MEALEY'S LITIGATION REPORT
Insurance Bad Faith

We Said What We Meant And We Meant What We Said! — Enforcing Contract Language Despite Assertions Of Bad Faith And Insurer 'Misconduct' During The Adjustment Of The Claim

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Commentary

We Said What We Meant And We Meant What We Said! Enforcing Contract Language Despite Assertions Of Bad Faith And Insurer 'Misconduct' During The Adjustment Of The Claim[1]

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Introduction

The general rule is that the unambiguous language of an insurance policy will be given its plain meaning. Nonetheless, when reviewing decisions on insurance disputes, the reader would be forgiven if he or she were to conclude that some courts are inclined to aggressively "interpret" the contract language to benefit the insured, even in the absence of any apparent ambiguity. However, two recent decisions (one state and the other federal) serve as a reminder that the parties to an insurance agreement would be well advised to carefully attend to the precise language of the policy to avoid awards outside the terms and conditions of the policy.

Travelers Of Florida v. Ray Clyde Stormont, Jr.

In *Travelers of Florida v. Stormont*,[2] a Florida appellate court addressed the insured's contention that the insurer's "bad faith" appointment of an "unqualified" appraiser constituted a waiver of policy language requiring appraisal, or, failing that, entitled plaintiff's counsel to attorney's fees under Florida's attorney-fee statute[3] following appraisal.

Facts Of The Case

Mr. Stormont owned a Ford Mustang Cobra SVT, which was stolen from a garage in January 2006.[4] The plaintiff-appellee insured retained counsel and submitted a claim based on an estimated value of $65,000 to $75,000.[5] The insurer offered to pay $39,587.[6] The parties were unable to reach agreement on the claim.

In June 2006, the insurer demanded appraisal under the terms and conditions of the policy and appointed its appraiser.[7] The insured filed suit in October 2006 without ever responding to the insurer's demand for appraisal.[8] The court denied the insurer's subsequent motion to dismiss but granted its motion to abate and compelled appraisal provided for by the policy.[9]

After considerable delay, the insured attempted to remove the insurer's choice of appraiser by petitioning the court to either order the insurer to appoint a "competent" appraiser, or in the alternative, to strike the insurer's demand for appraisal.[10] The court denied the motion and, as the parties had failed to agree

on an umpire, the court appointed an umpire from names submitted by the parties.[11] Finally, in April 2008, the appraisal panel determined that the value of the Mustang Cobra was $95,000.[12]

Despite the appraisal decision, the insurer failed to pay the amount determined by the panel, and, after three months had elapsed, the insured filed a motion demanding judgment in accordance with the appraisal, interest, costs, and attorney's fees.[13] The insurer paid the $95,000 appraisal decision in July 2008.[14] In August, the insurer paid interest calculated from the April 2008 appraisal award to the July 2008 payment.[15] Though the insured's motion to compel the payment of the appraisal decision was arguably moot, the trial court entered a judgment on the award for $95,000, prejudgment interest of $23,219.93, and attorney's fees for $134,956.25 (determined by multiplying the lodestar by a 2.5 multiplier),[16] and $271 for cost of judgment.[17] The insurer appealed.

Entitlement To Attorney's Fees Incurred During Appraisal

The court first addressed, "whether an insured was entitled to attorney's fees incurred in connection with an appraisal which is conducted under an insurance policy."[18] The court held:

In order to be entitled to attorney's fees, it must have been reasonably necessary for the insured to file a court action. The purpose behind Section 627.428 is plainly to place the insured or beneficiary in the place she would have been if the carrier had seasonably paid the claim or benefits without causing the payee to engage counsel and incur obligations for attorney's fees.

