Liability and Damages: Understanding Property Insurance Bad Faith Litigation in Florida

By Matthew J. Lavisky

Florida has a statutory action for first-party bad faith, which did not exist at common law. This comprehensive article explains the evolution of first-party bad faith claims under Florida law, with particular focus on the requirement of a breach of contract as a condition precedent to a bad faith claim.

INTRODUCTION

Florida recognizes two general categories of insurance bad faith: first-party and third-party.[1] A cause of action for third-party bad faith exists at common law,[2] but also may be brought under the Florida bad faith statute.[3] The essence of a cause of action for third-party bad faith is that the insurer breached its duty to its insured by failing to properly or promptly defend claim, which resulted in the insured being exposed to a judgment in excess of the coverage limits.[4]

A cause of action for first-party bad faith did not exist at common law.[5] It exists in Florida only because of statutory law allowing an insured to bring an action directly against an insurer for failing to settle a claim promptly.[6] Florida law recognizes several conditions precedent to that action. Two are set forth in the statute,[7] and one comes from the Florida Supreme Court's opinion in *Blanchard v. State Farm Mutual Automobile Insurance Co.*[8] There, the court held that "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."[9] This article will define that requirement, with particular attention to bad faith lawsuits arising out of first-party property insurance claims.

I. A HISTORY OF FLORIDA BAD FAITH LAW

A. *The genesis of first-party and third-party bad faith*

A cause of action for third-party bad faith has existed in Florida since 1938.[10] In *Auto Mutual Indemnity Co. v. Shaw*, the Florida Supreme Court observed that an "insurance company in the settlement of claims and in conducting a defense before the court on suits filed should be held to that degree of care and diligence which a man of ordinary care and prudence should exercise in the management of his own business."[11] The court reasoned that the insurance contract in *Shaw* gave the insurer "the right to take charge of the defense" of the claim.[12] Therefore, the court held, the insurer had a duty to act in good faith toward the insured in its effort to negotiate a settlement.[13]

In 1980, Florida's high court further defined the duty of good faith found in liability insurance policies in *Boston Old Colony Insurance Co. v. Gutierrez*.[14]

> An insurer, in handling the defense of claims against its insured, 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….The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.[15]

This is known as third-party bad faith because it involves a claim by a third party made against the insured.[16] The damages recoverable in this third-party bad faith action include "the entire judgment entered against the insured in favor of the injured

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third party, including any amount in excess of the insured's policy limits."[17]

Florida courts did not, however, recognize a corresponding duty of good faith in a first-party claim (meaning a claim made by the insured to his or her own insurer for a direct benefit to the insured).[18] Under Florida common law, an insurer did not owe a fiduciary duty to its insured in a first-party claim because their legal relationship was that of debtor and creditor.[19] The court in *Baxter v. Royal Indemnity Co.* reasoned "[i]t would be a strange quirk in the law to hold that each time a debtor fails or refuses to pay demands made upon it by a creditor, the debtor would be liable for both compensatory and punitive damages even though his failure or refusal was motivated by spite, malice, or bad faith."[20] Therefore, "[i]f an insurer acted in bad faith in settling a claim filed by its insured, the only common law action available to the insured was a breach of contract action against the insurer in which damages were limited to those contemplated by the parties in the insurance policy."[21] In other words the damages recoverable in a lawsuit against an insurer for breach of a contract were the value of the covered claim, not to exceed the coverage limits, plus interest.[22]

In 1982, the Florida Legislature enacted section 624.155, Florida Statutes.[23] This statute created a cause of action for first-party bad faith.[24] Section 624.155 "essentially extended the duty of an insurer to act in good faith and deal fairly in those instances where an insured seeks first-party coverage or benefits under a policy of insurance."[25] The damages generally recoverable under this statute "are those damages which are the natural, proximate, probable, or direct consequence of the insurer's bad faith actions and that such damages may exceed the limits of the insurance policy."[26] Section 624.155 also allows for recovery of punitive damages in limited circumstances.[27]

B. *The timing and accrual of a cause of action for statutory first-party bad faith*

Not long after the enactment of the bad faith statute, confusion arose as to when a cause of action for first-party statutory bad faith accrued. *Schimmel v. Aetna Casualty and Surety Co*. involved a first-party claim to Aetna under a policy covering household goods while being shipped.[28] After many of the goods were damaged in transit, the Schimmels made a claim to Aetna. Ultimately, the Schimmels sued for breach of contract. The Schimmels prevailed at trial.

The Schimmels then brought a second lawsuit for statutory first-party bad faith under section 624.155. The trial court entered summary judgment for Aetna because the Schimmels had split their causes of action.

On appeal, the Third District Court of Appeal affirmed. The court reasoned that the Schimmels could have brought their action for bad faith at the same time as the action for breach of contract, and stated "[i]f Aetna was liable under section 624.155 for bad faith failure to settle that claim, that liability, as well as the facts necessary to prove it, existed at the time the first trial commenced."[29] The appellate court concluded that the rule against splitting causes of action barred the claim as a matter of law.[30]

Other Florida courts, however, reasoned that a cause of action for bad faith was separate and distinct from a claim arising out of the insurance contract.[31] In *Blanchard v. State Farm Mutual Automobile Insurance Co.*, the Eleventh Circuit Court of Appeals was faced with a situation similar to that in *Schimmel*.[32] The Blanchards had a State Farm policy that provided uninsured motorist (UM) coverage. Mr. Blanchard suffered permanent injury when he was struck by an automobile driven by an uninsured motorist. The Blanchards alleged State Farm refused to make a good faith offer to settle the claim and sued State Farm for UM benefits. The jury returned a verdict for an amount that exceeded the UM coverage limits.

The Blanchards then brought a second lawsuit against State Farm, for bad faith, in federal court. The U.S. District Court dismissed the lawsuit based on *Schimmel*, as the Blanchards had failed to assert their bad faith claim in the contract action. The Blanchards appealed to the Eleventh Circuit, which certified several questions to the Florida Supreme Court for resolution, including whether an insured's claim for bad faith accrues before the conclusion of the underlying action for contract benefits.[33]

The Florida Supreme Court accepted jurisdiction, disapproved of *Schimmel*, and held that "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."[34] Thus, the court explained, "[a]bsent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for a bad faith failure to settle."[35]

C. *Early cases applying and interpreting* Blanchard v. State Farm

Blanchard involved UM coverage, a species of first-party claim, which involves tort principles. For instances, in a lawsuit for UM benefits, the UM insurer stands in the shoes of the uninsured motorist and is entitled to raise all the defenses that the uninsured motorist may raise.[36] "[I]n a[n] [uninsured motorist] claim the insured must prove that she is legally entitled to recover from the owner or operator of the uninsured or underinsured vehicle. Just as she would in a suit against the tortfeasor, the insured bears the entire burden to prove that her claimed damages were reasonable, necessary, and related to the accident."[37] And when an insured sues for UM benefits, the action is not for breach of contract, but rather is for a determination of entitlement to, and the amount of, damages caused by the uninsured or underinsured tortfeasor.[38]

As Florida courts began to shape *Blanchard* and its application, one of the first issues to arise was whether *Blanchard* applied to first-party claims other than UM claims. In *Allstate Insurance Co.*

v. Baughman, the Second District held that *Blanchard* was not limited to UM cases.[39] It now is settled that *Blanchard* applies to every type of first-party bad faith claim, including, for instance, claims arising under homeowners insurance,[40] disability insurance,[41] and automobile collision insurance.[42]

Accordingly, one of the effects of *Blanchard* is a prohibition against bringing a lawsuit for bad faith simultaneously with a lawsuit for breach of contract or coverage.[43] When a litigant brings a cause of action for bad faith at the same time as an action for breach of contract or for coverage, trial courts must dismiss or abate the action for bad faith.[44] The modern trend is to dismiss, rather than abate, bad faith claims,[45] and to require that an action for bad faith be brought in a separate action at the conclusion of the contract action.[46]

