Debtors' Insurance Bad Faith Claims: The overlooked asset that may be worth millions!

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Bad Faith Basics

Issue Spotting

Most common scenarios giving rise to bad faith or legal malpractice claim:

1) Debtor files for bankruptcy as a result of a lawsuit or judgment against them
   A. Was the plaintiff demanding more than the policy limits?
   B. Did the lawyer from the insurance company suggest the debtor file bankruptcy?
   C. Was there an issue about the coverage being available?
   D. Does the debtor seem generally confused about the process and how they are there?
   E. Are you getting calls from an insurance lawyer who wants to offer some 'nuisance' value to settle vague liabilities?

2) Debtor files for bankruptcy as a result of unpaid first-party coverage (i.e., windstorm, fire, uninsured motorist coverage) that is owed or was wrongfully denied

JI 404.4 Insurer's Bad Faith (Failure To Settle)

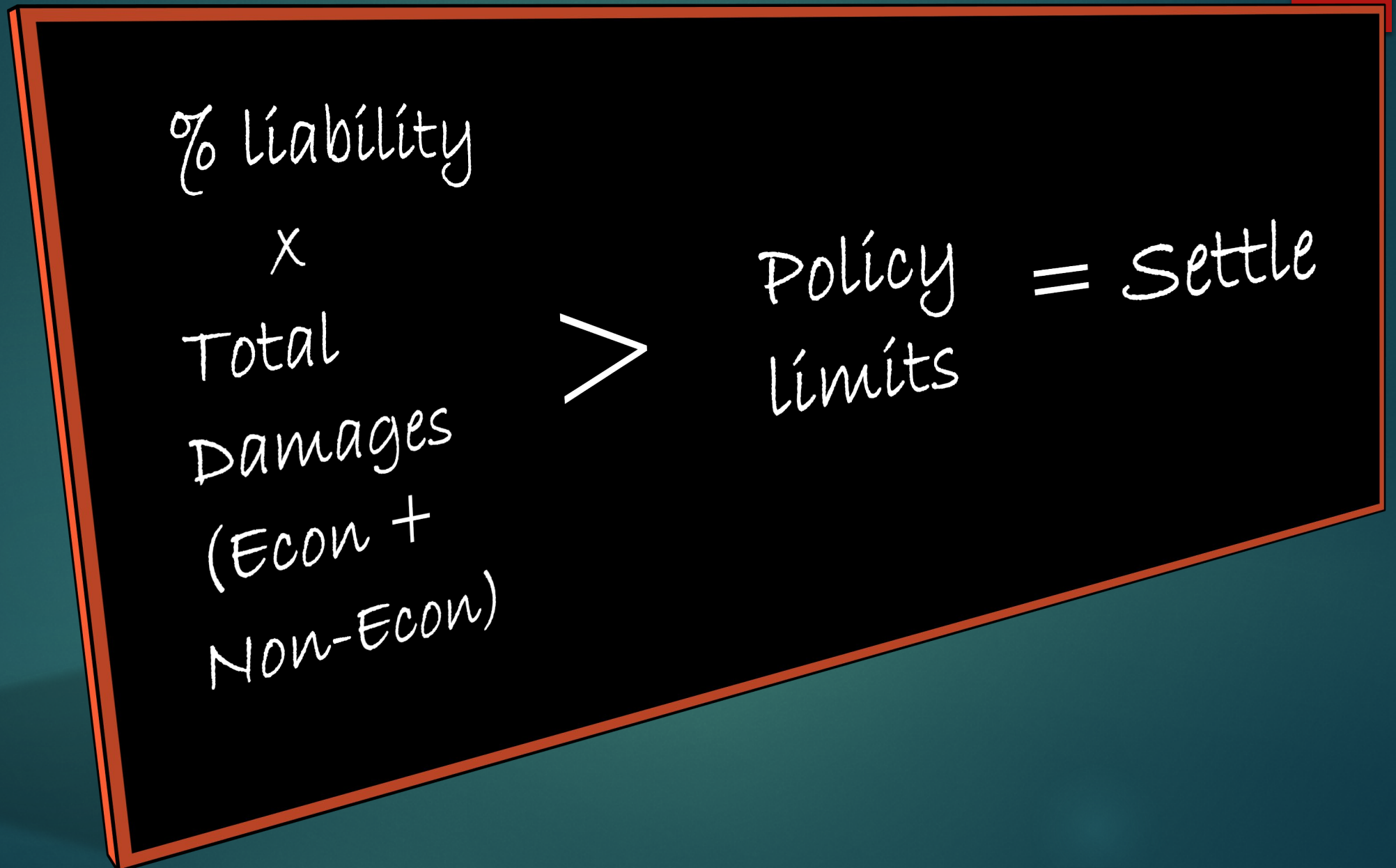
Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it should have and could have done so, had it acted fairly and honestly toward its insured and with due regard for her interests.

VERDICT

1. Did [Insurer] fail to settle the Smith claim against Jane Doe when, under all of the circumstances, it should have and could have done so, had it acted fairly, honestly and with due regard for Ms. Doe's interests?

Yes_____ No_____

Insurer Should Have Settled When . . .



Could Have: *Was settlement possible?*

"Insurer must settle, if possible, where a reasonably prudent person faced with the prospect of paying the total recovery would do so." Florida Supreme Court: *Boston Old Colony* (1980), *Berges* (2004), *Harvey* (2018).

"if possible"

"no realistic possibility" of settlement

"The insurer has the burden to show that there was no realistic possibility of settlement within policy limits…"

Powell v. Prudential Prop.& Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. 3d DCA1991).

No demand required

Could Have: *Was settlement possible?*

Harvey v. GEICO, 259 So. 3d 1 (Fla. 2018)

- "Four decades ago… we stated in no uncertain terms that an insurer 'has 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.'"

"Must initiate settlement… [without] "any delay in making an offer . . ."

- "Where 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."

- [W]here the financial exposure to the insured is a ticking financial time bomb and suit can be filed at any time, **any delay in making an offer** under the circumstances of the case, **even where there was no assurance that the claim could be settled** can be viewed as evidence of bad faith."