If the insured is forced to file suit, and the insurer thereafter pays the award without the necessity of the trial court entering judgment, the confession of judgment doctrine applies. This doctrine applies where the insurer has denied benefits the insured was entitled to, forcing the insured to file suit, resulting in the insurer's change of heart and payment before judgment.[19]

Addressing the facts of the case, the court concluded that there was no entitlement to fees from the date the insured filed suit.[20] The court concluded that the insured's suit was premature as it had been filed without regard to the insured's obligation to proceed to appraisal when appraisal was demanded by the insurer under the policy.[21] The insured asserted that his decision to file suit rather than proceed to appraisal was justified because the insurer had, in "bad faith," appointed someone the insured believed was "unqualified."[22] The insured argued that the insurer's appointment was a breach of the contract and waived the insured's right to appraisal.[23] The court rejected the insured's assertion:

Those facts do not create a waiver of the right to appraisal. In the context of the analogous field of arbitration, a waiver of the right to arbitrate occurs only when a party engages in conduct inconsistent with that right. Even if the insured is correct that the insurer appointed an appraiser who was not competent, that is not conduct which is inconsistent with the right to appraisal, and there is no legal basis for asserting that the insurer had waived the right to appraisal.

If the insured believed that the insurer's appraiser was not competent (where, as here, the appraisal clause required appointment of a competent appraiser), the issue must be raised promptly upon learning of the grounds for disqualification. The correct procedure would be first to make a written demand that the insurer replace the appraiser. If the insurer declines to do so, then the insured must promptly file a complaint in circuit court seeking removal of the appraiser.[24]

The court noted that the insured should have recognized the problem and taken action to disqualify the insurer's appraiser upon the disclosure of his identity in June 2006.[25] The insured failed to take any action regarding the appraiser until 2008.[26] The court thus concluded that the insured was not entitled to attorney's fees from the date suit was filed until appraisal was concluded in conformance with the terms and conditions of the policy.[27]

Entitlement To Attorney's Fees Incurred Enforcing Appraisal Award

The insurer contended that the insured did not need to file its motion to enter judgment in accordance with the award and, therefore, the insured was not entitled to any attorney's fees.[28] The court found that none of the insurer's cases were relevant to facts of the case and declared the insurer's argument without merit.[29] The court held:

The appraisal award was entered in April of 2008. The insurer failed to pay. In June, after almost three months had expired, the insured filed its motion to enter judgment in accordance with the award. It was entirely reasonable for the insured to file this motion after the insurer not only failed to pay the award, but also failed to pay its half of the umpire's fee.

Six weeks after the insured filed the motion, but before the motion was ruled on, the insurer paid the principal amount of the award. Even later the insurer paid the interest it calculated to be due. Where an insurer makes payment of a claim after suit is filed, but before a judgment is rendered, such payment operates as a confession of judgment, entitling the insured to an attorney's fee award.[30]

The court found that the insured had acted reasonably in filing its motion and that the insurer had confessed judgment by paying the award after suit was filed, thereby entitling the insured to attorney's fees for that portion of the litigation.[31] The decision of the court is curious because the court had already ruled that the insured had acted improperly when he filed suit rather than proceeding to appraisal. However, the decision can be understood in the context of the insurer's failure to pay the award when required by the policy, necessitating the insured's motion to compel payment. Thus, while the insurer had paid the award by the time of the final hearing in the insured's motion, the court concluded that the insurer's payment of the $95,000 in the context of that dispute "amounted to a confession of judgment."[32]

Calculation Of Prejudgment Interest

The insured argued that he was entitled to prejudgment interest from the date of loss.[33] The appellate court disagreed.[34] Citing again to the language of the policy, the court concluded that calculating the interest from the date of the loss was improper:

The insurance policy in this case does not specify when an appraisal award is to be paid by the insurer. Where that is the case, the insured is entitled to interest from the date of the appraisal award as that is the date on which the damages were liquidated. The prejudgment interest award must be reduced, so as to cover the period from the date of award until the date of the insurer's payment of the $95,000 principal amount of the award.[35]

Thus the court affirmed the trial court's award of attorney's fees, but remanded for reduction of the amount of fees and prejudgment interest.[36]

Buckley Towers v. QBE

In *Buckely Towers Condominium, Inc. v. QBE Insurance Corp.*,[37] the Eleventh Circuit Court of Appeals addressed the impact of policy provisions on the insured's entitlement to replacement costs, costs related due to enforcement of laws and ordinances and prejudgment interest. As in *Travelers of Florida v. Ray Clyde Stormont, Jr.*,[38] the insured argued that the insurer's conduct during the course of the adjustment waived policy provisions restricting coverage under the terms and conditions of the policy. While that argument found a receptive audience with the trial court, the federal appeals court took a dim view of this novel approach to contract law.