Another issue addressed post-*Blanchard* was whether a cause of action for bad faith could be brought while an appeal was pending from a judgment for the insured. Showing strict adherence to *Blanchard*, Florida's intermediate appellate courts, as well as federal courts (applying Florida law), held that the underlying action must be final. That includes resolution of any appeals.[47]

Florida courts also have addressed the issue of whether there could be a cause of action for first-party bad faith when the claim is not covered. While some jurisdictions had allowed claims for bad faith even when the claim was not covered in the first place,[48] Florida courts rejected that view,[49] firmly holding that an action for bad faith cannot exist if the claim is not covered under the policy:

> If there is no insurance coverage, nor any loss or injury for which the insurer is contractually obligated to indemnify, the insurer cannot have acted in bad faith in refusing to settle the claim. Similarly, if there is no coverage, then the insured would suffer no damages resulting from its insurer's unfair settlement practices.[50]

D. Blanchard v. State Farm *created a condition precedent to suit*

Blanchard defined the favorable resolution of the underlying insurance action as requiring "a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages" – often referred to as simply "the existence of liability and the extent of damages."[51]

The requirement that there first be a determination of liability and the extent of damages applies to all first-party insurance claims.

The requirement that there first be a determination of liability and the extent of damages applies to all first-party insurance claims, including property insurance claims. In *Vanguard Fire and Casualty Co. v. Golmon*, a claim for hurricane damage to a house, the First District Court of Appeal held that "[b]oth the existence of liability and the extent of damages are elements of a statutory cause of action for bad faith that must be determined before a statutory cause of action for bad faith will lie."[52]

Subsequent cases have made clear that *Blanchard* created a condition precedent to suit,[53] which is critical to understanding its significance. The rule in *Blanchard* did not simply create a procedural requirement that contract and coverage issues be bifurcated from bad faith claims. Nor is the rule in *Blanchard* satisfied at the conclusion of the underlying action, regardless of its resolution. Absent satisfaction of the condition precedent in *Blanchard*, a cause of action for first-party bad faith never will accrue. Here is how one court put it: "If a determination regarding liability is not made, a cause of action for bad faith can never ripen."[54]

II. "LIABILITY" IN A FIRST-PARTY PROPERTY INSURANCE CLAIM

Blanchard involved a claim and lawsuit for UM coverage benefits. In *Blanchard* "liability" meant the "liability on the part of the uninsured tortfeasor."[55] Obviously the same cannot be true in other first-party claims, such as property insurance claims, because there is no tortfeasor. In property claims, "liability" refers to the liability of the insurer, not a tortfeasor.[56] The insurer's liability is established by a favorable resolution for the insured of the underlying action for insurance benefits.[57] "Liability" in *Blanchard* meant negligence or wrongdoing by the tortfeasor. So what does "liability" mean for a property insurer?

Some policyholder attorneys argue that "liability" means simply the existence of "coverage." Under that view, the condition precedent in *Blanchard* is satisfied any time the insurer acknowledges coverage and pays a claim, so long as the payment is made outside of the sixty day safe-harbor provision in section 624.155(3)(d). They argue that the "favorable resolution" of the "underlying first-party action for insurance benefits" required by *Blanchard* is satisfied anytime an insurer pays money outside of the sixty day safe-harbor provision because that is a "favorable resolution" of the insurance claim.[58] This position essentially eliminates the condition precedent in *Blanchard* from property insurance claims and would turn nearly every property insurance claim into a lawsuit for bad faith. Take, for instance, the following hypothetical.

An insured house is damaged in a hurricane. The insurer inspects the house, acknowledges coverage, and pays $15,000 to repair the roof. A couple of years later, the insured hires a public adjuster.[59] The pub-

lic adjuster writes an estimate for $50,000. The public adjuster and insured do not tell the insurer about this new estimate or that they disagree with the amount paid. Instead, the public adjuster refers the insured to an attorney. The attorney files a Civil Remedy Notice of Insurer Violation[60] claiming the insurer underpaid the claim. A week later, the attorney sends the insurer the public adjuster estimate and requests appraisal.[61] Appraisal is mandatory under the insurance contract, and the insurer agrees to it.[62] The appraisal takes longer than sixty days, as most do. Seventy days after the civil remedy notice, the appraisal concludes and determines that the cost to repair the roof is $25,000. The insurer timely pays the amount of the appraisal, less the $15,000 it already paid.

The insurer has done nothing wrong in that hypothetical; there is nothing to suggest the insurer breached the insurance contract. Florida law is clear that "appraisal is not a process to resolve a breach of contract claim or even to determine a coverage dispute. Appraisal is a method of adjusting a claim within the terms of the insurance contract to determine the amount payable for the covered claim."[63] In fact, "[a]ppraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits."[64] In a different context, one Florida court stated:

> We cannot fault the insurer for complying with the terms of its insurance contract by participating in the appraisal process and paying in a timely manner. To do so would dissuade insurers from complying with the terms of their own agreements.[65]

Nonetheless, under the erroneous view that "liability" means only "coverage," *Blanchard* arguably has been satisfied because the insurer acknowledged "coverage" when the insured made the claim, and the "extent of damages" was determined by the appraisal. The claim resolved in favor of the insured, the argument goes, because payment was made after the sixty-day safe harbor provision provided by section 624.155(3)(d). This would be true, under this view, even though the insurer first knew of a dispute when it received the civil remedy notice, payment was made outside the safe harbor provision only because the insured requested an appraisal which generally takes longer than sixty days, and the amount awarded by the appraisal was significantly less than had been claimed by the insured.

This view must be rejected. "Liability" in a first-party property insurance claim, must mean "liability for breach of contract."

A. Statutory interpretation

Section 624.155 is in derogation of the common law, so it must be strictly construed.[66] Under Florida rules of statutory interpretation, statutes in derogation of the common law "will not be interpreted to displace the common law further than is clearly necessary."[67] To interpret section 624.155, it is important to know the relevant common law.

Before the enactment of section 624.155, there was no such thing as first-party bad faith in Florida.[68] That is because, as explained previously, "[t]he legal relationship existing between the insured and his insurer [in a first-party claim]…is that of debtor and creditor in which no fiduciary relationship is present."[69] In 1982 the legislature enacted section 624.155 and created the cause of action for first-party bad faith that the common law would not allow.[70] This action for insurance bad faith is tied to the performance of the insurance contract.[71]

Florida contract law recognizes an implied covenant of good faith and fair dealing in every contract.[72] However, at common law Florida courts had not found that this implied covenant created "a separate first-party action against an insurance company based on its bad-faith refusal to pay a claim."[73] Section 624.155 codified the common law cause of action for breach of the implied covenant of good faith and fair dealing in the context of first-party insurance contracts and created the exclusive remedy for a bad faith refusal to pay a first-party claim.[74] The Florida Supreme Court has said that first-party claims for breach of the implied warranty of good faith and fair dealing "are actually statutory bad-faith claims that must be brought under section 624.155 of the Florida Statutes."[75] Therefore, when interpreting the statute, it is important to look to the common law cause of action the statute codified.

Under Florida law, "a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract has been breached."[76] "[T]he duty of good faith performance does not exist until a plaintiff can establish a term of the contract the other party was obligated to perform and did not."[77] "A duty of good faith must 'relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements.'"[78] Florida law prohibits an action for breach of the implied covenant of good faith "where there is no accompanying action for breach of an express term of the agreement."[79] Florida courts also have held that a breach of contract action against a liability insurer is "subsumed into the bad faith claim."[80]

Allowing a statutory first-party bad faith cause of action unrelated to a breach of the insurance contract requires interpreting 624.155 more expansively than the common law cause of action for breach of the implied covenant of good faith. This would allow a cause of action for statutory bad faith under section 624.155 that would not have been cognizable at common law even if Florida courts had found a fiduciary relationship existed between an insurer and an insured. Under well-recognized rules of statutory interpretation, section 624.155 should not be interpreted more broadly than the common law cause of action for breach of the implied covenant of good faith. Thus, absent a breach of contract there can be no bad faith.