". . . even where there is no assurance the claim could be settled"

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Yes_____ No_____

Due Regard:

Harvey v. GEICO, 259 So. 3d 1 (Fla. 2018)

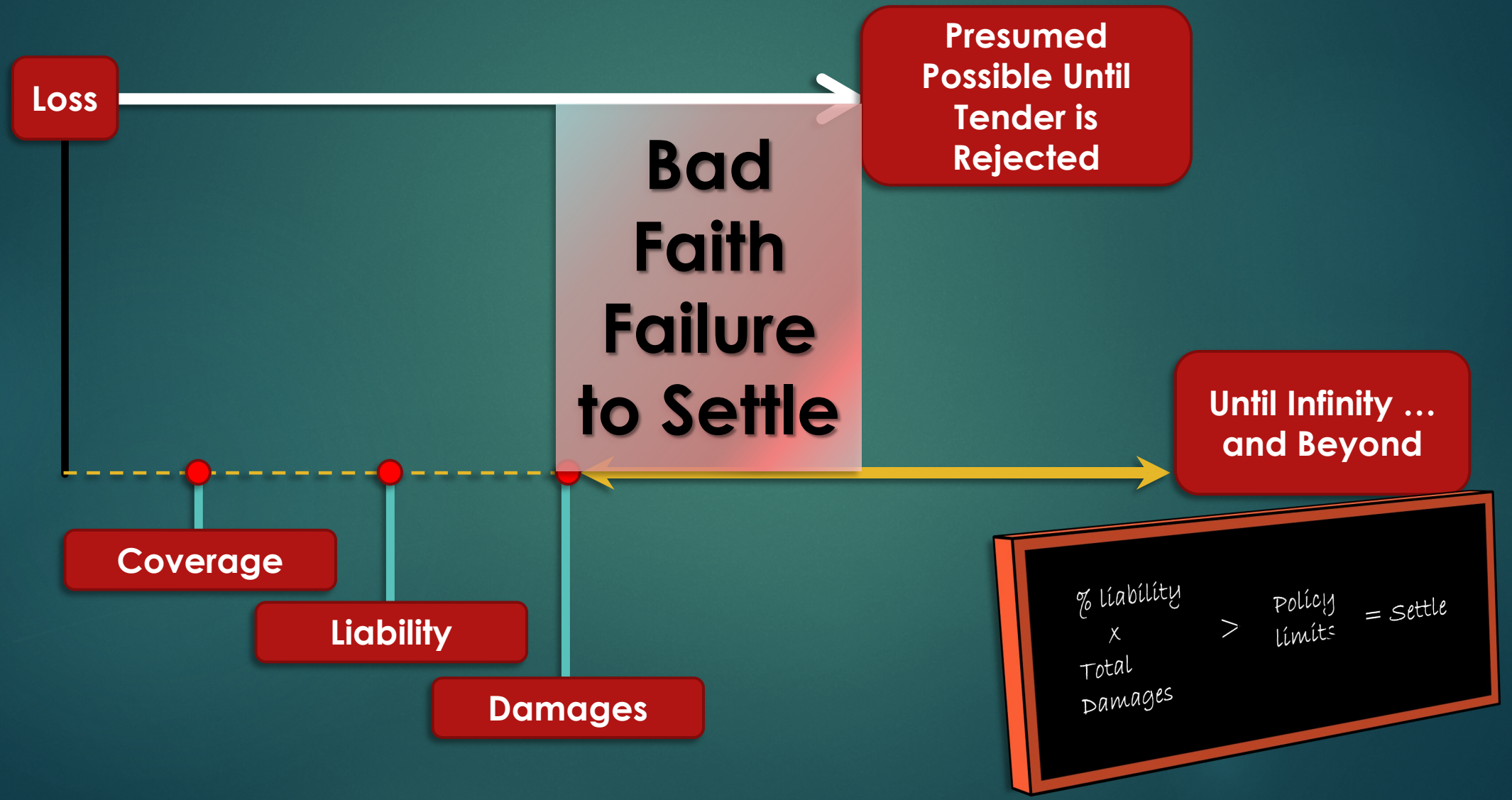
- "The critical inquiry is whether the insurer **diligently** and with the **same haste and precision as if it were in the insured's shoes**, worked on the insured's behalf to avoid an excess judgment."

"Diligently…and with Haste and Precision"

"Everything possible"

- "Instead of doing **everything possible** to facilitate settlement negotiations," adjusters delay was an impediment… there can be no doubt that had GEICO been faced with paying the entire multimillion-dollar judgment returned by the jury in this case, an amount that was completely foreseeable given the clear liability and catastrophic damages, it would have done **everything possible** …"

When Failure to Settle is Bad Faith



First-Party v. Third-Party

$1M Damages

Tort suit

Tort suit

§624.155 only

Bad Faith

Bad Faith

Common law (Thompson or assignment) or §624.155

Bad Faith

Common law or §624.155

$100k UM

$100k BI

First-Party v. Third-Party

$1M Damages

Tort suit

Bankruptcy Trustee

Tort suit

§624.155 only

Bad Faith

Bad Faith

Common law or §624.155 (Thompson or assignment)

Bad Faith

Common law or §624.155

$100k UM

State Farm

GEICO

$100k BI

Legal Malpractice

Legal Malpractice

- Attorney must "exercise ordinary skill and care in resolving settlement issues." *Sauer v. Flanagan & Maniotis, P.A.*, 748 So. 2d 1079 (Fla. 4th DCA 2000)

- Attorney may be held liable for negligent failure to settle even if liability insurer acted in good faith. *Torres v. Nelson*, 448 So. 2d 1058 (Fla. 3d DCA 1984)

Beware:
2-year SOL

- Insurer may be held liable under *respondeat superior* for its staff counsel's negligent failure to settle. *Hilson v. GEICO Gen. Ins. Co.*, 605 Fed. Appx. 829 (11th Cir. 2015)

Breach of Fiduciary Duty

"There is no relationship between individuals which involves a greater degree of trust and confidence than that of attorney and client.

The attorney is under a duty at all times to represent his client and handle his client's affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity."

Smyrna Developers, Inc. v. Bornstein, 177 So. 2d 16 (Fla. 2d DCA 1965)

Failure to Settle Claims

But not his insurance bad faith claim

Whose BF Claim is it Anyway?

Camp v. St. Paul Fire & Marine Ins. Co., 616 So. 2d 12 (Fla. 1993)

- Med Mal case
  - MD files for Chapter 7 bankruptcy while getting sued for malpractice
  - MD discharged
  - Stay modified to allow plaintiff to liquidate damages
  - $3M judgment v. MD, but not personally liable

- Bad Faith case
  - ND Fla: no bad faith because MD discharged and relieved of any personal liability
  - 11th Cir: certifies question to Florida Supreme Court

Whose BF Claim is it Anyway?

