Statutory Bad-Faith Claims Following An Appraisal Award In Florida

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More and more of first-party property insurance practice involves defending a bad-faith claim asserted by an insured when there has been no finding of breach of the underlying insurance contract. Often this claim arises in the following context: the insured or insurer demands appraisal; at some point just before the appraisal begins or during the appraisal, the insured files a Civil Remedy Notice of Insurer Violation (“CRN”); the insurer elects to proceed forward with the appraisal instead of curing the alleged violation within Florida’s sixty day cure period; the appraisal is completed and it results in an award in favor of the insured; and then the insured files an action for bad faith under Florida Statute § 624.155, which is commonly referred to as the “bad-faith” statute, and provides a cause of action for bad faith in a first party insurance claim. The Statute authorizes an insured to bring a civil action for bad faith based on the insurer’s conduct and/or violation of the designated Florida Statutes. In order to proceed with a bad-faith action in a first-party coverage claim, the following elements must be satisfied by the insured:

1. The insured must provide the insurer and the Florida Department of Financial Services (“DFS”) notice of the alleged violation giving rise to a bad-faith action (a civil remedy notice), and provide the insurer 60 days to “cure” any alleged violations; and

2. There must be a determination of the existence of liability with regard to the first-party insurance contract; and

3. There must be a determination of the extent of damages owed on the first-party insurance contract.

The Florida Supreme Court specifically stated in *Vest v. Travelers Insurance Co.* that the insured must obtain a determination of the existence of liability and damages before a cause of action for bad faith accrues. However, inexplicably, there often seems to be a great deal of debate regarding what constitutes a determination of the existence of liability and extent of damages as outlined in *Vest.* In *Blanchard v. State Farm Mutual Insurance Company*, the Florida Supreme Court stated, “an insured’s underlying first party action for insurance benefits against the insurer necessarily must be resolved...
favorably to the insured before the cause of action for ‘bad-faith’ in settlement negotiations can accrue.”

In *State Farm Mutual Insurance Co. v. Brewer,* the insured brought suit for bad faith relating to uninsured-motorist benefits. The insurer filed a motion for summary judgment which argued, among other things, that the insured’s bad-faith claim could not proceed because there was “no determination of liability and extent of damage owed on the insurance contract.” The motion was denied and the insured sought a writ of certiorari.

The Florida Fifth District Court of Appeal found that the trial court departed from the essential requirements of law by allowing the insured’s statutory bad-faith claim to proceed without a determination of liability and the extent of damages allegedly owed. The Court further stated that “[t]o obtain a determination of damages owed on the insurance contract, Brewer would need to bring an action on the contract...”

**When Does A Cause Of Action For Bad Faith Become Ripe?**

It is clear that if there is underlying litigation pending, then a “bad-faith” action is not ripe because there has been “no determination of liability and extent of damage.” However, some Florida Courts have also found that “payment of policy limits through settlement established that the insured had a valid claim and acts as a verdict of the insured.” Further, the Court in *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins.,* ruled that the condition precedent of finding the extent of liability and extent of damage is satisfied when an arbitration panel determines a party breached its duty under the contract.

The Courts have found that a bad-faith action accrues when the underlying litigation is final, when an insurer pays policy limits and when there is an arbitration award. However, the Courts are much more diverse when it comes to determining whether the bad-faith action accrues when there has been an appraisal award entered, but no action or determination of breach of the insurance contract.

**View That A Bad-Faith Claim Cannot Be Maintained Absent A Breach Of Contract**

The Florida Second District Court of Appeal has recently affirmed two orders granting summary judgment in favor of insurers in bad-faith actions where there had been no underlying finding of breach of contract. In *Huffman v. State Farm Florida Ins. Co.*, the parties disagreed with the amount of loss and the insurer invoked appraisal pursuant to the policy. The appraisal panel issued an appraisal award and the insurer paid the amount of the appraisal award within the time period prescribed by the insurance policy. The insurer then filed a bad-faith action. The insurer filed a motion for summary judgment which argued the bad faith action did not accrue until such time as the insured brought a breach of contract action and established that the insurer breached the contract. The trial court granted summary judgment in favor of the insurer, explaining that: “[b]efore proceeding with an action for unfair claims practices under § 624.155, a plaintiff must allege and prove that the defendant breached the insurance contract.” In an unpublished opinion, the trial court’s ruling was affirmed by the Florida Second District Court of Appeal.

