

In the Supreme Court of Florida

**In the matter of use by the
trial courts of the**

**Standard Jury Instructions
(Civil Cases)**

Case No.:SC03-

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**Supplemental Report (No.03-01) of the
Committee on Standard Jury Instructions (Civil)
Re: MI 3 INSURER'S BAD FAITH**

**To the Chief Justice and Justices of
the Supreme Court of Florida:**

Your Committee on Standard Jury Instructions in Civil Cases recommends that The Florida Bar be authorized to publish revisions to FLORIDA STANDARD JURY INSTRUCTIONS (CIVIL) MI 3, Insurer's Bad Faith. This supplemental report regarding proposed amendments to the Florida Standard Jury Instructions in Civil Cases is filed pursuant to Article V, section 2(a), Florida Constitution.

I. DESCRIPTION OF ATTACHED APPENDICES

The proposed revisions to MI 3 Insurer's Bad Faith are provided in Appendix A of this report. These proposed revisions received Committee approval after consideration at meetings held between October 1998 and November 2002. These proposed revisions follow two publications in the Florida Bar News. Initial proposed revisions to the Insurer's Bad Faith instructions were published in the Florida Bar News on May 15, 2002, a copy being attached at Appendix B of this report. The Committee received six (6) responses to the May 15 publication,

copies of which are attached at Appendix C of this report. After considering those responses and undertaking further review, subsequent proposed revisions were published in the Florida Bar News on October 15, 2002. A copy of the October 15 publication is attached at Appendix D of this report. The Committee received eight (8) responses to the October 15 publication, copies of which are attached at Appendix E of this report. Relevant excerpts from the Committee's minutes are attached at Appendix F of this report. The materials considered by the Committee are attached at Appendix G of this report.

II REASONS FOR REVIEWING THE ADEQUACY OF THE 1982 INSTRUCTION

The current version of MI3 Insurer's Bad Faith was approved by this Court in April 1982. When the current instruction was drafted, the only type of bad faith claim in Florida law was a common law claim. Since the current instruction was drafted, Florida adopted a statutory cause of action for insurer bad faith. The statutory claim allows first party bad faith claims, while common law claims were limited to third party cases. The Committee considered this dramatic change in the law and the length of time since the current instructions were drafted in determining that it should address whether revisions were needed to the insurer bad faith instructions.

The Committee spent a great deal of time discussing whether any changes were in fact needed, and if so, what form they should take. The Committee considered numerous possible formats for the instructions, including separate first party and third party instructions. The Committee also considered the possibility of separate statutory and common law instructions. In light of this Court's decision in State Farm Mutual Automobile Ins. Co. v. LaForet, 658 So.2d 55 (Fla.1995), which holds that the standard is the same for first and third party cases and for statutory and common law cases, the Committee proposal does not contain separate instructions for each type of case. In the same vein, the Committee proposes to consolidate MI 3.1 and 3.2 into a single instruction. The Committee's use of the same standard for all cases is explained in the Comment, with citation to LaForet.

The Committee noted that many reported appellate court decisions have addressed MI 3 since its 1982 adoption, all favorably. After much debate regarding whether the current instructions could be improved, the Committee ultimately determined that the base instructions should remain substantially the same. The proposed amendments relate to issues that were not addressed in the 1982 instructions.

III. ISSUES ADDRESSED BY PROPOSED INSTRUCTIONS

There are four (4) new issues addressed by the proposed revisions. In rough order in which they appear in the revisions, these are as follows. First, the Committee proposes to add “[an excess carrier]” to the list of alternative persons to whom a duty can be owed.

Second, the Committee proposes to delete that part of the current instruction which asks the jury to “consider the matter of damages,” and then tells them to award a sum certain, or to determine attorneys fees. The Committee determined, as expressed in proposed note on use 2, that it is unnecessary to instruct the jury concerning a damages determination where the number is fixed or to be determined by the court. Accordingly, the proposed revisions simply advise the jury that the Court will award damages recoverable by law. While the Committee believes that the damages will be fixed in many bad faith cases, such that the proposed standard instruction will be used in most trials, the note makes clear that the instructions can and should be modified for cases in which a fact issue is presented on damages.