Camp v. St. Paul Fire & Marine Ins. Co., 616 So. 2d 12 (Fla. 1993)

- Held:
  - Insured's bankruptcy does not bar bad faith claim by bankruptcy trustee

- Rationale:
  - Bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1)

  - *Including* any potential or contingent claims. *Palmer v. Travelers Ins. Co.*, 319 F.2d 296, 299-300 (5th Cir.1963)

Whose BF Claim is it Anyway?

Venn v. St. Paul Fire & Marine, 99 F.3d 1058 (11th Cir. 1996)

- St Paul: FL Supreme Court misinterpreted federal bankruptcy law
  - Section 541(a)(1) inapplicable because BF claim had not yet accrued at time of bankruptcy

- Held: FL SC precedent binding under "law of the case" doctrine
  - Regardless, "interests in property are creatures of state law"
  - "Thus, if the Florida Supreme Court chooses to recognize a potential bad faith claim as 'property,' it passes to the estate by operation of § 541(a)(1)."

Camp & Venn Takeaways

- *Unaccrued* bad faith claim passes to bankruptcy trustee → insured's bankruptcy doesn't allow liability carrier off the hook
- Insurer owes duty of good faith to insured *and* bankruptcy trustee
- Trustee "acted properly in filing a bad faith action to recoup the excess judgment for which the estate remains liable."
- Recoverable damages = excess judgment + prejudgment interest

Whose BF Claim is it Anyway?

Can injured plaintiff "stand in the shoes" of insured to bring bad faith case after insured's bankruptcy?

Probably.

- *But see Camp v. St. Paul Fire & Marine Ins. Co.*, 989 F.2d 428 (11th Cir. 1993) – affirmed dismissal of Camp

- *See Progressive Exp. Ins. Co. v. Scoma*, 975 So. 2d 461 (Fla. 2d DCA 2007) – bad faith case by judgment creditor after insured filed for bankruptcy

- *See In re Gaime*, 2018 WL 7199806 (Bankr. M.D. Fla. Dec. 18, 2018), *clarified on denial of reconsideration*, 2019 WL 436749 - Under Florida law, both the insured (the Debtor) and the judgment creditor can maintain a bad faith claim.

Liquidation of Damages

Whritenour v. Thompson, 145 So. 3d 870 (Fla. 2d DCA 2014)

- Held: Plaintiff entitled to have jury determine full extent of his damages

> "A plaintiff must first obtain a judgment in a negligence action that determines liability and the amount of resulting damages because that determination is essential to a potential suit against an insurance company for its bad faith in handling a liability claim against its insured.
>
> **A tortfeasor's bankruptcy filing and discharge does not change this procedure.**
>
> The only difference is that the bankruptcy trustee brings the bad faith action against the insurance company."

Whose Legal Mal Claim is it Anyway?

- Federal law determines whether an interest is property of bankruptcy estate, BUT . . .

  State law determines whether debtor's legal malpractice claim existed when debtor filed bankruptcy petition.

- If malpractice claim existed "prior to or contemporaneous with" bankruptcy petition = Estate asset.
  - Compare *In re Witko,* 374 F.3d 1040 (11th Cir. 2004) with *In re Alvarez,* 224 F.3d 1273 (11th Cir. 2000)

Whose Legal Mal Claim is it Anyway?

Herendeen v. Mandelbaum, 232 So. 3d 487 (Fla. 2d DCA 2017)

- Discharge of client / judgment debtor does not extinguish trustee's cause of action for legal malpractice, see Camp

What if lawyer negligently fails to settle pre-Petition but damages are suffered upon entry of a final judgment post-Petition?

Would FL Supreme Court recognize that a *potential* legal malpractice claim, like a bad faith claim, is "property"?

“A person does not waive or otherwise lose an attorney-client privilege merely because a ***third party*** is authorized to file a lawsuit against the person's insurance company.” Progressive Exp. Ins. Co. v. Scoma, 975 So. 2d 461, 465 (Fla. 2d DCA 2007)

"I assure you that everything you say to me will be held in the strictest confidence."

Whose Privileges?

"The bankruptcy estate stood in the shoes of the debtor and *in effect the estate became the insured.*" *Camp* (Fla. 1993)

Corporate debtor: attorney-client privilege automatically passes to Trustee. *Commodity Futures Trading Commission v. Weintraub,* 471 U.S. 343, 356 (1985).

Individual debtor: unsettled.

1. Automatically passes to Trustee. *In re Smith,* 24 B.R. 3 (Bankr. S.D. Fla. 1982)

2. Balancing test. *In re Courtney,* 372 B.R. 519 (Bankr. M.D. Fla. 2007); *In re Pearlman*, 381 B.R. 903, 908 (Bankr. M.D. Fla. 2007)

3. Retained by Debtor, absent assignment or waiver. *In re: Clarence Nathaniel Behn*, 2013 WL 12377690 (Bankr. M.D. Fla. Apr. 17, 2013)

Whose Privileges?

AUTHORIZATION FOR INFORMATION

TO: _____
_____
_____

By my execution of this instrument below, I hereby authorize and direct those attorneys and other professionals who may have worked on my behalf in connection with the personal injury claims made by [UNDERLYING PLAINTIFF] against me or the lawsuit styled [INSERT TORT CASE STYLE] to disclose any and all information relating to that work to [TRUSTEE] and Trustee's special counsel, Swope, Rodante P.A., *including* any information that would otherwise be protected from disclosure by the attorney-client privilege, work product doctrine, mediation privilege, or any other applicable privilege. I further authorize [TRUSTEE] and Trustee's special counsel, Swope, Rodante P.A., to waive, on my behalf, any privileges against disclosure of confidential information to the extent [TRUSTEE] and Swope, Rodante P.A. deem appropriate.

This release expressly revokes any prior similar release which may have been given previously, verbally or in writing, effective as of the date indicated below.

Signed this ____ day of _____, 2020.

X_____
[DEBTOR]

SWOPE, RODANTE P.A.
1234 5th Avenue East
Tampa, FL 33605
Office: (813) 273-0017
Fax: (813) 223-3678

Debtor's Duty to Cooperate

- With Trustee. 11 U.S.C. § 521(a)(3); Fed. R. Bankr. P. 4002(a)(4)
- And with Special Counsel. *In re Jackson*, 484 B.R. 141, 171 (Bankr. S.D. Tex. 2012)

Trustee's Duty to Cooperate

- Under the Debtor's insurance policy
- Trustee = insured
- Liability insurer remains in control of settlement and defense
- Must cooperate, otherwise you may void coverage.