Similarly, in *Schultz v. State Farm Florida Insurance Co.*, the insured brought a bad-faith action arising from a fire loss. During the adjustment of the loss, the parties had a disagreement with regard to the amount to be paid to repair the residence. The insurer demanded appraisal. During the appraisal process the insured filed a Civil Remedy Notice. The insurer tendered some money to the insured during the sixty day cure period and let the appraisal panel determine the total amount of damage. The appraisal panel issued its award and the insurer issued a payment for the entire amount of the appraisal award. After payment was issued by the insurer, the insured filed a bad-faith lawsuit. The insurer filed a motion for summary judgment and argued that the bad-faith action only accrues after the insured has established the insurer breached the insurance contract. The trial court entered summary judgment in favor of the insurer, stating: “[i]n order to prevail on their bad-faith claim, Plaintiffs must allege and prove that Defendant breached the insurance contract at issue.” In an unpublished opinion, the trial court’s ruling was affirmed by the Florida Second District Court of Appeal.

**View That An Appraisal Award Is A Sufficient Determination Of Liability And Damages To Permit A Bad-Faith Claim To Go Forward**

In contrast to the above view, other courts in Florida have held that an appraisal award was enough to
permit a bad-faith claim to go forward. In *Tropical Paradise Resorts, LLC v. Clarendon America Ins. Co.*, the insured filed an amended complaint for breach of the insurance policy, statutory bad faith, and breach of the implied covenant of good faith and fair dealing. The insurer moved to dismiss the bad-faith claim on the grounds that it was not ripe for determination, i.e. no determination of liability or extent of damage. Prior to the lawsuit, the parties participated in appraisal pursuant to the policy and an award was issued. The Court found that since the insurer had no dispute to coverage as a whole and did not dispute the actual loss determined by the umpire, then the appraisal award was sufficient to determine the insurer’s extent of liability and damage.

More recently, in *State Farm Florida Insurance Co. v. Seville Place Condominium Association*, Florida’s Fifth District Court of Appeal found that a confirmed appraisal award was sufficient to move forward with a bad-faith action. Although, Judge Shepherd wrote a strong dissenting opinion wherein he argued that a bad-faith action is not appropriate until a judgment against an insurer is final and non-appealable.

**View That The Issue Turns On Other Factors**

Despite the rulings in *Tropical Paradise and Seville Place*, it seems illogical that an insurer can be faced with a bad-faith action without a finding that the insurer breached the terms of the insurance contract. This is supported by many cases cited above where there is a requirement that the insured prove the insurer breached the insurance contract. However, even if the Courts are persuaded to allow bad-faith actions to proceed despite no finding of breach of contract, additional analysis of the insured’s claim may provide strong support for a motion for summary judgment.

**Focus On The Insurer’s Subjective Knowledge That It Owed Money**

In *316, Inc. v. Maryland Casualty Co.*, the insured filed a bad-faith action without filing an action for breach of contract. The insured, 316, suffered property damage as a result of Hurricane Ivan. It reported the loss to the insurer, Maryland Casualty, and Maryland Casualty began to adjust and pay on the loss. After approximately seven months of adjustment, Maryland Casualty had paid the insured approximately $3.8 million. Unfortunately, the insured believed it was owed additional amounts and Maryland Casualty invoked appraisal, pursuant to the terms and conditions of the policy, to determine the amount of the loss. One week after Maryland Casualty invoked appraisal, the insured filed a Civil Remedy Notice, which alleged claim delay, claim denial, unfair trade practices and unsatisfactory settlement offer. Maryland Casualty did not take any action to “cure” the allegations found in the Civil Remedy Notice during Florida’s 60-day “cure” period but, instead, elected to proceed forward with appraisal. Ultimately, the appraisal panel issued an award that required Maryland Casualty to pay the insured an additional $2.7 million. Maryland Casualty paid the appraisal award within the time allotted by the policy, and the insured filed a bad faith lawsuit seven (7) weeks later.

