Is a Claim for Breach of Implied Warranty of Good Faith and Fair Dealing Distinct from a Bad Faith Action in a First-party Insurance Claim in Florida?

By Sarah R. Burke[1]

In *Chalfonte Condominium Apartment Association v. QBE Insurance Corp.*[2], the insured, a condominium association, asserted that it had suffered damages to its property as a result of Hurricane Wilma.[3] On October 24, 2005, Hurricane Wilma struck Boca Raton, Florida, causing significant damage to property owned by Chalfonte. Shortly thereafter, Chalfonte filed a claim with QBE, its property insurer, pursuant to an insurance policy providing property coverage to Chalfonte for the twelve month period commencing January 1, 2005. Chalfonte submitted an estimate of damages in excess of $12 million dollars to QBE on December 18, 2005, and then submitted a sworn proof of loss to QBE on July 12, 2006. Dissatisfied with QBE's investigation and processing of its claim, Chalfonte filed suit in the United States District Court for the Southern District of Florida. Chalfonte asserted claims for declaratory judgment (Count I), breach of contract for failure to provide coverage (Count II), breach of contract-breach of the implied warranty of good faith and fair dealing (Count III), and violation of Fla. Stat. § 627.701(4)(a) (Count IV). The district court dismissed Count IV of the complaint, concluding that § 627.701 does not provide a private right of action, and then held a jury trial on Chalfonte's remaining claims.

In response to the complaint, the Insurer argued that the insured's damages did not meet the threshold for the applicable deductible.[4] QBE filed a motion for summary judgment. In its motion, QBE argued that the insured's count for breach of implied duty of good faith was "nothing more than a dressed up claim grounded in bad faith against QBE as an insurance carrier." QBE asserted the claim was premature as the insured in Florida cannot bring a bad faith claim until the underlying coverage dispute is resolved. The court disagreed with QBE and stated in relevant part:

> Chalfonte (the insured) has properly alleged breach of implied covenant of good faith and fair dealing in count three where it alleged breach of an express term of the contract, QBE's failure to pay a covered loss, and then goes on to allege QBE's failure to act in good faith as require by Florida law, including but not limited to, failing to fairly and promptly investigate the damage claim.[5]

On appeal of the district court's final judgment in favor of the insured, QBE asserted that Florida law did not recognize a claim for breach of the implied warranty of good faith and fair dealing based on an insurer's failure to investigate and assess its insured's claim within a reasonable period of time. QBE contended the trial court's decision to allow Chalfonte to try such a claim entitled it to either a new trial or judgment as a matter of law. In the alternative, QBE argued that Chalfonte's good faith and fair dealing claim should be viewed as the equivalent of a statutory bad faith claim under Florida's first party bad faith statute.[6] Under Florida law, there is no common law cause of action for first party bad faith. The insured wishing to pursue such a claim must pursue a statutory cause of action. However, the statutory cause of action for first party bad faith does not accrue until the insured prevails against its insurer on a claim for benefits under an insurance policy.[7] QBE contended that this bifurcation requirement applied to Chalfonte's claims and that the district court erred by allowing Chalfonte to try its good faith and fair dealing claim simultaneously with its claim for benefits under the Policy. QBE asserts that this alleged error entitles QBE to either a new trial or judgment as a matter of law.

On appeal[8] the Eleventh Circuit Court observed that both federal district courts and one state court in

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2 2007 WL 2225972 (S.D. Fla. 2007)
3 *Id*. at 1
4 *Id*.
5 *Id*. at 3
6 Fla. Stat. § 624.155
7 *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So.2d 1289, 1291 (Fla.1991).
8 *Chalfonte Condominium Apartment Assoc. V. QBE Insurance Corp.*, 561 F.3d 1267 (11th Cir. 2009),

Florida have held that common law good faith and fair dealing claims are distinct from statutory bad faith claims in the context of a first-party action on an insurance contract.[9] However, the Eleventh Circuit found these decisions were not supported by controlling precedent of the Supreme Court of Florida on the issue. The court also observed that the single state court decision on the issue, *O'Shields v. United Auto. Ins. Co.*,[10] did not involve a suit for failure to investigate and assess the insured's claim within a reasonable time, but rather for failure to provide information relating to the settlement of his claim. Finding no controlling precedent, the Eleventh Circuit certified the following questions to the Supreme Court of Florida:

> (1) Does Florida law recognize a claim for breach of the implied warranty of good faith and fair dealing by an insured against its insurer based on the insurer's failure to investigate and assess the insured's claim within a reasonable period of time?
>
> (2) If Florida law recognizes a claim for breach of the implied warranty of good faith and fair dealing based on an insurer's failure to investigate and assess its insured's claim within a reasonable period of time, is the good faith and fair dealing claim subject to the same bifurcation requirement applicable to a bad faith claim under Fla. Stat. § 624.155?[11]

The questions posed by the Eleventh Circuit indicate the degree of confusion that exists with the assertion of first party claims for the "breach of the duty of good faith and fair dealing." The only reason for the bifurcation requirement applicable to a bad faith claim under Fla. Stat. § 624.155 is the statutory basis for the claim. Under Florida law, a statutory bad faith claim cannot be brought at the same time as a claim disputing insurance coverage."[12] An insured's action against the insurer for payment of benefits must be resolved favorably to the insured before a bad faith claim accrues. See *Blanchard*, 575 So. 2d at 1291. Even where a plaintiff does not assert a separate cause of action for bad faith, but instead includes bad faith allegations within a breach of contract claim, the bad faith allegations may be stricken as prejudicial.[13] Thus, if a Plaintiff brings a bad faith claim with the contract action, the statutory bad faith claim is premature and cannot proceed with the contract action.

9 See, e.g., *Townhouses of Highland Beach Condo. Ass'n, Inc. v. QBE Ins. Corp.*, 504 F.Supp.2d 1307, 1312 (S.D.Fla.2007) and *O'Shields v. United Auto. Ins. Co.*, 790 So.2d 570, 571 (Fla.Dist.Ct.App.2001).

10 *O'Shields*, 90 So.2d 570, 571 (Fla.Dist.Ct.App.2001).

11 The court also certified questions concerning whether: (1) an insured can bring a claim against an insurer for failure to comply with the language and type-size requirements established by Fla. Stat. § 627.701(4)(a), (2) an insurer's failure to comply with the language and type-size requirements established by Fla. Stat. § 627.701(4)(a) renders a non-compliant hurricane deductible provision in an insurance policy void and unenforceable (3) language in an insurance policy mandating payment of benefits upon entry of a final judgment requires an insurer to pay its insured upon entry of judgment at the trial level.

12 *Shulman v. Liberty Mut. Fire Ins. Co.*, 2006 WL 952327, at *3 (11th Cir. Apr. 13, 2006) citing *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991)).

13 See *Dennis v. NW Mut. Life Ins. Co.*, 2006 WL 1000308, at *34 (M.D. Fla. 2006).