Pros & Cons of Trustee's Failure to Settle Case

Cons:

- It can take a LONG time

- Possibility of having costs or even fees taxed against the Estate

In re Kwiatkowski, 2017 WL 4221097 (Bankr. M.D. Fla. Sept. 22, 2017) ("[F]ees or costs awarded to the insurer are recoverable only against the bankruptcy estate and not against Debtor individually.")

Pros:

- Low Risk / High Reward
  - Most BF attorneys will represent on a contingency fee and advance all costs
  - Can collect policy limits once FJ becomes "final" and full value of judgment, eventually
- Stops PI creditor from pulling $ from other creditors
- *Potentially* allows other unsecured creditors a chance to share in the bad faith recovery

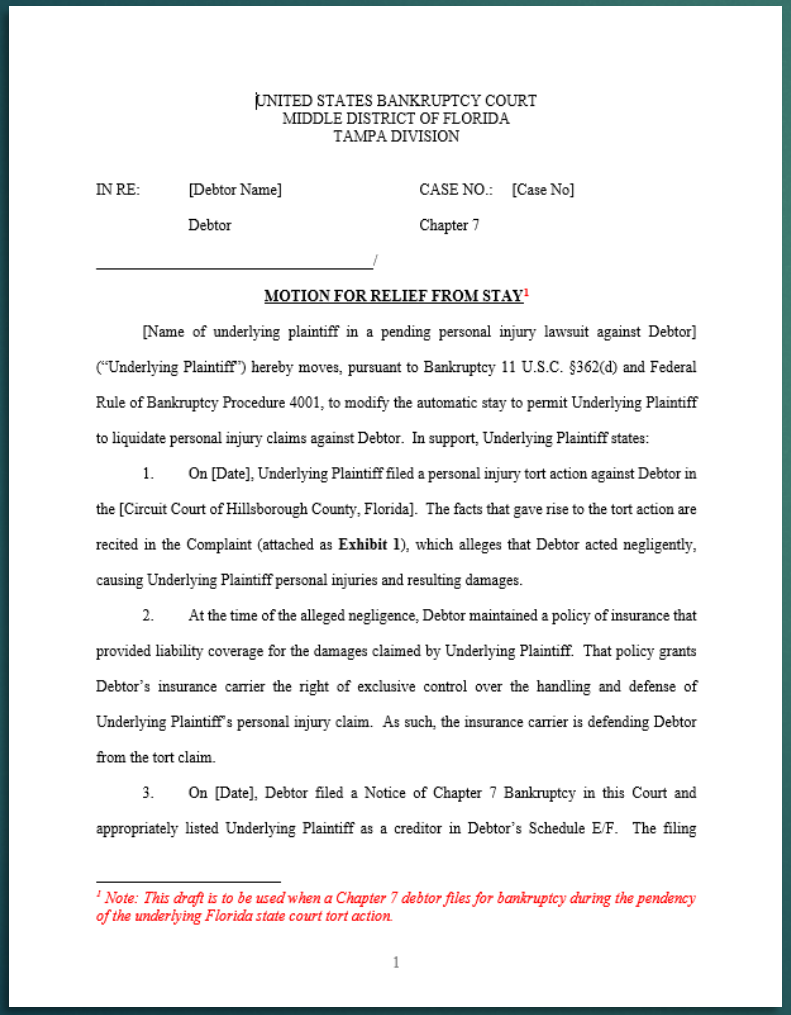
Process to Liquidate and Collect the Asset

At time of Bankruptcy Filing

- Schedule the tort litigation claim(s).
- Identify claim as asset through inquiry at creditors' meeting.
- Inquire of the attorney representing the underlying plaintiff.
- Collect and review all potential liability insurance policies (Other residents' auto policies, CGL, Homeowners)

At time of Bankruptcy Filing

- Offer draft motion for relief from stay and order granting motion.



UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: [Debtor Name] CASE NO.: [Case No]
Debtor Chapter 7
_____/

MOTION FOR RELIEF FROM STAY[1]

[Name of underlying plaintiff in a pending personal injury lawsuit against Debtor] ("Underlying Plaintiff") hereby moves, pursuant to Bankruptcy 11 U.S.C. §362(d) and Federal Rule of Bankruptcy Procedure 4001, to modify the automatic stay to permit Underlying Plaintiff to liquidate personal injury claims against Debtor. In support, Underlying Plaintiff states:

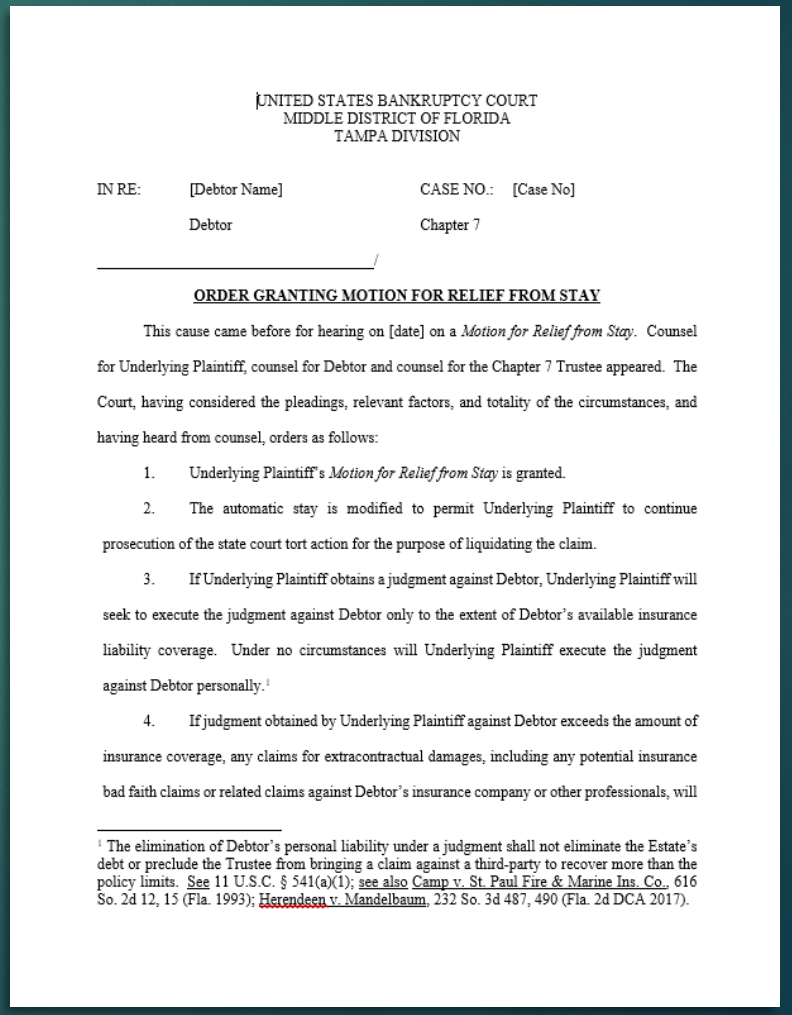
1. On [Date], Underlying Plaintiff filed a personal injury tort action against Debtor in the [Circuit Court of Hillsborough County, Florida]. The facts that gave rise to the tort action are recited in the Complaint (attached as **Exhibit 1**), which alleges that Debtor acted negligently, causing Underlying Plaintiff personal injuries and resulting damages.

