the many unanswered messages were by design. Brink's counsel tried to "lure Direct General into making mistakes that [Brink] could later use to generate a bad-faith claim," he said.

"All we hold is that when a party properly argues a theory of liability grounded in state law, a district court abuses its discretion if it causes prejudice by failing to instruct the jury on that theory," Judge Britt C. Grant wrote in the majority opinion, joined by Judge Jill A. Pryor.

According to **Tuesday's decision**, Brink was riding his motorcycle in 2008 when he collided with a car driven by Juan Ruis Pereles and suffered serious injuries. Pereles was covered under his father's auto policy with Direct General. After Direct General learned of the accident, it promptly interviewed Pereles and his father and learned that Brink had hired an attorney. Despite several attempts, however, the insurer failed to subsequently reach Pereles and his father and further failed to get in touch with Brink since his original lawyer had quit representing him.

Four months after the accident, Direct General sent letters to Pereles' father explaining that his policy provided bodily injury coverage up to \$10,000 per person and a \$20,000 cap per accident. Direct General eventually decided to pay the policy limit and attempted to contact Brink's new attorney, Alexander Clem.

Clem was also unreachable, and after two months of efforts, the insurer sent the lawyer a check for \$10,000 attempting to settle the auto injury dispute, which was never cashed. More than a year after the accident, Clem finally returned Direct General's messages and requested additional information from the insurer on the total amount of coverage available to Pereles and his father, Tuesday's decision continued. By February 2010, Clem indicated that a settlement was possible if he could get more information on available insurance coverage and that any settlement release would allow Brink to also recover uninsured motorist and medical payment claims.

However, there's no evidence on record that Pereles or his father were informed of Clem's offer, Tuesday's opinion states. Three weeks after the February 2010 letter, Clem sued Pereles and his father. Direct General's eventual letter expressing hope over a "finalized" settlement came too late, and Brink ultimately won roughly \$12.6 million at the end of the trial — \$12 million against Pereles and \$600,000 against his father as the insured car owner. In order to collect the \$12.6 million judgment, Brink subsequently sued Direct General, accusing it of breaching its fiduciary duty to Pereles and his father because of what Brink said was the insurer's bad-faith conduct.

The bad-faith suit proceeded to trial, and Brink's counsel repeatedly told the jury that an insurer not only has a duty to settle a claim on behalf of its insureds, but also advise them of settlement offers and likely litigation outcomes. Before jury deliberations, Brink requested a jury instruction that stated the definition of bad faith to that end — that bad faith includes a failure to settle and failure to advise.

His proposed instruction specifically included a line stating that the "focus in this bad-faith case is not on the actions of Dustin Brink or his attorneys, but rather on the actions of Direct General and its obligation to act in good faith toward its insureds." The district court instead opted for a standard jury instruction addressing only liability for an insurer's failure to settle. During deliberations, the jury members had also asked whether they should consider the full length of time starting from the accident or from the February 2010 letter, to which the district court responded that the jury should consider the "totality of the circumstances."

All three appellate judges found Tuesday that the latter statement the district court made did not abuse its discretion. However, Judge Grant wrote for the majority that Brink's proposed instruction correctly stated Florida law, presented a germane issue before the jury and the failure to give that instruction prejudiced Brink. Judge Anderson, meanwhile, disagreed on that first and third finding.

Despite Direct General's arguments to the contrary, Brink's statement that the focus in the bad-faith case is not on him or his attorneys, but on Direct General, comports with binding Florida precedent, Judge Grant said. He further noted the Eleventh Circuit's decision last year in **Pelaez v. GEICO**, where the court in that case said there is a difference "between focusing on a claimant's actions, which would be improper, and factoring a claimant's actions into the totality of the circumstances analysis, which is not improper."

"Brink's proposed instruction carefully observed that difference, and the dissent points to no language in the instruction that violates the principle we explained in Pelaez," Judge Grant said. The judge further rejected the insurer's argument that because Brink informed the jury multiple times of Direct General's duty to advise, the jury was not left in the dark on that duty.

"This argument ignores the fundamental difference between counsel and the court," Judge Grant continued, noting that the court is a neutral arbiter and the jury "must rely on the law as stated by the court, not the law as construed in various — often conflicting — ways by attorneys throughout the trial."

In his partial dissent, Judge Anderson disputed that Brink correctly stated Florida insurance law in his proposed jury instruction and doubted whether Brink was actually prejudiced when the district court opted for the standard instruction. The sentence at issue on appeal is "misleading in that it suggests that the actions of Brink's counsel are irrelevant," Judge Anderson said, further noting that other circuits have held that district courts have no independent duty to correct a proposed jury instruction.

"But we know from our Pelaez decision that the actions of Brink's attorney were relevant under Florida law and could properly be factored into the totality of the circumstances analysis," he continued.

The judge went on to find that, in his view, evidence indicates that Brink's counsel never wanted to settle to begin with and that "Brink's counsel tried to lure Direct General into making mistakes that he could later use to generate a bad-faith claim."

Brent Steinberg, an attorney for Brink, told Law360 in an emailed statement that though Brink's path to recovery has been "long and winding," they are nonetheless "thrilled" by Tuesday's decision and are hopeful a properly instructed jury will return a verdict in favor of Brink.

"Not only did Direct General fail to advise its insureds of the settlement offer, but Direct General also misrepresented why the claim did not settle within their liability limits," Steinberg said. "That is why it was absolutely critical the jury be instructed that Direct General's failure [to] properly communicate with their insureds ... must be considered when evaluating whether Direct General acted in bad faith."

Brink is represented by Brent Steinberg and Daniel Greene of Swope Rodante PA.

Direct General is represented by James H. Wyman and Rory E. Jurman of Hinshaw & Culbertson LLP.

The case is Dustin C. Brink v. Direct General Insurance Co., case number 21-11070, in the U.S. Court of Appeals for the Eleventh Circuit.

--Additional reporting by Shane Dilworth. Editing by Nick Petruncio.