Facts Of The Case

QBE Insurance Corp. ("QBE") issued a policy providing hurricane coverage to Buckley Towers Condominium, Inc. ("Buckley Towers"), the owner of a pair of condominium buildings in Miami-Dade County, Florida.[39] The policy issued by QBE conditioned entitlement to replacement costs and costs due to enforcement of laws or ordinances on the completion of those repairs.[40] In October 2005, Buckley Towers was damaged by Hurricane Wilma.[41] Buckley Towers submitted a claim to QBE and then filed suit demanding full replacement costs and costs attributed to the enforcement of laws or ordinances despite the fact that the insured had not incurred those costs.[42]

In June 2006, Buckley Towers submitted a Sworn Statement in Proof of Loss, designating the "Full Cost of Repair or Replacement" as $5,187,388.03, the "Applicable Depreciation" as $12,503.43, and the "Actual Cash Value Loss" as $5,174,885.50.[43] Buckley Towers designated the "Net Amount Claimed" as $4,238,708.50.[44] QBE interpreted Buckley Towers' claim as a demand for the full cost of repair or replacement and determined that replacement costs were not due and owing under the contract until and unless Buckley Towers repaired its damaged property.[45] Because Buckley Towers did not make such repairs, QBE neither paid nor fully denied the claim.[46]

Buckley Towers filed suit for Actual Cash Value ("ACV") damages, Replacement Cost Value ("RCV")

damages, law and ordinance damages, and declaratory judgment.[47] Buckley Towers conceded that it failed to completely repair its property before it made a claim for RCV damages and also acknowledged that the policy required it to incur such costs before it was entitled RCV and law-and-ordinance coverage.[48] However the insured asserted that the policy restrictions of the coverages should not be enforced due to QBE's failure to pay ACV when due.[49] Giving credence to the insured's assertions, the trial court instructed the jury that "QBE may be obliged to pay RCV damages if it found that QBE had prevented Buckley Towers' performance under the RCV provision of the contract by denying ACV damages."[50]

At trial, the jury found that Buckley Towers had submitted a request for ACV damages and awarded $11,395,665 in ACV damages.[51] According to the judge's instruction, the jury also found that QBE had prevented Buckley Towers' performance and awarded Buckley Towers $18,708,608 for RCV and $803,500 in law-and-ordinance damages per building.[52] Pursuant to Buckley Towers' motion, the court amended the judgment to add prejudgment interest, increasing the final award to $24,986,750.87.[53] QBE filed post-trial motions for judgment as a matter of law as to RCV, ACV and law-and-ordinance damages, for a new trial on the basis of juror misconduct, and to alter or amend the judgment to strike the award for prejudgment interest.[54] The district court denied QBE's post-trial motions and QBE appealed.[55]

Enforcement Of Policy Restrictions On Appeal

The Eleventh Circuit Court of Appeals rejected the trial court's application of the "prevention of performance" doctrine to allow the insured to claim full replacement costs and law-and-ordinance coverage despite its failure to repair or replace its damaged property.[56] The court explained that Florida's doctrine of "prevention of performance" bars one party from taking action outside the contract to cause and then benefit from the other party's nonperformance under that contract.[57] The court then outlined the several reasons it determined that the district court had erred in applying the doctrine.[58]

The court first observed that the unambiguous language of the policy requires an insured to repair and replace its property before receiving RCV damages and does not contain any allowances for advance payments to fund repairs.[59] Thus, while QBE had not issued "advance" RCV payments, as such payments were not required, the "failure" to make them did not give rise to the application of Florida's "prevention of performance" doctrine. The court held:

Applying the doctrine of prevention of performance in this case would impermissibly rewrite the insurance contract . . . . Allowing Buckley Towers to claim RCV damages without repairing or replacing entirely removes the plaintiff's obligations under the Replacement Cost Value section of the contract. The parties freely negotiated for that contractual provision and it is not the place of a court to red-line that obligation from the contract.