B. *Interpreting “liability” to mean the existence of “coverage” eliminates the “liability” requirement in property insurance claims*

In *Blanchard* “liability” meant “liability on the part of the uninsured tortfeasor.” In addition to a finding of liability against the tortfeasor, there also must be a determination and resolution of all coverage issues.[81] Recall the rule that, without coverage, an insured is precluded from suing for bad faith.[82] So in addition to “a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff’s damages,” the UM claim must be covered in the first place.

Interpreting “liability” as “coverage” in the context of property insurance essentially eliminates the liability requirement, because there always must be coverage for there to be a lawsuit for bad faith, including in the context of UM coverage where “liability” also must be established. Because coverage must exist, in addition to liability and damages in an UM coverage case, “liability” cannot mean “coverage” in a property insurance case without rendering the “liability” requirement nugatory.

C. *Florida courts interpreted “liability” in property insurance claims to mean liability for breach of contract, at least until recently*

The notion that “liability” means simply the existence of “coverage” was foreclosed by *Lime Bay Condominium Inc. v. State Farm Florida Insurance Co.*[83] *Lime Bay* involved an insurance claim for hurricane damage. State Farm acknowledged coverage, estimated the damages and paid the claim. Lime Bay disagreed with the amount paid. Lime Bay filed a civil remedy notice against State Farm. Lime Bay then sued for breach of contract. Two years later, the parties participated in a contractual appraisal of the loss. State Farm paid the additional amounts owed as determined by the appraisal.

Lime Bay then sued in a separate action for statutory bad faith. State Farm moved to dismiss because “there had not yet been a final determination of liability and maintaining that it intended to dispute liability in the breach of contract case.”[84] The trial court agreed, and dismissed the lawsuit. The Fourth District Court of Appeal affirmed the order of dismissal because there had not “been a final determination of liability…”[85] The appellate court held that the trial court in the underlying action “must first resolve the issue of State Farm’s liability for breach of contract, as well as the significance, if any, of the appraisal award.”[86]

Under *Lime Bay*, “liability” did not mean simply an acknowledgement of “coverage,” otherwise State Farm’s “liability” would have been established when State Farm paid the appraisal or when “State Farm concluded that the property suffered damages in the amount of $281,731.46.”[87] The *Lime* Bay decision showed that the “liability” that must be determined before a lawsuit for bad faith accrues for a property insurance claim is “liability for breach of contract.”

That “liability” does not mean “coverage” for purposes of the condition precedent to a statutory first-party bad faith lawsuit in a property insurance claim is supported by other cases. In *Good v. Commerce & Industry Insurance Co.*, a U.S. District Court stated that under Florida law “a bad faith claim can only exist after a determination that coverage is applicable and that the carrier has breached the policy.”[88] In *O’Rourke v. Provident Life & Accident Insurance Co.*, a U.S. District Court held that “[u]nder Florida law, a cause of action for bad faith refusal to settle does not accrue until the insured has demonstrated a breach on the part of the insurer.” In *Bonita Villas Condominium Association, Inc. v. Empire Indemnity Insurance Co.*,[89] a U.S. District Court dismissed a suit for bad faith because the insured had released the claim for breach of contract, and, absent proving breach of contract it could not sue for bad faith.[90]

In *Wild Enterprises, Inc. v. Assurance Company of America*, a Florida circuit court entered summary judgment for the insurer on a bad faith suit after the insurer had paid an appraisal because there had “been no determination that Assurance breached the insurance contract.”[91]

In *Vanguard Fire and Casualty Co. v. Golmon*, the First District Court of Appeal held “[b]ecause [the Golmons] have not yet secured a final determination that Vanguard paid less than was due under the policy, they have not yet established that a bad faith or unfair claims settlement action against Vanguard lies.”[92] Paying less than is due under an insurance contract unmistakably refers to breach. Similarly, another appellate court held that the insured could not sue for bad faith before the insured prevailed on the merits in the breach of contract action.[93] And in *North Pointe Insurance Co. v. Tomas*, the amount of the loss was determined by a contractual appraisal.[94] Thereafter, the plaintiff amended the complaint to add a count for bad faith. The insurer moved to dismiss. The trial court denied a motion to dismiss. The Third District Court of Appeal granted a petition for writ of certiorari. The appellate court reasoned “[s]ince the record does not reflect and the Tomases have not alleged that damages under the insurance contract have been ascertained for the alleged breach, the trial court departed from the essential requirements of law by not dismissing or abating the bad faith action as premature.”[95]

As these cases show, “liability” in the context of the condition precedent to a first-party statutory bad faith case under property insurance means liability for breach of contract, not simply the existence of coverage. The other view essentially requires an alteration of the language of *Blanchard*. To interpret “liability” to mean only “coverage” requires one to eliminate or ignore the “underlying action” requirement in *Blanchard*, except in instances where the insurer has denied coverage.

The underlying action requirement is tied to the liability requirement because the insured establishes the insurer’s liability through a favorable resolution of the underlying action. Citing *Blanchard*, the First District made this point in *Golmon*: “It is well established that a statutory claim of bad faith failure to settle

does not accrue until the underlying action for insurance benefits is resolved in favor of the insured, thus establishing liability on the part of the insurer."[96] The contrary view — that a pre-suit payment of a claim could constitute a favorable resolution of an action for insurance benefits — is not supported by rules of interpretation or existing law. *Blanchard* talks in terms of "action." In interpreting and applying supreme court precedent courts are required to assume that "the Supreme Court chose its words carefully,"[97] and "that the Supreme Court meant what it said."[98]

There has been a dramatic increase in bad faith claims since Cammarata, most of which follow a predictable pattern.

"Action" is not synonymous with insurance claim. An "action" is a lawsuit.[99] An insurance claim is a request that an insurer perform under an insurance contract by paying money. Those are two completely distinct concepts. So while a voluntary extra-judicial payment of an insurance claim may resolve the claim, it does not resolve, favorably or otherwise, an action.

Lime Bay appeared to put the issue to rest. An insured could not sue for bad faith in a first-party claim without first establishing the insurer breached the contract. How could an insurer have breached the insurance contract in bad faith, if it never breached the contract in the first place?

But shortly after *Lime Bay* came *Cammarata v. State Farm Florida Insurance Co.*[100] In that case, the insureds made a claim for damage caused by a hurricane. The insureds requested an appraisal. State Farm agreed and paid the amount of the loss determined by the appraisal. The insured then sued for bad faith. Relying on *Lime Bay*, State Farm moved for summary judgment because there had been no determination of its liability for breach of contract. The trial court agreed, and the insured appealed.

The Fourth District Court of Appeal reversed *en banc*. In doing so, the Fourth District receded from *Lime Bay*: "[W]e are compelled to hold that an insurer's liability for coverage and the extent of damages, and not an insurer's liability for breach of contract, must be determined before a bad faith action becomes ripe."[101] The Fourth District went on: "the appraisal process, which determined the existence of liability and the extent of the insured's damages, established the…conditions precedent of a bad faith action. Put another way, the appraisal award 'constitute[d] a 'favorable resolution' of an action for insurance benefits, so that [the insured] ... satisfied the necessary prerequisite to filing a bad faith claim.'"[102]

The concurring opinion appreciated the result the Fourth District had reached could lead to abuses, but felt constrained by supreme court precedent. "In theory, the majority opinion would open the door to allow an insured to sue an insurer for bad faith any time the insurer dares to dispute a claim, but then pays the insured just a penny more than the insurer's initial offer to settle, without a determination that the insurer breached the contract."[103] But far from theoretical, this already has become reality. There has been a dramatic increase in bad faith claims since *Cammarata*, most of which follow the same predictable pattern as in *Cammarata* – claim, appraisal, payment, lawsuit for bad faith.