2. At the time of the alleged negligence, Debtor maintained a policy of insurance that provided liability coverage for the damages claimed by Underlying Plaintiff. That policy grants Debtor's insurance carrier the right of exclusive control over the handling and defense of Underlying Plaintiff's personal injury claim. As such, the insurance carrier is defending Debtor from the tort claim.

3. On [Date], Debtor filed a Notice of Chapter 7 Bankruptcy in this Court and appropriately listed Underlying Plaintiff as a creditor in Debtor's Schedule E/F. The filing

[1] *Note: This draft is to be used when a Chapter 7 debtor files for bankruptcy during the pendency of the underlying Florida state court tort action.*

1



UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: [Debtor Name] CASE NO.: [Case No]
Debtor Chapter 7
_____/

ORDER GRANTING MOTION FOR RELIEF FROM STAY

This cause came before for hearing on [date] on a *Motion for Relief from Stay*. Counsel for Underlying Plaintiff, counsel for Debtor and counsel for the Chapter 7 Trustee appeared. The Court, having considered the pleadings, relevant factors, and totality of the circumstances, and having heard from counsel, orders as follows:

1. Underlying Plaintiff's *Motion for Relief from Stay* is granted.

2. The automatic stay is modified to permit Underlying Plaintiff to continue prosecution of the state court tort action for the purpose of liquidating the claim.

3. If Underlying Plaintiff obtains a judgment against Debtor, Underlying Plaintiff will seek to execute the judgment against Debtor only to the extent of Debtor's available insurance liability coverage. Under no circumstances will Underlying Plaintiff execute the judgment against Debtor personally.[1]

4. If judgment obtained by Underlying Plaintiff against Debtor exceeds the amount of insurance coverage, any claims for extracontractual damages, including any potential insurance bad faith claims or related claims against Debtor's insurance company or other professionals, will

[1] The elimination of Debtor's personal liability under a judgment shall not eliminate the Estate's debt or preclude the Trustee from bringing a claim against a third-party to recover more than the policy limits. See 11 U.S.C. § 541(a)(1); see also Camp v. St. Paul Fire & Marine Ins. Co., 616 So. 2d 12, 15 (Fla. 1993); Herendeen v. Mandelbaum, 232 So. 3d 487, 490 (Fla. 2d DCA 2017).

1-3 Months after Bankruptcy Filing

- Hire special counsel for the Trustee to bring bad faith claim (and others)
- Get special counsel's contract court approved
- Obtain attorney-client privilege waiver from Debtor.

After Jury Verdict in Tort Action

- Offer to review of proposed final judgment
  - Incantation of "for which sum let execution issue"
- Special counsel files bad faith action after judgment "final."
- Settlement considerations under *Justice Oaks* factors

  (1) the probability of success in litigation;
  (2) the likely difficulties in collection;
  (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and
  (4) the paramount interest of the creditors and a proper deference to their reasonable view in the premises.

Questions?

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Brent Steinberg – BrentS@Swopelaw.com

Stephanie Miles – StephanieM@Swopelaw.com

S W O P E ■ R O D A N T E

Key Elements of Insurance Bad Faith

- An insurance bad faith claim is an Estate asset. *Camp v. St. Paul Fire & Marine Ins. Co.*, 616 So. 2d 12, 15 (Fla. 1993).
- Most bad faith attorneys will handle these claims on a contingency fee basis. The Estate may recover hourly attorneys' fees as a prevailing party, minimizing the Estate's expenses. *See* Fla. Stat. § 627.428.
- An insurer that fails to settle in bad faith will be held liable for the entire excess judgment, plus interest and any consequential damages. *Swamy v. Caduceus Self Ins. Fund, Inc.*, 648 So. 2d 758, 760 (Fla. 1st DCA 1994).
- "Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it ***could*** and ***should*** have done so, had it acted ***fairly*** and ***honestly*** toward its insured and with ***due regard*** for their interests." Fla. Std. Jury Instr. (Civ.) 404.4.
- "The critical inquiry in a bad faith 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." *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 7 (Fla. 2018).
- The focus of a bad faith case is on the carrier's conduct. It is not about whether the claimant's attorney was uncooperative or tricky. *See id.*
- Where liability is clear and the injuries are so serious that a judgment in excess of the policy limits is likely, the carrier has an affirmative duty to offer to settle or tender. *Id.*
- Where there are multiple claimants or insureds, the carrier must attempt to settle as many claims as possible, against as many insureds as possible, within the policy limits. If it cannot settle all claims against all insureds, it must act reasonably to minimize the insured's exposure. *See Farinas v. Florida Farm Bureau*, 850 So. 2d 555 (Fla. 4th DCA 2003); *Contreras v. U.S. Security*, 927 So. 2d 16 (Fla. 4th DCA 2006).

Insurance Bad Faith Estate Asset Checklist

- Identify a potential insurance bad faith claim.
  - Is Debtor generally confused about the bankruptcy process?
  - Did Debtor's lawyer from the insurance carrier suggest filing?
  - What amount of liability insurance coverage did Debtor carry?
  - Did the claimant demand thousands more than available coverage?
  - Did settlement negotiations occur before the suit was filed?
  - Was there a question about whether the claim was covered?
  - Are you getting calls from an insurance lawyer offering "nuisance" value to settle vague liabilities?
  - Did Debtor file for bankruptcy because Debtor's insurer still owes or wrongfully denied payment of first-party coverage (i.e., windstorm, fire, uninsured motorist coverage)?