Third, the proposed revision accommodates this Court’s decision in Time Insurance Company v. Burger, 712 So.2d 389 (Fla. 1998), in which this Court allowed a claim for mental distress. The revision incorporates the three specific issues that the jury must determine in deciding whether to award damages for mental distress. There was some debate whether mental distress claims would be permitted outside the confines of the Burger situation. The instruction is drafted for a Burger claim, but the note makes clear that the Committee does not intend to foreclose other types of mental distress claims if permitted by substantive law.

The final proposed revision relates to punitive damages. The current instructions do not have any punitive damages provisions specific to insurance bad faith cases. The Committee proposal follows section 624.155, Florida Statutes (2002), which provides a specific standard for recovery of punitive damages in statutory bad faith cases. The Committee proposal merely adapts the general PD-Punitive Damages instructions to accommodate the different requirements provided in section 624.155.

The Committee notes address two issues debated during the Committee's consideration of punitive damages claims. First, the Committee assumes that the "clear and convincing" evidence standard of proof established in section 768.725, Florida Statutes (2002), for punitive damages applies to causes of action under section 624.155. Second, the note makes clear that the modified standard applies only to statutory punitive damages claims pursuant to section 624.155. It is not the intent of the Committee to modify PD-Punitive Damages instructions as applied to common law bad faith claims.

IV. PUBLIC COMMENTS FOLLOWING PUBLICATION

The Committee received and considered numerous public comments following both publications in the Florida Bar News. In addition, the Committee solicited input from the Academy of Florida Trial Lawyers and from the Florida Defense Lawyers Association in drafting the instructions prior to publication. Many comments from practitioners outside the Committee were incorporated into the Committee proposal.

At its November 2002 meeting, the Committee considered the various comments received after the October 15 2002 publication. In addition to the issues outlined above, the comments raised several other issues. A commentator suggested that the term "settle" be defined. The Committee has considered this suggestion and has decided that it is unworkable to adopt such a definition.

Likewise, a commentator suggested that the Committee should define what "bad faith" is not. Traditionally, this Committee has avoided negative instructions. The Committee decided that this circumstance did not warrant a deviation from the traditional approach.

Another category of comment raised concern about merging instructions 3.1 and 3.2 into a single bad faith instruction, and whether this represented a change in the law. As explained above, the Committee reads this Court's decision in LaForet to apply the same standard for all bad faith cases, so there is no need for separate instructions. Furthermore, the note on use establishes that the Committee does not intend in merging the instructions to cause a substantive change in the law.

Another comment suggested using the words "not attempting in good faith" instead of the proposed formulation of "in bad faith in failing to settle the claim." The Committee noted that the language in the proposal has been in the instruction since 1982. The Committee also evaluated the recommended change from a plain English perspective and determined that it did not add clarity.

Yet another category of comment suggested that the proposal would remove the issue of causation from bad faith cases. This aspect of the proposed amendment is actually a continuation of the language used in the 1982 version of the instructions, and the Committee in no way intends to change the law.

It was suggested that the Committee should indicate that an excess judgment is required as a prerequisite to a bad faith action for failure to settle. The Committee did not believe it was necessary to instruct the jury on a legal prerequisite.

Finally, the Committee received several criticisms of its use of the clear and convincing evidence standard in punitive damages claims under section 624.155. In response and in order to avoid inadvertently foreclosing an argument on this issue, the Committee added the note clarifying that it merely "assumes" that the general standard provided in chapter 768 applies.

V. CONCLUSION

The Committee recommends that the instructions be revised as proposed. No member of the Committee dissents. Should the Court conclude that oral argument would be beneficial, the undersigned would be pleased to appear.

Respectfully submitted,

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