What is striking about the *Cammarata* opinion is the apparent reluctance by the court in reversing. At least seven times, in the opinion and the concurrence, the authors state they are "compelled" (or a variation thereof) to reverse, or "compelled" to agree with the insureds. And then, as mentioned, *Cammarata* contains a concurrence written to express concern about the effect of the opinion.

The Fourth District felt it was bound by the supreme court's holding in *Vest v. Travelers Ins. Co.*, a bad faith claim for UM coverage.[104] In that case, Vest, the insured, made a UM claim to Travelers. Travelers refused to settle, and Vest sued for UM benefits and bad faith. At some point during the litigation, Travelers approved a settlement between Vest and the tortfeasor. The tortfeasor's carrier tendered $1.1 million to Vest. About two months later, Travelers tendered its UM limits of $200,000 to Vest.

Travelers moved for summary judgment on the bad faith claim. The trial court granted the motion, finding that Travelers' duty to pay UM benefits did not arise until after Vest had settled with the tortfeasor. Vest appealed. The appellate court found the trial court was wrong that Vest could not recover UM benefits before she settled with the tortfeasor. However, the appellate court went on to affirm the trial court's ruling that there was no cause of action until there was a settlement with the tortfeasor and that Travelers had paid the claim within sixty days of that settlement. Therefore, the appellate court held that Vest had no cause of action for bad faith.

Vest appealed to the Florida Supreme Court. The issue before the supreme court was whether *Blanchard* "preclude[s] recovery as a matter of law for bad-faith damages allegedly incurred from the date when all the conditions precedent for payment of the contractual policy benefits had been fulfilled because these damages were incurred prior to the settlement with the tortfeasor..."[105] The appellate court said yes, *Blanchard* bars recovery of "bad faith" damages incurred before the bad faith action accrued. The supreme court reversed.

After analyzing whether damages incurred before the bad faith action accrued were recoverable, the supreme court concluded its opinion by stating "[t]he present action has now ripened and should have been allowed to proceed," because both liability and the extent of damages had been determined.[106] The high court held that "liability" had been established because "a settlement

was authorized with the tortfeasor."[107] With regard to damages, the supreme court quoted *Brookins v. Goodson*[108] for the proposition that "the payment of the policy limits by the insurer here is the functional equivalent of an allegation that there has been a determination of the insured's damages."[109]

This concept does not translate to property insurance cases. Cases that have held otherwise conflated "liability" in the context of UM cases, (the negligence liability of the tortfeasor to the UM coverage policyholder), and "liability" in a property insurance case, (the insurer's liability).[110] It is important to remember the liability that had to be determined in *Vest* was the "liability on the part of the uninsured tortfeasor."[111] By the time the supreme court wrote the opinion in *Vest*, the liability of the tortfeasor was no longer an issue. The tortfeasor's insurer had paid $1.1M. Travelers had paid $200,000, standing in the shoes of the tortfeasor as the UM carrier.[112] The supreme court held this had established liability on the part of the uninsured tortfeasor.[113]

The payment of the claim by Travelers had nothing to do with "liability," only "damages." The supreme court cited *Brookins*[114] for the proposition that "payment of the policy limits by the insurer…[was] the functional equivalent of an allegation that there has been a determination of the insured's damages" in the context of the UM claim.[115] This certainly makes sense because a judgment cannot be entered against an insurer in a UM action for more than the coverage limits.[116]

Decisions that have allowed a first-party bad faith action to proceed under a property insurance contract after an insurer voluntarily settles a claim generally have been based on a misapplication of *Vest*. For instance, in one case a court cited *Brookins* and another federal court opinion interpreting *Vest* and *Brookins* for the proposition that "an insurer that makes payments on an insured's claims admits liability under the insurance policy…"[117] But, as discussed previously, the payment of the coverage limits in *Vest* and *Brookins* did not establish "liability" because the liability to be established was the negligence of the tortfeasor.[118] The payment of the claim established only damages owed for the UM claim.

Vest does not support a view that payment of a property insurance claim establishes "liability" because the focus of "liability" is completely different in a UM claim than in a property insurance claim. In a UM claim, the "liability" to be determined is the liability (negligence) of the tortfeasor.[119] In a property insurance claim, the "liability" to be determined is the insurer's liability.[120]

It is worth pointing out that paying a claim does establish that the insurer breached the contract.[121] Because an insurance contract is a contract to pay money in the event of a covered claim, the payment of the claim is the very performance of that contract.[122]

Cammarata, of course, is limited to the Fourth District. Hopefully the Fourth District will revisit the decision. The opinion, particularly the concurrence, appears to appreciate the likelihood that it will encourage the filing of meritless lawsuits. But the Court felt compelled by *Vest* to reverse. However, as discussed above, *Vest*, a case involving a bad faith lawsuit under a UM claim, did not compel the result in *Cammarata*.

Lime Bay was correct. So was the observation in the concurring opinion in *Cammarata*: "the record here provides no basis indicating that the insurer breached the contract, much less failed to act in good faith to settle the claim. On the contrary, the record here indicates that the insurer merely exercised its rights under the contract's agreed-upon dispute resolution process of appraisal. The insurer's exposure should be at an end."[123]

III. ESTABLISHING AN INSURER'S LIABILITY

The requirement that an insured establish an insurer's liability for breach of contract as a condition precedent to a lawsuit for statutory first-party bad faith under a property insurance claim does not mean insureds only can sue for bad faith if they try the breach of contract case to verdict. A judgment for breach of contract is not the only way of obtaining a favorable resolution.[124]

For instance, an arbitration award can establish an insurer's liability and satisfy the condition precedent in *Blanchard*.[125] This is consistent with *Blanchard* because "[a] n agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties upon which award a judgment may be entered…"[126] Arbitration proceedings are considered judicial or quasi-judicial and have the same or similar procedural safeguards as judicial proceedings.[127] Therefore, an arbitration establishing an insurer's liability will satisfy *Blanchard*.

A "confession of judgment" also has been held to establish an insurer's liability and allow for a bad faith lawsuit.[128] Under the confession of judgment rule, "[w]hen the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured."[129] However, the confession of judgment rule is not absolute.[130] The rule applies only when an insured has clearly notified the insurer of a dispute, but the insurer wrongfully forces its insured to resort to litigation to obtain benefits.[131] Again, this is consistent with *Blanchard* because if an insurer wrongfully forces its insured to file suit, and the insurer then declines to defend its position and pays the claim to resolve the lawsuit, then it can be said that the underlying action for insurance benefits resolved in favor of the insured.