In analyzing the bad-faith claim, the Court looked at whether the carrier delayed in paying the claim when it knew it owed money. The Court stated: “[a]s the amount by which an anticipated claim exceeds policy limits increases, the amount of time before a prudent insurer would be expected to tender policy limits decreases.” In *316, Inc.*, the insurer did not believe the loss exceeded policy limits, and it paid approximately 60% of the final appraisal award prior to demanding appraisal. The Court found that Maryland Casualty’s payments showed that “it was intent on upholding its side of the insurance contract.” “The fact that the appraisers found that Maryland owed more money to 316 does not, in and of itself, indicate bad faith on the part of Maryland.” It was reasonable for Maryland Casualty to demand appraisal when its assessment of damages was considerably below policy limits.

**Focus On The CRN And The Possibility Of ‘Cure’**

The *316* Court also looked at the language of the Civil Remedy Notice to determine whether Maryland Casualty could “cure” the alleged violations. Upon review of the Civil Remedy Notice, the Court noted that it was written in general terms that gave no actual notice of the actions Maryland Casualty could take to “cure” the alleged violations. Specifically, there was nothing in the Civil Remedy Notice or the bad faith pleadings that would indicate the amount Maryland Casualty was to pay to avoid bad-faith litigation. “Based on Plaintiff’s failure to provide any facts on how Defendant could avoid a bad-faith lawsuit other than for Defendant to pay the policy limits, I cannot find fault with the Defendant seeking an appraisal un-
der the terms of the insurance contract.” The Court went on to state:

If I were to follow Plaintiff’s line of reasoning in this case, I would be, in effect, saying that an insurance company is in bad faith if it doesn’t pay whatever a plaintiff demands when the plaintiff files a Civil Remedy Notice. This is not the law. If it were the law, it would make the appraisal process meaningless because every insurer who tried to invoke the appraisal process would be faced with the prospect of a bad-faith suit. An insurance company is entitled to a final determination of how much is owed under a policy before a bad-faith claim can be brought against it so long as the insurer is not exercising its contractual rights to an appraisal in an effort to delay inevitable payments.

The Court entered summary judgment in favor of Maryland Casualty and found, as a matter of law, that Maryland Casualty was not acting in bad faith in its dealings with its insured.

Florida Statute § 624.155 (3)(a) requires the insured to state with “specificity” the information contained in the civil remedy notice. In 316, Inc., the Court focused heavily on the language of the Civil Remedy notice to determine whether the language was particular enough to allow the insurer to “cure” the alleged violations. The Court found “[p]laintiff’s Civil Remedy Notice was written in such general terms that it gave no actual notice of the specific actions that Defendant could have undertaken to cure it.” There was nothing in the Civil Remedy Notice to allow Maryland Casualty to determine the amount being demanded by the insured at the time the appraisal was demanded. The Court was “left to wonder how the Defendant could have resolved the conflict with the Plaintiff, curing the alleged violations of the bad-faith claim, other than by putting the matter in the hands of an appraisal panel.”

Similarly, in Heritage Corp. of South Florida v. National Union Fire Insurance Co. of Pittsburgh, P.A., the insured brought a bad-faith claim to recover damages from the insurer’s alleged bad-faith handling of the claim. Specifically, the insured focused on an allegation that the insurer failed to properly investigate the loss. The court found that the Civil Remedy Notice did not provide the insurer with specific enough information to satisfy the statute. The Civil Remedy Notice failed to specify the subsections of the Florida Statutes at issue and/or how the insurer violated them. The notice recited vague facts that were not related to the bad-faith action. Additionally, the notice did not provide any specific information regarding the action the insurer should have taken to cure the alleged violations. “The CRN is vague and ‘shotgun’ in nature - hardly the type of specific notice required by the statute that would allow National Union an opportunity to cure.”