Nor is it a defense to say that it would be costly for Buckley Towers to comply with the insurance contract as written. . . . Although Buckley Towers may be unable to receive the full range of benefits of their contract without an advance payment under Florida law, that cost and inconvenience may not relieve them of repairing the building prior to claiming RCV damages.[60]

The appellate court was not persuaded by the authority offered by Buckley Towers in support of its use of the "prevention of performance" doctrine.[61] Because it could not provide any on-point Florida case law, Buckley Towers relied upon two surety cases that the court distinguished finding the prevention of performance was the result of events outside the contract.[62] The court noted:

In sharp contrast, here, QBE was enforcing its express rights under the contract. Whatever obstacles the language of this policy created, the obstacles were not imposed on account of conduct falling outside the scope of the parties' agreement itself. The insurance contract clearly provides for the possibility of a lawsuit to determine the right to payment. What's more, the insurance contract provides for another means of seeking reimbursement for hurricane damage, without any need to repair or replace anything – the requirement of the insurer to honor a properly made ACV claim. But nothing in this insurance contract, or in Florida law for that matter, requires QBE to fund the repairs before the building claims RCV damages. In short, as we read Florida law, the doctrine of prevention of performance may not be wielded as a sword in a case

like this one where the insured is required first to meet its obligations to repair under the policy provision.[63]

Based upon its analysis and the lack of precedent sufficient to establish that "Florida courts would apply the ["prevention of performance"] doctrine to change the basic terms of the underlying contract,"[64] the appellate court refused to do so and granted QBE's motion for judgment as a matter of law on RCV damages.[65] The court noted its conclusion was supported by prior decisions similarly enforcing express provisions of policies, including *Ceballo v. Citizens Property Insurance Corp.*, where the Florida Supreme Court enforced a policy requirement that the insured must incur a covered expense prior to receiving supplemental coverage.[66]

Based upon the same reasoning, the court quickly concluded that the district court erred by denying QBE's motion, and therefore granted QBE's motion for judgment as a matter of law on law-and-ordinance damages.[67]

However, under Florida law and under the terms of the contract, Buckley Towers is not entitled to law and ordinance damages because it never repaired the property and never actually incurred increased damages due to the enforcement of laws or ordinances. For the reasons we have already explained, the doctrine of prevention of performance provides no excuse from Buckley Towers' obligation to perform its duties under the contract.[68]

Prejudgment Interest

The court also rejected the district court's award of prejudgment interest, finding the award inconsistent with the explicit terms of the policy:[69]

Not surprisingly, Florida law holds that prejudgment interest is governed by the terms of the insurance contract. This insurance contract provides that damages are only due either "(1) 20 days after [QBE] receives the sworn proof of loss, and [QBE] has reached agreement with [Buckley Towers] on the amount of loss, or (2) within 30 days after [QBE] receive[s] a sworn proof of loss and [t]here is an entry of a final judgment." Because neither of those conditions were satisfied until final judgment, Buckley Towers is not entitled to prejudgment interest under Florida law. [70]

Conclusion

The insurers in both cases prevailed by relying upon the plain meaning of the terms and conditions in their policies. In *Stormont*, the insurer successfully limited the insured's entitlement to attorney's fees because the insured filed suit prematurely before complying with the appraisal provision of the policy. QBE successfully appealed the multi-million-dollar RCV and law-and-ordinance awards because the insured failed to satisfy the policy's preconditions for those coverages.

The appellate courts in each case rejected the insureds' attempts to rewrite the terms of their contracts based on what the insureds asserted was insurer misconduct during the adjustment. While those decisions can be viewed simply as the enforcement of basic contract principles, it is important to note that contrary decisions would have been inconsistent with Florida's statutory provisions for "bad faith" actions.[71] Permitting an insured to raise insurer misconduct during the contract action to obtain an award that is, on its face, extra-contractual would violate the statutory-bad-faith scheme enacted by the Legislature.[72] This implication was either missed by the respective trial courts or ignored. The cases are thus important both for what was correctly decided by the respective appellate courts and the damage that could have been done to the state's statutory "bad faith" scheme had the decisions affirmed the trial court rulings.