Florida courts also have found that an appraisal may satisfy *Blanchard*, but, at least before *Cammarata*, only had done so in instances when the insurer invoked appraisal, to resolve a lawsuit, after the insured had sued.[132] In *Hunt*, the insured made a claim for sinkhole damage.[133] State Farm paid the claim, but the insured filed suit. State Farm moved for appraisal and paid the additional amounts owed after the appraisal. The trial court determined that State Farm had confessed judgment under *Goff v. State Farm Florida Insurance Co.*[134] and

awarded attorney fees. The insured then voluntarily dismissed the breach of contract lawsuit, and brought a second action for statutory first-party bad faith. State Farm moved for summary judgment that the insured had not satisfied the condition precedent in *Blanchard*. The trial court granted the motion, and the insured appealed. The Second District reversed, finding that the appraisal had satisfied the condition precedent in *Blanchard*. The opinion cites *Goff* twice for the proposition that "payment of appraisal award after insured files suit but before judgment is functional equivalent of confession of judgment."[135] So although *Hunt* generally discusses the appraisal, it applied a confession of judgment analysis.[136]

Similarly in *State Farm Insurance Co. v. Ulrich*, the Fourth District held that "an appraisal award may constitute a 'favorable resolution' permitting a bad faith claim in certain circumstances."[137] The court elaborated that "[w]hether a bad faith claim may be maintained where an appraisal provision has been invoked and paid depends on the circumstances of the case…"[138]

IV. BREACH OF CONTRACT AS AN ELEMENT OF THE BAD FAITH CLAIM

For the reasons discussed previously, courts should continue to require an insured to establish the insurer breached the insurance contract as a condition precedent to an action for statutory first-party bad faith. But even if the *Cammarata* view ultimately prevails, an insured still should be required to plead and prove the insurer breached the contract as an element of the bad faith lawsuit. Conversely, in those cases where the insurer establishes in the bad faith case, or has established in a preceding breach of contract case through a summary judgment, jury verdict, or otherwise, that it did not breach the insurance contract, the insurer must be entitled to summary judgment in the bad faith case as a matter of law.

That a breach of the insurance contract by the insurer is an element of the bad faith claim is consistent with the many decisions tying bad faith to the performance of the insurance contract. For instance, in *Shuster v. South Broward Hospital District Physicians' Profesional Liability Insurance Trust*, the supreme court refused, under the guise of bad faith, to rewrite the policy "when the insurer merely exercises its rights under the agreement."[139] Allowing an insured to sue for bad faith without pleading and proving the insurer breached the contract would be contrary to *Shuster* because it would create, under the guise of bad faith, a cause of action for some alleged breach of a duty or obligation for which the insurer was not contractually obligated.

Chalfonte also supports this view.[140] *Chalfonte* set out the basic rules, discussed above, for the common law cause of action for breach of the implied covenant of good faith, but noted that Florida law did not recognize a common law duty of good faith in a first-party insurance contract.[141] *Chalfonte* recognized section 624.155 codified the common law cause of action for breach of the implied covenant of good faith in the context of first-party insurance contracts.[142] Thus, claims for breach of the implied warranty of good faith and fair dealing "are actually statutory bad-faith claims that must be brought under section 624.155 of the Florida Statutes."[143]

A "claim for breach of the implied covenant of good faith and fair dealing cannot be maintained…absent an allegation that an express term of the contract has been breached."[144] The same, then, must be true for claims of statutory first-party bad faith. Anything else would be contrary to the rule that "a duty of good faith must relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements."[145] This would have the unenviable effect of creating a statutory cause of action for the type of frivolous complaints rejected under the common law action.[146]

Recognizing an insured must plead and prove a breach of contract by the insurer as an element of the bad faith claim also is consistent with the supreme court's opinion in *Talat Enterprises v. Aetna Casualty and Surety Company*.[147] There, the court looked at what an insurer must do to "cure" a civil remedy notice to fall within the immunity of section 624.155(3)(d). The supreme court held that "for there to be a 'cure,' what had to be 'cured' is the nonpayment of the contractual amount due the insured." The court went on to explain that, "[i]n the context of a first-party insurance claim, the contractual amount due the insured is the amount owed pursuant to the express terms and conditions of the policy after all of the conditions precedent of the insurance policy in respect to payment are fulfilled." Thus, in response to a civil remedy notice, an insurer only must pay the contractual amount then due the insured. If there is no money then due under the insurance contract, there is nothing to "cure."

Talat unmistakably ties the bad faith claim to the performance of the insurance contract. But more importantly, *Talat* precludes, *a fortiori*, a first-party bad faith claim in the absence of a breach of the insurance contract. Under *Talat*, to sue for bad faith there must have been a contractual amount owed, pursuant to the terms and conditions of the policy, that the insurer did not pay — in other words, a breach of the underlying contract.

Unfortunately, in application policyholder attorneys often try to distort *Talat* to argue that an insured must pay the entire claim, even if that money is not owed under the terms of the insurance contract, within sixty days of the civil remedy notice to avoid bad faith. This argument is wrong, as recognized in *316, Inc. v. Maryland Casualty Co.*[148] Requiring an insured to plead and prove a breach of contract as an element of the bad faith action gives more teeth to the statutory protection discussed in *Talat*. It also precludes a lawsuit in those increasingly common instances where the insured or their attorney files a civil remedy where no money or no additional money is then owed under the contract. Common examples include filing the civil remedy notice almost immediately af-

ter making the claim or in the middle of a contractual appraisal.

Recognizing a breach of the insurance contract as an element of the bad faith action is a step toward preventing the gamesmanship and abuses that now plague civil remedy notices and first-party insurance claims.

V. PUBLIC POLICY CONSIDERATIONS

Requiring an insured to establish that the insurer breached the insurance contract before suing for bad faith is not only good law, it is good policy. Florida courts will not punish insurers for complying with the terms of the insurance contract.[149] Why would Florida courts allow an insurer to be subjected to an oppressive bad faith lawsuit for doing so?

Litigation is a business, unfortunately. One law review article summed it up perfectly:

> Over the past twenty-five years, the law of "bad faith" has grown from infancy as a compensable action in contract law into a major source of tort litigation. During this relatively short gestation period, at least in comparison to other legal actions, this new body of tort, grounded in an implied contractual or fiduciary duty not to act in bad faith in any dealing, or conversely to act in good faith, has shifted the balance of power in many transactions. As intended, plaintiffs' ability to bring a separate tort action has helped to curb abuse and unfair practices. Unfortunately, as quickly as bad-faith law developed to come to the aid of the disadvantaged party in a contract or fiduciary relationship, it has evolved into a litigation quandary that often misses its basic purpose. With every state adopting statutes to govern certain types of bad-faith actions, litigation of such claims has gone beyond simply righting wrongs to become a big business of its own. In some cases, enterprising plaintiffs' attorneys seek out technical violations to bring a bad-faith action where there is no purposeful or malevolent will, or even a remotely unfair act. In legitimizing such claims, bad-faith law has lost its way. Today the law may actually facilitate bad faith in the very manner in which these laws were meant to combat it.[150]

The Wisconsin Supreme Court has recognized that "permitting a party to succeed on a first-party bad faith claim completely uncoupled from a prerequisite breach of contract would invite the filing of unmeritorious claims…"[151] Moreover, "[b]ad faith litigation is not a game, where insureds are free to manufacture claims for recovery. Every judgment against an insurer potentially increases the amounts that other citizens must pay for their insurance premiums."[152] Acknowledging and enforcing the requirement that an insured establish that the insurer breached the insurance contract before a lawsuit for first-party bad faith will accrue weeds out the frivolous claims while not creating an insurmountable threshold that would prevent meritorious ones.