Focus On Whether The Insurer Could Have Reasonably Settled

Florida Courts have also found there is no bad faith when the insurer could not have reasonably settled the insured’s claim for the amount determined by appraisal, arbitration or judgment. Heritage Corp. of South Florida v. National Union Fire Insurance Co. of Pittsburgh, P.A. As stated above, the Court determined that the Civil Remedy Notice filed by the insured was not sufficient. However, even if the notice was sufficient, the insurer had no ability to settle the claim with the insurer because the insured would never have accepted an offer in the amount of the judgment. The insured sought approximately $3.8 million in damages related to the underlying breach of contract action, but the jury awarded damages to the insured in the amount of $55,310.00. The court found that the insurer could not have reasonably settled the insured’s claim for the amount awarded by the jury. As such, there was no bad faith as a matter of law.

In Longpoint Condominium Association v. Allstate Ins. Co., the insured submitted a proof of loss in the amount of $538,564.01. The insured invoked appraisal and the umpire determined the amount of loss to be $100,249.68. The insurer paid the appraisal amount and the insured sued for bad-faith failure to adequately investigate the loss and failure to pay the amount claimed. The Court found that if the insured’s claim was premised on the insurer’s failure to pay $538,564.01, the bad-faith claim fails, because the amount was determined to be grossly excessive; the insurer had every right to challenge the amount of the insured’s claim. Further, the Court noted that
the insured’s claim would fail if it were based on the insurer’s failure to pay $100,249.68 because the insured had not proven or asserted that it would have accepted such a payment if it was presented by the insurer. “It can hardly be characterized as bad faith for an insurer to fail to tender an amount the insured would not have accepted in any event.”

Focus On The Relationship Between The Alleged Bad Faith And The Alleged Damages

In addition to challenging the specificity of the Civil Remedy Notice and the amount of damages, Florida Statute § 624.155 (8) requires the damages to be “a reasonably foreseeable result of a specified violation of this section.” In Heritage, supra, the insured sought bad faith damages in excess of $4.5 million. The Court found the insured did not provide sufficient information to show its damages were “reasonably foreseeable” from the insured’s alleged violations of Florida Statutes § 624.155 and § 626.9541(1)(I). The insured’s bad-faith claim alleged that the insurer failed to adequately investigate the claim or pay the claimed amount. However, the insured failed to show how any of its damages were in any way linked to the insurer’s alleged bad faith.

Conclusion

It seems so clear cut that a bad-faith claim should not be permitted to proceed forward without a finding that the insurer breached the insurance contract, especially in an appraisal situation. Allowing a bad-faith action to proceed after the parties have participated and completed appraisal defeats the very purpose of the appraisal provision. The appraisal provision was designed to provide insurers and insureds an outlet to resolve their disputes without the need for expensive and time consuming litigation. A bad-faith action after resolution of the claim through appraisal does not resolve any dispute with finality; it simply provides the insured and their counsel another bite at the apple and another avenue to generate attorney fees when the insurer has fully complied with its contractual duties.

Endnotes


3. Id.

4. 753 So. 2d 1270 (Fla. 2000).

5. Id. at 1276.


8. Id. at 1286.

9. Id.


12. 945 So. 2d 1216, 1234 (Fla. 2006).

13. In Justice Wells’s dissenting opinion in the Dadeland Depot case, he stated that the majority failed to establish any liability on the part of the surety that was not already imposed under the terms of the performance bond. Id. at 1245 (Wells, J., dissenting). Further, Justice Wells opined that the arbitration award must find both a breach of contract and a sum certain amount of damage to state a claim for bad faith.


19. Id. at *3.


21. Id. at 18.


23. § 624.155(3)(d), Fla. Stat. (2008) (“No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.”).


25. Id. at 1193.

26. Id. at 1194.

27. Id. at 1194-95.

28. Id. at 1194.

29. Id.


31. Heritage Corp. of S. Fla. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A., 580 F. Supp. 2d 1294, 1300 (S.D. Fla. 2008). See also Valenti v. Unum Life Ins. Co. of America, No.04-1615, 2006 WL 1627276, at *2 (M.D. Fla. June 6, 2006) (finding that the insured failed to state with specificity what the insured failed to adequately investigate, which made the Civil Remedy Notice inadequate, as there was no indication as to what conduct must be cured).