Thus these two cases serve as both a reminder that the parties to an insurance agreement should attend to the precise language of the policy and that they should recognize and resist positions taken by insureds that, by definition, would result in awards that fall outside the terms and conditions of the policy.

Endnotes

1. Our apologies to Dr. Seuss for paraphrasing his dialogue for Horton the elephant in Seuss's *Horton Hears a Who* ("I meant what I said, and I said what I meant. An elephant's faithful, one hundred percent!").

2. Travelers Fla. v. Ray Clyde Stormont, Jr., __ So. 3d __, 35 Fla. L. Weekly D2059a, 2010 WL 3564708 (Fla. 3d DCA Sep. 14, 2010).

3. Fla. Stat. § 627.428 (2005).

4. *Stormont,* 2010 WL 3564708, at *2.

5. The vehicle was valuable because it had been modified for and owned by Petty Racing Enterprises and had been driven by a member of the Petty family. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at *2-*3.

10. *Id.* at *3.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. The appellate court reversed the trial court's application of the 2.5 multiplier, ruling "[i]n considering the issue now before us, the First District has held that 1.0 is the correct multiplier. The First District reasoned that '[a]though there was some question as to the amount that would be recovered by [the insured] under the insurance policy, there was no question that there would be a recovery of damages.' That logic is applicable here. The multiplier must be eliminated." *Stormont,* 2010 WL 3564708, at *10 (quoting Reliance Ins. Co. v. Harris, 503 So. 2d 1321, 1323 (Fla. 1st DCA 1987)) (alteration in original, citation and internal quotation marks omitted).

17. *Stormont,* 2010 WL 3564708, at *4.

18. *Id.*

19. *Id.* at *4-*5 (citing Fla. Stat. § 627.428; Nationwide Prop. & Cas. Ins. v. Bobinski, 776 So. 2d 1047, 1048 (Fla. 5th DCA 2001); State Farm Fla. Ins. Co. v. Lorenzo, 969 So. 2d 393, 397-98 (Fla. 5th DCA 2007); Federated Nat'l Ins. Co. v. Esposito, 937 So. 2d 199, 200-02 (Fla. 4th DCA 2006)); *accord* Travelers Indem. Ins. Co. v. Meadows MRI, LLP, 900 So. 2d 676, 678-79 (Fla. 4th DCA 2005) (citations omitted).

20. *Stormont,* 2010 WL 3564708, at *7.

21. *Id.* at *5-*7.

22. *Id.* at *6.

23. *Id.*

24. *Id.* at *6-*7 (citing Raymond James Fin. Servs., Inc. v. Saldukas, 896 So. 2d 707, 711 (Fla. 2005); U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170, 172 (Fla. 1st DCA 1983) ("Implied waiver of the right to arbitration occurs only when a party engages in conduct which is inconsistent with that right.")) (citations omitted).

25. *Stormont,* 2010 WL 3564708, at *7.

26. *Id.*

27. *Id.*

28. *Id.* at *7-*9.

29. *Id.* at *8-*9 (citing Tristar Lodging, Inc. v. Arch Specialty Ins. Co., 434 F. Supp. 2d 1286, 1298 (M.D. Fla. 2006); State Farm Fla. Ins. Co. v. Lorenzo, 969 So. 2d 393, 395-96 (Fla. 5th DCA 2007); and Federated Nat'l Ins. Co., v. Esposito, 937 So. 2d 199, 199-200 (Fla. 4th DCA 2006)) (citations omitted).

30. *Stormont*, 2010 WL 3564708, at *8 (quoting Magnetic Imaging Sys. I, Ltd. v. Prudential Prop. & Cas. Ins. Co., 847 So. 2d 987, 990 (Fla. 3d DCA 2003)) (citation and internal quotations omitted).

31. *Stormont,* 2010 WL 3564708, at *9.

32. *Id.* at *9 n.3.

33. *Id.* at *10.