Some might argue that insured parties should have "their day in court" and allow litigation to weed out less meritorious claims. This ignores the reality of litigation in several ways. First, "[a]ll of the models of settlement imply that parties divide between them the gains from avoiding litigation."[153] So even an unmeritorious lawsuit, if allowed to stand, has value. Second, the somewhat nebulous nature of a bad faith lawsuit, and the potentially wide ranging issues involved, invite discovery abuse:

> [D]iscovery [is] both a tool for uncovering facts essential to accurate adjudication and a weapon capable of imposing large and unjustifiable costs on one's adversary. Litigants with weak cases have little use for bringing the facts to light and every reason to heap costs on the adverse party….The prospect of these higher costs leads the other side to settle on favorable terms.[154]

Third, the costs and risks of litigation encourage settlement, even of claims an insurer might believe it should win:

> Choosing to litigate an insurance claim is a costly undertaking for an insurer, regardless of the economies of scale an insurer might possess. There are attorneys' fees and other unavoidable costs, and the outcome is uncertain. Insurers are also not blind to the poor public perception of their industry; a perception that contributed to the creation of tort liability in insurance contracts where it does not exist in other contexts. The prospect of paying extra-contractual damages, especially punitive damages, is itself daunting; this daunting prospect is enhanced by the insurer's position as an unpopular defendant and the belief of many juries that insurers have deep pockets and can afford it. In addition, any plaintiff verdict could lead to negative press, which could cause existing policyholders to change insurers or could deter future customers. A particularly high damage award could also provide harmful precedential value and inflate other award amounts. For these reasons, insurers are poised to settle claims they reasonably believe they will lose, as well as some they believe they should

win. Settlement simply becomes the better option.[155]

Fourth, the prospect of attorney fees encourages bad faith claims. Section 624.155(4) allows recovery of attorney fees if an insured prevails in a lawsuit for statutory bad faith. In many cases, the actual damages are almost non-existent. Judge Altenbernd has explained how statutory fees can, and often do, drive litigation:

> In a typical contingency fee case, the plaintiff's attorney will recover a fee based on a percentage of the total recovery. Thus, the monetary success of the client and the attorney are closely interrelated. By contrast, in this type of statutory fee case where the damages are relatively small, as the lawsuit progresses, it quickly becomes a larger monetary asset for the law firm than for the client….
>
> By the time the lawsuit approaches trial, so long as the defendant is not making offers to settle that include a separate resolution of the fee issue, a reasonable offer for the client under a contingency contract is unlikely to be a reasonable offer from the perspective of the attorney.[156]

It doesn't take much for a lawsuit, even one without merit, to be attractive, from the perspective of the lawyer. There are examples of a lawsuit over $1 — plus a statutory attorney fee, of course.[157] It is reported that one lawsuit was filed over a penny that had not been paid due to a rounding error.[158] As the attorney fees increase so does the potential exposure, and, at least in theory, the settlement value.

All of this encourages the filing, and settlement, of unmeritorious lawsuits. This must be discouraged. As Judge Sawaya wrote, in a somewhat analogous context:

> Litigation is not a game of tricks and traps where clever litigants and their lawyers break contractual promises to achieve an unjust victory against an opponent intent on complying with its contractual promises. That sort of gamesmanship is anathema to all involved in the legal system who seek the truth by means of rules promulgated to achieve justice through fairness. When aberrant litigants and their lawyers get away with the spoils of that type of victory, it cheapens the currency of those rules, gives encouragement to others to do the same, and lends credence to the cynics who say that such practice is endemic to the legal system.[159]

VI. CONCLUSION

The importance of *Blanchard* cannot be overstated. The amount owed on a property insurance claim is not an objectively determinable amount. It usually is impossible to predict, with any degree of precision, the exact amount that a jury or appraisal might determine is owed. Moreover, property insurance claims frequently take longer than sixty days to resolve, especially when there is disagreement over the amount. If an insured can sue for bad faith simply because he or she gives a civil remedy notice early on during the claim, or without first telling the insurer of a disagreement, and it takes longer than sixty days to resolve the claim or disagreement, then every insurance claim can be manipulated by an insured or their attorney to achieve that result. For instance, in the case of an appraisal requested around the time of the civil remedy notice, the insured's appraiser could ensure that the appraisal takes longer than sixty days by having little availability to meet with the other members of the appraisal panel until after the sixty days expire.

Enforcing the condition precedent in *Blanchard* is one way to prevent this type of gamesmanship. It requires some *prima facie* showing of wrongdoing, i.e. breach of contract on the part of the insurer, before an insured can launch an expensive and oppressive bad faith lawsuit. Efforts to erode *Blanchard* must be rejected. Bad faith should be reserved to address actual injustices done in the handling of a claim. It should not be considered round two of the insurance claim process or a threat to extract an undeserved settlement. A proper interpretation of *Blanchard* protects the public, and insurers, from unmeritorious lawsuits.

1 *Macola v. Gov't Employees Ins. Co.*, 953 So. 2d 451, 455-56 (Fla. 2006).
2 *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995).
3 *State Farm Fire & Cas. Co v. Zebrowski*, 706 So. 2d 275, 277 (Fla. 1997); § 624.155, Fla. Stat.
4 *Kelly v. Williams*, 411 So. 2d 902, 904 (Fla. 5th DCA 1982).
5 *QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n*, 94 So. 3d 541, 546-48 (Fla. 2012).
6 *Id.*; § 624.155, Fla. Stat.
7 Section 624.155(3)(a); (d); *see also Lane v. Westfield Ins. Co.*, 862 So. 2d 774, 779 (Fla. 5th DCA 2003).
8 575 So. 2d 1289 (Fla. 1991).
9 *Id*. at 1291.
10 *Auto Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938).
11 *Id*. at 859.
12 *Id*.
13 *Id*.
14 386 So. 2d 783 (Fla. 1980).
15 *Id*. at 785 (internal citations omitted).
16 *See Progressive Express Ins. Co. v. Scoma*, 975 So. 2d 461, 465-66 (Fla. 2d DCA 2007) for a discussion of the different types of bad faith claims.
17 *Laforet*, 658 So. 2d at 58.
18 *See Scoma*, 975 So. 2d at 465-66 (explaining distinction between first and third party bad faith).
19 *Baxter v. Royal Indem. Co.*, 285 So. 2d 652, 657 (Fla. 1st DCA 1973); *see also Chalfonte*, 94 So. 3d at 546.
20 285 So. 2d at 657.
21 *Macola*, 953 So. 2d at 455-56.
22 *See Baxter*, 285 So. 2d at 656-57 ("The penalty imposed by law on the insurer for its failure to settle the claim of its insured within a reasonable time is the payment of interest at the legal rate."); *State Farm Mut. Auto. Ins. Co. v. Horkheimer*, 814 So. 2d 1069, 1071 (Fla. 4th DCA 2011) ("Absent a showing of bad faith, a judgment cannot be entered against an insurer in excess of its policy limits.").
23 *Macola*, 953 So. 2d at 456.
24 *Chalfonte*, 94 So. 3d at 546.
25 *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1126 (Fla. 2005).
26 *Adams v. Fidelity & Cas. Co. of New York*, 591 So. 2d 929, 930 (Fla. 1992). A provision in the uninsured motorist statute states

that the damages recoverable in a bad faith lawsuit under uninsured motorists coverage "shall include the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state. The total amount of the claimant's damages is recoverable whether caused by an insurer or by a third-party tortfeasor." § 627.727(1), Florida Statutes. Florida law also allows for recovery of damages for emotional distress against an insurer in an action for first-party bad faith, but only in narrow circumstances, and only against a health insurance provider. *Time Ins. Co. v. Burger*, 712 So. 2d 389 (Fla. 1998); *see also Otero v. Midland Life Ins. Co.*, 753 So. 2d 579, 580 (Fla. 3d DCA 1999) (holding that emotional distress damages were recoverable only against health insurers, but not life insurers).

[27] § 624.155(5), Fla. Stat.

[28] 506 So. 2d 1162 (Fla. 3d DCA 1987).

[29] *Id*. at 1165.

[30] *Id*.

[31] *Opperman v. Nationwide Mut. Fire. Ins. Co.*, 515 So. 2d 263 (Fla. 5th DCA 1987), *rev. denied*, 523 So. 2d 578 (Fla. 1988); *State Farm Mut. Auto. Ins. Co. v. Lenard*, 531 So. 2d 180 (Fla. 2d DCA 1988).

[32] 903 F.2d 1398 (11th Cir. 1990).

[33] Art. V, § 3(b)(6), Fla. Const. gives the Florida Supreme Court jurisdiction to review questions of law certified by the United States Court of Appeals which is determinative of the cause of action and for which there is no controlling precedent of the supreme court of Florida.