- Review all communications between the insurer and appointed defense counsel, first obtaining a privilege waiver from the Debtor, if necessary.
  - Although some case law suggests the Debtor's privileges automatically pass to the Trustee (*In re Smith*, 24 B.R. 3 (Bankr. S.D. Fla. 1982)), the court may apply a balancing test (*In re Courtney*, 372 B.R. 519 (Bankr. M.D. Fla. 2007)) or even require the Debtor to assign or waive his rights (*In re: Clarence Nathaniel Behn*, 2013 WL 12377690 (Bankr. M.D. Fla. Apr. 17, 2013)) before compelling the Debtor to provide you with the privileged communications.

- Analyze all liability policies – including homeowner's, CGLs and other household members' auto policies – to confirm no additional liability coverage.

- Offer claimant's counsel draft motion and order for relief from stay.

- Hire special counsel for any case with an exposure above the liability insurance limits.

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https://www.swoperodante.com/portal-log-in/

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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2. At the time of the alleged negligence, Debtor maintained a policy of insurance that provided liability coverage for the damages claimed by Underlying Plaintiff. That policy grants Debtor's insurance carrier the right of exclusive control over the handling and defense of Underlying Plaintiff's personal injury claim. As such, the insurance carrier is defending Debtor from the tort claim.

3. On [Date], Debtor filed a Notice of Chapter 7 Bankruptcy in this Court and appropriately listed Underlying Plaintiff as a creditor in Debtor's Schedule E/F. The filing

[1] *Note: This draft is to be used when a Chapter 7 debtor files for bankruptcy during the pendency of the underlying Florida state court tort action.*

operates as an automatic stay of the tort action. See 11 U.S.C. § 362(a).

4. It is well-established that "a plaintiff may proceed against the debtor simply in order to establish liability as a prerequisite to recover from another, an insurer, who may be liable." In re Jet Florida Sys., Inc., 883 F.2d 970, 976 (11th Cir. 1989). Indeed, "a discharge will not act to enjoin a creditor from taking action against another who also might be liable to the creditor." Id. at 973.

5. Accordingly, Underlying Plaintiff now moves to modify the automatic stay to allow the continued prosecution of the tort action against Debtor for the purpose of liquidating the claims to judgment. See 11 U.S.C. § 362(d)(1) (permitting the stay to be modified for "cause").

6. If Underlying Plaintiff obtains a judgment against Debtor, Underlying Plaintiff will seek to execute the judgment against Debtor only to the extent of Debtor's available insurance liability coverage. Underlying Plaintiff will not seek to execute the judgment against Debtor personally. If the judgment obtained by Underlying Plaintiff against Debtor exceeds the amount of insurance coverage, the Debtor's claims for extracontractual damages, including any potential insurance bad faith claims or related claims against Debtor's insurance carrier or other professionals, will become the property of the Bankruptcy Estate. However, the elimination of Debtor's personal liability under a judgment does not eliminate the Bankruptcy Estate's debt nor preclude the Trustee from bringing a claim for extracontractual damages. See 11 U.S.C. § 541(a)(1); see also Camp v. St. Paul Fire & Marine Ins. Co., 616 So. 2d 12, 15 (Fla. 1993) (recognizing trustee may bring debtor's insurance bad faith claim); Herendeen v. Mandelbaum, 232 So. 3d 487, 490 (Fla. 2d DCA 2017) (recognizing trustee may bring debtor's legal malpractice claim).

7. Because Debtor's filing for bankruptcy does not eliminate Underlying Plaintiff's claims, the question for this Court is merely where, not if, Underlying Plaintiff's tort claim(s) shall proceed.

8. As a preliminary matter, this Court's "core" jurisdiction does not extend to personal injury claims because they do "not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy." See In re Toledo, 170 F.3d 1340, 1348 (11th Cir. 1999) (quoting with approval In re Wood, 825 F.2d 90, 97 (5th Cir. 1987)); see also 28 U.S.C. §157(b)(2)(B) and (O) (excluding personal injury claims from definition of "core" proceedings). Moreover, Underlying Plaintiff has requested, and therefore has an absolute right to, a jury trial. Art. 1, § 22, Fla. Const.; see also 28 U.S.C. § 1411 (providing that the bankruptcy laws "do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim"). On those bases alone, this Court should grant Underlying Plaintiff relief from the automatic stay. See In re Todd B. Shipyard Corporation, 92 B.R. 600, 604 (Bankr. N.J. 1988) (holding that the automatic stay should be lifted to allow movants to prosecute a personal injury suit against a debtor because "personal injury tort claim(s) must be tried in a forum other than this [Bankruptcy] Court....").

9. Congress has also recognized "it will often be more appropriate to permit proceedings to continue in their place of origin, when *no great prejudice* to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere." In re Murray Indus., Inc., 121 B.R. 635, 636 (Bankr. M.D. Fla. 1990) (quoting Senate Rep. No. 989, 95th Cong., 2d Sess., 50, *Reprinted in* (1978) U.S. Code Cong. & Ad. News 5787, 5836) (emphasis added). Whether "cause" exists

to lift an automatic stay will be determined on a case-by-case basis. In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

10. In deciding whether an automatic stay should be lifted to allow continuation of a pending lawsuit in another forum, bankruptcy courts in Florida have applied a three-factor test. In re Makarewicz, 121 B.R. 262, 265 (Bankr. S.D. Fla. 1990) (citing In re Pro Football Weekly, 60 B.R. 824, 826 (N.D. Ill. 1986)); but see In re Sonnax Indus., Inc., 907 F.2d 1280, 1286 (2d Cir. 1990) (applying a twelve-factor test). Those factors are:

a) Any "great prejudice" to either the bankrupt estate or the debtor will result from continuation of a civil suit,

b) the hardship to the [non-bankrupt] by maintenance of the stay considerably outweighs the hardship of the debtor, and

c) the creditor has a probability of prevailing on the merits of his case.

In re Makarewicz, 121 B.R. at 265.

11. As to the first two factors, modification of the stay to permit prosecution of the tort action would allow for the most expeditious and economical resolution of the claim. The tort action has been pending for [insert time] and considerable pre-trial discovery has occurred. Trial is currently scheduled to occur on [Date]. With the considerable discovery that has occurred in the tort action and the pending trial date, Underlying Plaintiff would be significantly prejudiced if he is not permitted to continue the prosecution of the state court tort action. Conversely, any potential prejudice to Debtor or Estate is minimal with the insurance carrier having fully assumed responsibility for the defense. See In re Robertson, 244 B.R. 880, 882 (Bankr. N.D. Ga. 2000) (recognizing that "neither the bankruptcy estate nor the Debtors will suffer, at least from a pecuniary standpoint, by permitting Movant to prosecute his tort action" because the liability

insurer was "bearing the litigation costs in the civil lawsuit"). If anything, they would benefit from not "incurring costs in relitigating issues already presented to a court of competent jurisdiction." In re S. Oakes Furniture, Inc., 167 B.R. 307, 309 (Bankr. M.D. Ga. 1994).