34. *Id.*

35. *Id.* at *11 (quoting Aries Ins. Co. v. Hercas Corp., 781 So. 2d 429, 430 (Fla. 3d DCA 2001); citing Liberty Mut. Ins. Co. v. Alvarez, 785 So. 2d 700, 71 n.1 (Fla. 3d DCA 2001)) (citations and internal quotation omitted).

36. *Stormont,* 2010 WL 3564708, at *11.

37. Buckley Towers Condominium, Inc. v. QBE Ins. Corp., No. 09-13247, 2010 WL 3551609 (11th Cir. Sep. 14, 2010).

38. Travelers Fla. v. Ray Clyde Stormont, Jr., No. 3D09-110, 2010 WL 3564708 (Fla. 3d DCA Sep. 14, 2010).

39. *Buckley Towers*, 2010 WL 3551609, at *1.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at *2.

48. *Id.*

49. *Id.* at *2-*4.

50. *Id.* at *2.

51. *Id.*

52. *Id.* The unpublished opinion reads, "$803,500,000 in law and ordinance damages per building," which, based upon the other figures and the amount of the final award, we reason to be a scrivener's error.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at *2-*3.

57. *Id.* at *2 (citing Knowles v. Henderson, 22 So. 2d 384, 385-86 (Fla. 1945)) (citation omitted).

58. *Buckley Towers*, 2010 WL 3551609, at *2-*3.

59. *Id.* at *2 (quoting Condominium Association Coverage Form, provision G(3)(d)) (citation and quotation omitted).

60. *Buckley Towers*, 2010 WL 3551609, at *3 (quoting Acosta, Inc. v. Nat'l Union Fire Ins. Co., 39 So. 3d 565, 573 (Fla. 1st DCA 2010); N. Am. Van Lines v. Collyer, 616 So. 2d 177, 179 (Fla. 5th DCA 1993)) (citation and internal quotations omitted).

61. *Buckley Towers*, 2010 WL 3551609, at *4.

62. *Id.* at *4.

63. *Id.* at *4.

64. *Id.* at *3 (citing Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)) (citation omitted).

65. *Id.* at *4.

66. *Buckley Towers*, No. 09-13247, 2010 WL 3551609, at *3 (quoting Ceballo v. Citizens Prop. Ins. Corp., 967 So. 2d 811, 815 (Fla. 2007); citing State Farm Fire and Cas. Co. v. Patrick, 647 So. 2d 983, 983 (Fla. 3d DCA 1994) (*per curiam*); Citizens Prop. Ins. Corp. v. Hamilton, 35 Fla. L. Weekly D1516 (Fla. 1st DCA Jul. 7, 2010)) (citations and internal quotation omitted).

67. *Buckley Towers*, 2010 WL 3551609, at *4.

68. *Id.* (citing Ceballo v. Citizens Prop. Ins. Corp., 967 So. 2d 811, 815 (Fla. 2007); Citizens Prop. Ins. Corp. v. Ceballo, 934 So. 2d 536 (Fla. 3d DCA 2006)) (citations and footnote omitted).

69. *Buckley Towers*, 2010 WL 3551609, at *5.

70. *Buckley Towers*, 2010 WL 3551609, at *5 (quoting

Florida Changes, Provision D; citing Columbia Cas. Co. v. So. Flapjacks, Inc., 868 F.2d 1217, 1219-20 (11th Cir. 1989)) (citations omitted).

71. Under Florida law, there is no first-party cause of action for "bad faith" outside of the statutory provisions (i.e., under the common law). In 1982, the Florida Legislature enacted Section 624.155, Florida Statutes, which provides the circumstances under which an insured may sue his insurer for unfair claims practices. *See* FLA. STAT. § 624.155 (2005); Talat Enterprises, Inc. v. Aetna Cas. And Sur. Co., 753 So. 2d 1278, 1281 (Fla. 2000).

72. *See* Chalfonte Condominium Apartment Ass'n , Inc. v. QBE Ins. Corp., No. 10-80584, 2010 WL 3385982, *1-*2 (S.D. Fla. Aug. 30, 2010). ■

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