[34] 575 So. 2d at 1291.

[35] *Id.*

[36] *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Revuelta*, 901 So. 2d 377, 380 (Fla. 3d DCA 2005).

[37] *USAA Cas. Ins. Co. v. Shelton*, 932 So. 2d 605, 608 (Fla. 2d DCA 2006).

[38] *Geico Gen. Ins. Co. v. Graci*, 849 So. 2d 1196, 1199 (Fla. 4th DCA 2003).

[38] 741 So. 2d 624, 626 (Fla. 2d DCA 1999).

[39] Id.

[40] *Vanguard Fire & Cas. Co. v. Golmon*, 955 So. 2d 591, 593 (Fla. 1st DCA 2006).

[41] *Doan v. John Hancock Mut. Life Ins. Co.*, 727 So. 2d 400, 402-03 (Fla. 3d DCA 1999).

[42] *Sivilla v. State Farm Mut. Auto. Ins. Co.*, 614 So. 2d 553, 554 (Fla. 3d DCA 1993).

[43] *E.g.*, *Progressive Select Ins. Co. v. Shockley*, 951 So. 2d 20 (Fla. 4th DCA 2007); *State Farm Mut. Auto. Ins. Co. v. O'Hearn*, 975 So. 2d 633 (Fla. 2d DCA 2008); *Golmon*, 955 So. 2d at 594-95; *Baughman*, 741 So. 2d at 626.

[44] *E.g.*, *Landmark Am. Ins. Co. v. Studio Imports, Ltd., Inc.*, 76 So. 3d 963, 964-65 (Fla. 4th DCA 2011).

[45] *E.g.*, *Wells v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 3819436, n.1 (M.D. Fla. 2014). *But see Dela Cruz v. Progressive Select Ins. Co.*, 2014 WL 6705414 (M.D. Fla. 2014).

[46] *Gov't Employees Ins. Co. v. King*, 68 So. 3d 267, 270 n.3 (Fla. 2d DCA 2011) (*en banc*); *Allstate Ins. Co. v. Jenkins*, 32 So. 3d 163, 165 (Fla. 5th DCA 2010); *but see Safeco Ins. Co. of Illinois v. Beare*, --- So. 3d ---, 2014 WL 4626851 (Fla. 4th DCA 2014).

[47] *Illinois Nat. Ins. Co. v. Bolen*, 53 So. 3d 388, 389-90 (Fla. 5th DCA 2011); *Michigan Millers Mut. Ins. Co. v. Bourke*, 581 So. 2d 1368 (Fla. 2d DCA 1991); *United Auto. Ins. Co. v. Tienna*, 780 So. 2d 1010, n.4 (Fla. 4th DCA 2001); *XL Specialty Ins. Co. v. Aircraft Holdings, LLC*, 929 So. 2d 578, n.7 (Fla. 1st DCA 2006); *Lexington Ins. Co. v. Royal Ins. Co. of Am.*, 886 F.Supp. 837 (N.D. Fla. 1995).

[48] *Coventry Ass. v. Am. States Ins. Co.*, 961 P.2d 933 (Wash. 1998).

[49] *Hartford Ins. Co. v. Mainstream Constr. Group, Inc.*, 864 So. 2d 1270 (Fla. 5th DCA 2004); *OneBeacon Ins. Co. v. Delta Fire Sprinklers, Inc.*, 898 So. 2d 113 (Fla. 5th DCA 2005); *Maryland Cas. Co. v. Alicia Diagnostic, Inc.*, 961 So. 2d 1091 (Fla. 5th DCA 2007).

[50] *Mainstream Constr. Group, Inc.*, 864 So. 2d at 1272.

[51] *Shockley*, 951 So. 2d at 20; *see also State Farm Mut. Auto. Ins. Co. v. Brewer*, 940 So. 2d 1284, 1286 (Fla. 5th DCA 2006); *Golmon*, 955 So. 2d at 594.

[52] 955 So. 2d at 594.

[53] *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1234 (Fla. 2006); *Hunt v. State Farm Fla. Ins. Co.*, 112 So. 3d 547, 549 (Fla. 2d DCA 2013).

[54] *Studio Imports*, 76 So. 3d at 964.

[55] 575 So. 2d at 1291.

[56] *Golmon*, 955 So. 2d at 593.

[57] *Id*.

[58] *Makes & Models Magazine, Inc. v. Assur. Co. of Am.*, 2005 WL 2045780 (M.D. Fla. 2005) essentially sets out the framework of this argument.

[59] *See* § 626.854, Fla. Stat. (defining public adjusters).

[60] A civil remedy notice is a condition precedent to a lawsuit for statutory bad faith set forth in section 624.155(3).

[61] *See generally Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021 (Fla. 2002) (discussing appraisal).

[62] *See United Community Ins. Co. v. Lewis*, 642 So. 2d 59 (Fla. 3d DCA 1994).

[63] *Hill v. State Farm Fla. Ins. Co.*, 35 So. 3d 956, 959 (Fla. 2d DCA 2010).

[64] *Fla. Ins. Guar. Ass'n, Inc. v. Olympus Ass'n, Inc.*, 34 So. 3d 791, 794 (Fla. 4th DCA 2010).

[65] *Federated Nat. Ins. Co. v. Esposito*, 937 So. 2d 199, 201-02 (Fla. 4th DCA 2006).

[66] *Talat Enters., Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1283 (Fla. 2000).

[67] *Carlile v. Game & Fresh Water Fish Comm.*, 354 So. 2d 362, 364 (Fla. 1977).

[68] *Chalfonte*, 94 So. 3d at 546-47.

[69] *Baxter*, 285 So. 2d at 657.

[70] *Talat*, 753 So. 2d at 1281.

[71] *N. Am. Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325, 1329 (Fla. 4th DCA 1996); *Higgins v. West Bend Mut. Ins. Co.*, 85 So. 3d 1156, 1158 (Fla. 5th DCA 2012).

[72] *Chalfonte*, 94 So. 3d at 548.

[73] *Id*. at 548-49.

[74] *Id*. at 546-49.

[75] *Id*. at 549.

[76] *Ins. Concepts* & *Design, Inc. v. Healthplan Servs., Inc.,* 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001).

[77] *Snow v. Ruden, McClosky, Schuster & Russell, P.A.*, 896 So. 2d 787, 792 (Fla. 2d DCA 2005) (citing *Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc.*, 710 So. 2d 573, 575 (Fla. 4th DCA 1998)).

[78] *Chalfonte*, 94 So. 3d at 548 (citing *Ins. Concepts*, 785 So. 2d at 1234); *see also Ament v. One Las Olas, Ltd.*, 898 So. 2d 147, 149 (Fla. 4th DCA 2005).

[79] *Id*.

[80] *E.g.*, *Gov't Employees Ins. Co. v. Prushansky*, 2012 WL 6103220, *3 (S.D. Fla. 2012).

[81] *Geico Gen. Ins. Co. v. Hoy*, 927 So. 2d 122 (Fla. 2d DCA 2006).

[82] *Mainstream Constr. Group, Inc.*, 864 So. 2d at 1272.

[83] 94 So. 3d 698 (Fla. 4th DCA 2012).

[84] *Id*. at 699.

[85] *Id*.

[86] *Id*. at 698.

[87] *Id*.

[88] 2009 WL 1393423, *4 (S.D. Fla. 2009).

[89] 2010 WL 2541763 (S.D. Fla. 2010).

[90] 48 F.Supp.2d 1383, 1384 (S.D. Fla. 1999).

[91] 2011 WL 3802246 (Fla. 4th Cir. 2011).

[92] 955 So. 2d at 594.

[93] *Studio Imports*, 76 So. 3d at 963.