12. Moreover, the Debtor [has been / will soon be] discharged, and thus will not be personally liable for any judgment entered in the tort action. Therefore, Debtor has no interest in the outcome of the tort action. The fact that Debtor may be required to participate in discovery or appear at trial does not provide a valid basis for denying Underlying Plaintiff's motion for relief from the stay. See In re Robertson, 244 B.R. at 883.

13. Likewise, judicial economy is served by allowing the tort claim to proceed in state court. The state court is familiar with the facts and law regarding the case and can conduct a trial of the tort claim(s). Pursifull v. Eakin, 814 F.2d 1501, 1506 (10th Cir. 1987) (holding that relief from stay is appropriate where a state court action is pending and the issues to be decided are based on state law); Garland Coal & Mining Co. v. United Mine Workers of America, 778 F.2d 1297, 1304 (8th Cir.1985) (noting that the law to be applied in a cause of action is a relevant consideration to relief from stay). Additionally, because Underlying Plaintiff only seeks to litigate his claim to the point of a judgment and does not seek relief from the stay to attach the property of Debtor, the relief sought does not interfere with the bankruptcy proceedings.

14. As to the third factor – the probability of prevailing on the merits of the case – this Court need only decide whether Underlying Plaintiff has a "colorable claim," not whether Underlying Plaintiff is likely to prevail. See Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 34 (1st Cir. 1994) ("[T]he only issue properly and necessarily before a bankruptcy court during relief from stay proceedings is whether the movant creditor has a colorable claim; thus, a decision to lift the stay is not an adjudication of the validity or avoidability of the claim, but only a determination

that the creditor's claim is sufficiently plausible to allow its prosecution elsewhere."). A cursory review of the operative complaint should reveal that Underlying Plaintiff's personal injury claim is "colorable."

15. Accordingly, after consideration of the relevant factors, Underlying Plaintiff has demonstrated "cause" under 11 U.S.C. 362(d)(1) to modify the automatic stay. Therefore, this Court should exercise its broad discretion to modify the automatic stay to permit Underlying Plaintiff to liquidate the claim in the tort action.

WHEREFORE, Underlying Plaintiff requests this Court hold a hearing and modify the stay to permit Underlying Plaintiff to

1) liquidate claims against the Debtor through judgment in the tort action;
2) if judgment is obtained, permit Underlying Plaintiff to execute against Debtor only to the extent of available insurance liability coverage; and
3) if judgment is obtained in excess of insurance coverage, permit the Trustee for the Bankruptcy Estate to pursue any claims for extracontractual damages through approved special counsel;

along with any other relief this Court deems appropriate.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: [Debtor Name] CASE NO.: [Case No]

Debtor Chapter 7

_____/

ORDER GRANTING MOTION FOR RELIEF FROM STAY

This cause came before for hearing on [date] on a *Motion for Relief from Stay*. Counsel for Underlying Plaintiff, counsel for Debtor and counsel for the Chapter 7 Trustee appeared. The Court, having considered the pleadings, relevant factors, and totality of the circumstances, and having heard from counsel, orders as follows:

1. Underlying Plaintiff's *Motion for Relief from Stay* is granted.

2. The automatic stay is modified to permit Underlying Plaintiff to continue prosecution of the state court tort action for the purpose of liquidating the claim.

3. If Underlying Plaintiff obtains a judgment against Debtor, Underlying Plaintiff will seek to execute the judgment against Debtor only to the extent of Debtor's available insurance liability coverage. Under no circumstances will Underlying Plaintiff execute the judgment against Debtor personally.[1]

4. If the judgment obtained by Underlying Plaintiff against Debtor exceeds the amount of insurance coverage, any claims for extracontractual damages, including any potential insurance bad faith claims or related claims against Debtor's insurance company or other professionals, will

[1] The elimination of Debtor's personal liability under a judgment shall not eliminate the Estate's debt or preclude the Trustee from bringing a claim against a third-party to recover more than the policy limits. See 11 U.S.C. § 541(a)(1); see also Camp v. St. Paul Fire & Marine Ins. Co., 616 So. 2d 12, 15 (Fla. 1993); Herendeen v. Mandelbaum, 232 So. 3d 487, 490 (Fla. 2d DCA 2017).

become the property of the Bankruptcy Estate and may be prosecuted through approved special counsel.

CONTINGENCY FEE CONTRACT FOR LEGAL SERVICES

Client: [Trustee] _____

Address: _____

Telephone: _____ **Email:** _____

Underlying Incident:
Underlying Case: Click here to enter text.
Underlying Judgement Amount/Date: Click here to enter text.

INTRODUCTION

This written document sets forth the terms of this Agreement under which the undersigned lawyer will undertake your representation. For convenience, the undersigned lawyer is referred to as the "**law firm**" and you are referred to as **"client"** throughout this Agreement.

SCOPE OF EMPLOYMENT

The **law firm** is hereby employed and retained to represent the **client** to prosecute the **client's** claims identified within this contract for damages against all appropriate parties resulting from the Final Judgment that will be entered in the Underlying Case described above. The **law firm** will have discretion to use its best judgment in all aspects of the representation and will have authority to sign pleadings and other papers on behalf of the **client**. However, the **law firm** is not authorized to sign a Final Release on behalf of the **client**.

The claims the **law firm** is handling are any claims against the **client's** liability insurer, Type insurance company here.and any claims and legal professionals who are or were responsible for the handling of the claim and defense of the **client** in the Underlying Case brought against the **client** for damages arising out of the Underlying Incident. These claims may be based on bad faith, breach of contract, breach of fiduciary or statutory duties, negligence, or professional malpractice.

CALCULATION OF LAW FIRM'S FEES

The compensation for the services of the **law firm** for the prosecution of the **client's** claims will be calculated on a contingent fee based on recovery. If there is no recovery, there is no fee.

If there is a recovery, the fee will be as follows:

a. [10% - 20%] percentType out the percentage. of any payment made in excess of the known conceded insurance policy limits, **plus**

b. Time-based fees calculated by considering the number of hours expended in the case at every level, times a fair hourly rate, multiplied by an appropriate factor to account for the risk of

recovery, all taking into account the factors considered when setting a court awarded fee under the principals of Standard Guaranty Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990), and Florida Patient's Comp. Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). These charges are not contingent on the amount of the recovery or amount of any court awarded fee, but are contingent on a recovery being made and payable *only if* a recovery is made; **plus**

c. An additional 5% percent of any recovery, after any appellate proceeding is filed or required.

The intention of this provision is that the hourly-based fees will be calculated with the same formula as a court-awarded fee, and if the **client** elects to settle the case under terms that integrate or waive its claim for court awarded fees, the **client** will pay these hourly based fees from any settlement.

The **client** acknowledges that the **law firm** would not accept this case, manage the financing of the costs on a non-recourse basis, and incur the risks that will be required to actually take the case through trial, (rather than settling it before trial), if it were not for the contract provisions relating to the time based contingency fees.

At any time during the handling of the case, the **client** may obtain from the **law firm** a statement of the time spent on the case to date, and advance any limitations on the amount of time to be invested into the case. If no such direction is given, the **law firm** will use its discretion to spend that level of time it determines to be appropriate for the prosecution of the **client's** claims.

COSTS AND EXPENSES

The **client** agrees to repay from any recovery all out-of-pocket expenses incurred and expended by the **law firm** in prosecution of the claim. Some examples of the expenses we frequently incur in the prosecution of a case are, investigator's fees, photographs, fees paid to experts for services, reports, examinations, and appearances at depositions and in court, court reporter's fees for attendance and transcripts, court filing fees, sheriff service fees, photocopying, scanning, indexing, on-line charges for computer-based research, and mailing expenses, long distance telephone calls, travel expenses and mileage, jury consultants, mock trials and focus groups, as well as other expenses, depending on the particular case.

At any time during the handling of this case, the **client** may inquire of the **law firm** as to the costs advanced to date and those anticipated. The **client** may also direct, in advance and in writing, any limitation of the costs to be advanced in the prosecution of this case. If no such direction is given, the **law firm** may use its discretion in making advances on the **client's** behalf.

The **law firm** will receive reimbursement of costs advanced on behalf of the **client** but only if a recovery is obtained for the **client**. **If there is no recovery that benefits the client by paying all or part of the excess claim against the, then the client is not obligated to repay these costs and expenses.**

CLIENT'S RESPONSIBILITIES

Client agrees to keep the **law firm** advised of the **client's** current address(es) and telephone number(s), to cooperate in the prosecution of the case, to attend depositions and trials as required, and to not discuss any aspect of the case with any person without prior consultation with the **law firm.**

The undersigned **client** has, before signing this contract, received and read the *Statement of Client's Rights* and understands each of the rights set forth therein. The undersigned **client** has signed the statement and received a signed copy to refer to while being represented by the **law firm**.

CLAIMS SETTLEMENT

The **client** will be advised of all settlement offers within a reasonable time after they are made, and shall have the discretion to accept or reject any offers after receiving the **law firm's** advice.

The **client** and **law firm** agree to negotiate the settlement of the principal claim, if any, separately from the claim for attorney's fees, and both agree not to waive the claim for fees without the approval of the other party to this contract.

Following settlement, in order to facilitate processing, the **law firm** is authorized by the **client** to execute settlement drafts or checks on behalf of the **client** and to deposit them into their trust account for collection while releases and other documents are signed.

Prior to disbursement of any funds from trust, the **client** will receive and approve a closing statement reflecting the amount of the recovery, deductions for court costs, the amount of the attorney's fees and the basis of calculating them, deductions for protected medical bills and other expenses, and the net proceeds to the **client**.

LIMITATIONS ON THE SCOPE OF EMPLOYMENT

Legal claims can sometimes present significant tax issues, and other collateral issues that do not directly relate to the prosecution of the claim, and recovery of damages. In order to develop the skills necessary to better prosecute legal claims and recover damages from others, the **law firm** declines to give legal advice on tax issues, financial planning, property law, government benefits entitlements, or other similar matters. The **law firm** will not be giving legal advice on any such matters to the **client**. The **law firm** hereby advises that consultations with accountants, advisors, or other attorneys outside the **law firm**, who are specialists in those fields, are advisable, and available to the **client**. Any discussion of such matters with a member of the **law firm** should not be considered legal advice, but instead is only a general lay person's view, which should not be relied upon in making any decisions.

TERMINATION OF AGREEMENT

This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the **client** shall not be obligated to pay any fees to the attorney for the work performed during that time.

If the attorney has advanced funds to others in representation of the **client,** the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the **client.**

If the **law firm** terminates the agreement, it will give the **client** written notice of its intention to do so and, if the withdrawal is a result of a determination by the **law firm** that prosecution of the case is not justified, there will be no charge for the **law firm's** services, except the reimbursement of its out-of-pocket expenses advanced on behalf of the **client.**

ENTIRE AGREEMENT

In order to avoid any potential for confusion as to the scope and terms of our agreement, the **law firm** and the **client** agree that this written document contains all the agreements, promises, and representations that the **law firm** and the **client** are relying upon in entering into this agreement. This document contains the entire agreement and there are no changes or additions to the typewritten portions for the filled-in blanks, unless they are initialed by all parties at each place a change is made, or are included in an attached written addendum signed by all parties.

THIS DOCUMENT IS A LEGAL CONTRACT. PLEASE BE SURE YOU UNDERSTAND IT FULLY AND AGREE TO IT BEFORE SIGNING IT.

_____	_____
Client	Lawyer
_____	_____
Date	Date

AUTHORIZATION FOR INFORMATION

TO: _____
_____
_____

By my execution of this instrument below, I hereby authorize and direct those attorneys and other professionals who may have worked on my behalf in connection with the personal injury claims made by [UNDERLYING PLAINTIFF] against me or the lawsuit styled [INSERT TORT CASE STYLE] to disclose any and all information relating to that work to [TRUSTEE] and Trustee's special counsel, Swope, Rodante P.A., *including* any information that would otherwise be protected from disclosure by the attorney-client privilege, work product doctrine, mediation privilege, or any other applicable privilege. I further authorize [TRUSTEE] and Trustee's special counsel, Swope, Rodante P.A., to waive, on my behalf, any privileges against disclosure of confidential information to the extent [TRUSTEE] and Swope, Rodante P.A. deem appropriate.

This release expressly revokes any prior similar release which may have been given previously, verbally or in writing, effective as of the date indicated below.

Signed this _____ day of _____, 2020.

X_____
[DEBTOR]

SWOPE, RODANTE P.A.
1234 5th Avenue East
Tampa, FL 33605
Office: (813) 273-0017
Fax: (813) 223-3678