[94] 999 So. 2d 728 (Fla. 3d DCA 2008), *receded from on other grounds by State Farm Fla. Ins. Co. v. Seville Place Condo. Ass'n, Inc.*, 74 So. 3d 105 (Fla. 3d DCA 2011).

[95] *Id*.

[96] 955 So. 2d at 593.

[97] *Medina v. Peralta*, 705 So. 2d 703, 704 (Fla. 3d DCA 1998).

[98] *McKenzie v. State*, 355 So. 2d 434, 434 (Fla. 3d DCA 1977); *BMR Funding, LLC v. DDR Corp.*, 67 So. 3d 1137, 1140 (Fla. 2d DCA 2011).

[99] *Cf.* Florida Rules of Civil Procedure 1.040.

[100] --- So. 3d ---, 2014 WL 4327948 (Fla. 4th DCA 2014).

[101] *Id.* at *3.

[102] *Id*. at *6 (citing *Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co.*, 100 So. 3d 1155, 1158 (Fla. 4th DCA 2012)).

[103] *Id*., at *8 (Gerber, J. concurring).

[104] 753 So. 2d 1270 (Fla. 2000).

[105] *Id*. at 1274.

[106] *Id*. at 1276.

[107] *Id*. at 1274.

[108] 640 So. 2d 110 (Fla. 4th DCA 1994).

[109] *Vest*, 753 So. 2d at 1273.

[110] *See Plante v. USF&G Specialty Ins. Co.*, 2004 WL 741382 (S.D. Fla. 2004).

[111] 753 So. 2d at 1275.

[112] *See Revuelta*, 901 So. 2d at 380 (stating underinsured motorist carrier stands in the shoes of underinsured motorist and is entitled to raise all defenses that the underinsured motorist can raise).

[113] *Vest*, 753 So. 2d at 1274.

[114] 643 So. 2d at 112-13.

[115] *Vest*, 753 So. 2d at 1273.

[116] *Horkheimer*, 814 So. 2d 1069, 1071.

[117] *Makes and Models Magazine, Inc.*, 2005 WL 2045780.

[118] In *Brookins*, the court noted that "the insured will be able to allege that there has

been a determination of the tortfeasor's liability by virtue of the settlement with the tortfeasor." 640 So. 2d at 114.

[119] *Blanchard*, 575 So. 2d at 1291.

[120] *Golmon*, 955 So. 2d at 593.

[121] *Cf. Hill*, 35 So. 3d at 959 ("appraisal is not a process to resolve a breach of contract claim or even to determine a coverage dispute. Appraisal is a method of adjusting a claim within the terms of the insurance contract to determine the amount payable for the covered claim.").

[122] *Cf. Esposito*, 937 So. 2d at 201 ("We cannot fault the insurer for complying with the terms of its insurance contract by participating in the appraisal process and paying in a timely manner.")

[123] *Cammarata*, 2014 WL 4327948, *8.

[124] *Hunt*, 112 So. 3d at 549 (citing *Trafalgar at Greenacres, Ltd.*, 100 So. 3d at 1158).

[125] *Dadeland Depot, Inc.*, 945 So. 2d at 1234; *Hunt*, 112 So. 3d at 549.

[126] *Preferred Ins. Co. v. Richard Parks Trucking Co.*, 158 So. 2d 817, 820 (Fla. 2d DCA 1963) (quoting 5 Am. Jur. 2d, *Arbitration and Award* § 3 (1962)).

[127] *Tassinari v. Loyer*, 189 So. 2d 651, 653 (Fla. 2d DCA 1966).

[128] *Scott v. Progressive Express Ins. Co.*, 932 So. 2d 475, 479 (Fla. 4th DCA 2006) (citing *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217 (Fla. 1983)).

[129] *Wollard*, 439 So. 2d at 218.

[130] *Clifton v. United Cas. Ins. Co. of Am.*, 31 So. 3d 826, 829 (Fla. 2d DCA 2010).

[131] *Id.*; *see also State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 397-98 (Fla. 5th DCA 2007).

[132] *Hunt*, 112 So. 3d at 549; *Trafalgar at Greenacres, Ltd.*, 100 So. 3d at 1158.

[133] *Hunt*, 112 So. 3d at 549.

[134] 999 So. 2d 684 (Fla. 2d DCA 2008).

[135] *Hunt*, 112 So. 3d at 549.

[136] *Trafalgar at Greenacres, Ltd.* 100 So. 3d 1155, also involved a request for appraisal made after the insured had sued for breach of contract.

[137] 120 So. 3d 217, 219 (Fla. 4th DCA 2013).

[138] *Id.*

[139] 591 So. 2d 174, 177 (Fla. 1992).

[140] 94 So. 3d at 541.

[141] 94 So. 3d at 548.

[142] *Id.* at 546-49.

[143] *Id.* at 549.

[144] *Ins. Concepts* & *Design, Inc.,* 785 So. 2d at 1234.

[145] *Hosp. Corp. of Am.*, 710 So. 2d at 575.

[146] For example, in *Ament v. One Las Olas, Ltd.*, the Fourth District Court of Appeal, based on the rule that a duty of good faith must related to the performance of an express term of the contract, recognized that a claim may not be based on "rudeness." 898 So. 2d at 149.

[147] 753 So. 2d at 1278.

[148] 625 F.Supp.2d 1187, 1194-95 (N.D. Fla. 2008).

[149] *Esposito*, 937 So. 2d at 201-02.

[150] Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. Rev. 1477 (2009).

[151] *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 798 N.W.2d 467, 482 (Wis. 2011).

[152] *J.B. Aguerre, Inc. v. Am. Guar. & Liability Ins. Co.*, 68 Cal. Rptr. 2d 837, 844 (Cal. App. 2d Dist. 1997).

[153] Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 636 (1989).

[154] *Id.*

[155] Victor E. Schwartz & Christopher E. Appel, *CommonSense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. Rev. 1477 (2009).

[156] *Dish Network Serv. L.L.C. v. Myers*, 87 So. 3d 72, 76 (Fla. 2d DCA 2012). The opinion gives the following example:

> For example, in this case, immediately before trial an offer of $30,000 would have provided a gross award to [the plaintiff] of $20,000 and a net award of about $10,000. He would have come out ahead. But the attorneys would have recovered only $10,000 after investing more than 200 hours. If the attorneys know that they can possibly recover more than $100,000 in attorneys' fees by going to trial for two days, then mathematically they have an incentive at that point to go to trial even in a case where the chance of victory is quite small.

[157] *Small Awards Can Mean Huge Fees for Lawyers*, Sun-Sentinel, January 16, 2011, (2011 WLNR 947918).

[158] *Id.*

[159] *State Farm Mut. Auto. Ins. Co. v. Curran*, 83 So. 3d 793, 832 (Fla. 5th DCA 2011) (Sawaya, J., dissenting).

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The Florida Supreme Court Clarifies the Harmless Error Standard for Civil Appeals

[1] — So. 3d —, 39 Fla. L. Weekly S676, 2014 WL 5856384 (Fla. Nov. 13, 2014).

[2] 79 So. 3d 755 (Fla. 4th DCA 2011), reversed, — So. 3d —, 39 Fla. L. Weekly S676, 2014 WL 5856384 (Fla. Nov. 13, 2014).

[3] *Id.* at 768.

[4] *Id.*

[5] *Id.* at 771.

[6] Id. at 757.

[7] *Id.* at *4. The court quoted section 59.041, Florida Statutes: "No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice."

[8] 491 So. 2d 1129 (Fla. 1986).

[9] 2014 WL 5856384 at *4.

[10] *Id.* at *5.

[11] *Id.* (quoting section 59.041, Florida Statutes).

[12] *Id.* at *13.

[13] *Id.* at *26.

[14] *E.g.*, *Cooper v. State*, 43 So. 3d 42, 43 (Fla. 2010) (citing *DiGuilio,* 491 So.2d at 1139).

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